

2012 CUMMULATIVE SUPPLEMENT
TO
EXEMPTIONS
IN
FLORIDA BANKRUPTCY
PRACTICE

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EXEMPTIONS IN FLORIDA BANKRUPTCY PRACTICE

This outline supplements the outline prepared for the 2001 seminar. It is a cumulative supplement, with current year changes in *italics*. ***This supplement covers the period through June 30, 2012.***

I. DOMICILE

A. GENERAL

For an article on domicile planning, see Patrick J. Lannon, Domicile Planning – Don’t Take It for Granted, Fla. B. J. 34 (Jan. 2006).

B. SIGNIFICANCE OF DOMICILE IN FLORIDA

See Wolf, “The Importance of Domicile in Asset Preservation Planning,” 79 Fla. B. Journal 30 (Nov. 2005).

C. SIGNIFICANCE IN BANKRUPTCY CASES

A non-immigrant alien living in Florida was entitled to claim the federal exemptions. See, In re Arispe, 289 BR 245 (Bankr. S.D. Fla. 2002) and In re Goldsmith, 2003 WL 295690 (Bankr. S.D. Fla. 2003).

Under BAPCPA the law of the state of debtor's domicile for the greater part of the 180 days preceding the two years preceding the petition will determine which state's exemption laws apply. 11 USC 522(b)(3)(A). However, since most states only allow residents to claim the benefit of the state's exemptions, in most cases where debtor has lived in Florida for less than two years the federal exemptions in 11 U.S.C. §522(d) will apply. See the last sentence in §522(b). The net effect of this has been that people who have recently moved to Florida generally have better personal property exemptions than do long time residents of this State.

It should be noted however, that the right to claim property as TBE depends upon the debtor's domicile on the date of the petition, not where they lived over 2 years before. See 11 U.S.C. §522(b)(3)(B) and In re Robedee, 367 B.R. 901 (Bankr. S.D. Fla. 2007). See also, In re Schwarz, 362 B.R. 532 (Bankr. S.D. Fla. 2007) where a debtor could not claim his homestead as exempt under the Florida Constitution because he had lived in Florida less than 2 years but was entitled to claim it as exempt as TBE.

D. IMPACT ON CHOICE OF LAW

In an unreported opinion, Judge Killian looked to the law of Oklahoma and concluded that Debtor's former residence in Oklahoma was exempt under the law of Oklahoma such that the debtor had a reasonable time after moving to Florida within which to sell the home and reinvest the proceeds in a Florida residence. In re Navarrete, Case No. 02-40601-PNS3 (July 12, 2002).

A contrary result was reached in In re Schlakman, 2007 WL 1482011 (Bankr. S.D. Fla. 2007) where the bankruptcy court held that in order to claim proceeds as exempt under the Florida Constitution, the home that was sold must have been in Florida and the debtor must intend to reinvest the proceeds in a Florida home.

Which state's law applies to determine whether property is immune as "tenancy by the entirety?" See Sheehan, "Exemption of 'Out of State' Property Held as Tenants by the Entireties," 24 NabTalk (Vol. 1, 2008).

What happens when a person moves to Florida from a state that doesn't recognize tenancy by the entirety as a form of ownership? In Republic Credit Corp. v. Upshaw, 10 So.3d 1103 (4th DCA Fla. 2009), the Fourth DCA held that if it wasn't owned as tenancy by the entirety the move to Florida did not result in becoming property owned as tenants by the entirety.

E. PROCEDURE FOR ASSERTING DOMICILE

F. MULTIPLE RESIDENCES

In two cases Judge Paskay was called upon to analyze the facts to determine which of two places the debtor's domicile was. In re Whitehead, 278 B.R. 597 (Bankr. M.D. Fla.,2002) Judge Paskay held that the Chapter 7 trustee failed to establish, by a preponderance of the evidence, that debtor was not a bona fide resident of Florida for the greater part of the 180 days preceding petition filing where Judge Paskay found the evidence as to whether debtor resided in Florida or in Indiana was equivocal; debtor's total presence in Florida during pertinent time period was 103 days, during which she purchased a Florida residence, opened two bank accounts in Florida, and abandoned her former residence in Indiana, but during the time period at issue debtor also accepted temporary substitute teaching position in Indiana, her vehicle had Indiana registration, she received her mail in Indiana, her tax return listed an Indiana address, and her physicians were in Indiana.

He reached a contrary result in In re Young, 276 B.R. 683 (Bankr. M.D. Fla. 2002) where Judge Paskay found that Chapter 7 debtors were not domiciled in Florida for greater part of the 180-day period preceding petition date where debtors were physically present in state for at most 43 days during this 180-day period, and where debtors, though registered to vote in Florida and owners of a condominium located in this state, also owned home in Missouri, held occupational licenses, including license to

sell real estate, only in Missouri, and received all of their mail in Missouri. Judge Paskay held that the test is (1) whether the Debtors were physically present in this State for the greater part of the 180 day period preceding the Petition date and (2) whether the Debtors intended to remain here indefinitely.

In a recent case Judge Paskay appears to have deviated from his mechanical approach to domicile. Instead, he focused on indicia of intent. Specifically, he considered the fact that debtor was registered to vote in Florida, had a Florida driver's license and had a car registered in Florida. This along with the debtor's history of living in Florida in the past convinced him that Florida was the debtor's domicile notwithstanding the fact the debtor was not physically present in Florida for the greater part of the 180 days preceding the petition. In re Dwyer, 305 B.R. 582 (Bankr. M.D. Fla. 2004).

For a list of facts the Bankruptcy Court may consider in determining whether a debtor has been domiciled in Florida for 730 days, see Judge Glenn's opinion in In re Welton, 448 B.R. 76 (Bankr. M.D. Fla. 2011).

For a case that apparently didn't meet the "smell" test, see Judge Killian's decision in In re Middleton, 462 B.R. 832 (Bankr. N.D. Fla. 2011). While it was decided based upon the issue of whether debtor intended to permanently reside in his Florida home, it could have as

easily been decided upon the closely related issue of domicile. Judge Killian’s decision was affirmed on appeal. Middleton v. Phillips, 2012 WL 764196 (N.D. Fla. 2012). The District Court’s decision to affirm was based, in part, upon the theory that there cannot be two homesteads for a spouse where the marriage is “intact.”

II. FLORIDA EXEMPTIONS

A. CONSTITUTIONAL EXEMPTIONS

1. HOMESTEAD

See generally, Nelson, “FLORIDA’S UNLIMITED HOMESTEAD EXEMPTION DOES HAVE SOME LIMITS, Part I,” 77 Fla. B. J. 60 (January 2003) for an overview of the essential elements to claim homestead in Florida. In Part II (February 2003) he discusses further state and federal law limitations on the homestead exemption, and proposed federal bankruptcy legislation which, if enacted, would severely limit homestead protection for those debtors seeking to move to Florida to avoid creditors. He also discusses planning issues for homestead and potential conflicts that can arise between the attorney, CPA, and financial planner when providing advice on homestead exemption planning.

For an article addressing the homestead exemption in the context of fractional ownership and future interests, see Percopo,

“The Impact of Co-Ownership on Florida Homestead”, Fla. Bar J. 32 (May, 2012).

a. Limitations and requirements

(1) Natural person

In a December 2001 decision Judge Proctor in the Middle District held that a debtor could not claim the homestead exemption for a personal residence she owned not in her individual capacity, but as trustee of the revocable trust into which she had conveyed the homestead. Crews v. Bosonetto (In re Bosonetto), 271 B.R. 403 (Bankr. M.D. Fla. 2001).

But in In re Cocke, 2007 WL 2027924 (Bankr. M.D. Fla. 2007) Judge Proctor held on remand that the interest of a grantor and beneficiary of a revocable trust was a sufficient interest to qualify as homestead.

In Cutler v. Cutler, 2007 WL 601866 (Fla. 3rd DCA 2007) the mother owned the property where she lived. Eight months before she died she deeded the property to an irrevocable trust for the benefit of her children retaining a life estate. She

continued to live on the property until her death. One of the questions that the Third District was called upon to decide was the question, was the home her “homestead” at the time of her death notwithstanding the fact that the home was owned by an irrevocable trust, which is not a “natural person.” The Third District held that her interest was sufficient to qualify as homestead.

In In re Steffen, 405 B.R. 486 (M.D. Fla. 2009) the District Court affirmed the decision of Judge Paskay holding that a beneficiary of a trust that owns a interest in a limited partnership which in turn owns the home where the beneficiary / debtor resides cannot claim the home as exempt under Article X, §4 of the Florida Constitution.

(2) Limitations on size, location and use

In In re McLachlan, 266 B.R. 220 (Bankr. M.D. Fla. 2001) Judge Baynes granted summary judgment in favor of the debtor on the following facts. The Debtor, in December 1995, owned a parcel of land outside a municipality which was his

and his wife's homestead. In December 1996, the Debtor acquired an adjacent and contiguous parcel of land. This parcel had a palm grove from which the Debtor sold palm trees from time to time. Both parcels of land were outside a municipality, and they met the Florida Constitution's geographic limits to qualify as a homestead outside a municipality. He distinguished the Nofsinger case, "It should be noted the facts in this case do not concern the circumstance whereby the debtor/owner of the homestead leases a portion of that property to another party, thus destroying the residency aspect of the homestead required by the Florida Constitution.... [T]he mere allowance of a license, lease, profit, or granting of an incorporeal hereditament, which allows for a consistent occupation of the homestead property without negating the residency, should not be a basis for denying a homestead exemption. Within this context, the use of the land for citrus groves, the grazing of cattle, the growing of animal feed, the digging of burrow pits, should not be a per se basis

for eliminating the homestead exemption, unless it can be shown the debtor has abandoned or waived its homestead by such acts.”

The First District Court of Appeals held that property consisting of not only the residence but also a mobile home park producing rental income qualified as a homestead where it was outside of a municipality and was less than 160 acres. Davis v. Davis, 864 So. 2d 458 (Fla. 1st DCA 2003).

In the case of In re Aliu, 16 Fla. L. Weekly (Fed) B262 (Bankr. S. D. Fla. 2003) a judgment was entered in state court granting specific performance of a contract to sell a residence. The debtor then filed bankruptcy claiming the property as homestead. The bankruptcy court held that the transfer of title effectively occurred when the judgment granting specific performance was entered. Accordingly, the debtor did not have an interest in the property that was exempt.

How do you calculate the size for purposes of the ½ acre limitation for a condominium unit? Do you include the debtor’s interest in the common

areas. The Third District Court of Appeals held, No. Braswell v. Braswell, 890 So 2d 379 (Fla. 3rd DCA 2004).

The owner of a duplex within the city limits is not entitled to claim both units as homestead but is limited to the unit in which the debtor resides. In re Bornstein, 335 B.R. 462 (Bankr. M.D. Fla. 2005). See also, Menard v. University Radiation Oncology Assoc. LLP, 976 So. 2d 69 (Fla. 4th DCA, 2008).

In In re Wilson, 393 B.R. 778 (Bankr. S.D. Fla. 2008) the debtor lived in an apartment within a building that housed his adult entertainment business. The Bankruptcy Court held that he was entitled to claim as exempt the portion in which he lived, but not the portion used for business. The debtor contended that he used the entire building for various non-business activities normally associated with a home, such as using the employees shower, but the Bankruptcy Court limited his exemption to the apartment.

In In re Ensenat, 2007 WL 2029332 (Bankr. S.D. Fla. 2007) the bankruptcy court held that a

detached dwelling unit occupied by a relative did not preclude the debtor from claiming the entire property as homestead even though it was within the city where the relative did not pay any rent.

In In re Mazon, 387 B.R. 641 (M.D. Fla. 2008) the District Court affirmed the decision of the Bankruptcy Court that a cabana that went with the condo unit was not part of the homestead.

In In re Radtke, 344 B.R. 690 (Bankr. S.D. Fla. 2006) the debtors owned a home and 2.23 acres outside the city limits. A portion of their property had mobile home lots which debtors rented to third parties. Judge Friedman of the Southern District held that “the primary issue ... concerns the nature of the property’s utilization” citing the Nofsinger case. Judge Friedman declined to follow the decision of Davis v. Davis, 864 So. 2d 458 (Fla. 1st DCA 2003), which presented similar facts on the theory it was not precedent. He stated, “Although a decision from an alternate state district is persuasive, this Court finds that the language contained in the Florida Constitution was not

intended to extend homestead protection to those portions of the property which its owner utilizes for commercial purposes.” Whether or not Judge Friedman is correct in his opinion that the decision of the First District Court of Appeals is not precedent is beyond the scope of this presentation. However, the author believes that Judge Friedman has clearly misinterpreted the Florida Constitution. The homestead provision distinguishing between property within a municipality and property outside of a municipality was adopted in 1868. At the time Florida was primarily a farming state. It is the author’s understanding that the distinction between inside and outside a municipality was intended to allow farmers to keep their land notwithstanding its use for business purposes.

A different conclusion was reached by Judge Funk in In re Oullettet, 21 Fla. L. Weekly Fed B773 (Bankr. M.D. Fla. 2009) where the debtors leased a portion of their property to another and also used a portion of their property to operate their business through a closely held entity.

In re Mohammed, 376 B.R. 38 (Bankr. S.D. Fla. 2008) emphasizes the right to retain contiguous property not used for residence as exempt notwithstanding it was acquired at a different time.

- (3) Present, possessory interest.

In In re Plaster, 271 B.R. 202 (Bankr. M.D. Fla. 2001) Judge Proctor followed existing precedent in holding that a remainder interest was not an interest entitled to protection as homestead. What is interesting in this case is the debtor's argument for an exception to that rule where the debtor lives on the premises and is "head of the family," citing opinions of the Florida Supreme Court. Judge Proctor did not reject such an exception, but instead held that debtor failed to prove that she was head of the family.

In In re Williams, 427 B.R. 541 (Bankr. M.D. Fla. 2010) Judge Glenn held that a debtor was entitled to claim as exempt a remainder interest where the debtor's mother was elderly, the debtor resided with her, the debtor had no other place of

abode and the debtor intended to continue to reside there after the mother's death.

In a similar vein, Judge Killian recognized an exception to the general rule and allowed a debtor with a remainder interest to claim it as exempt. In re Hildebrandt, ___ B.R. ___, 2010 WL 2718044 (Bankr. N.D. Fla. 2010).

For an article addressing the homestead exemption in the context of fractional ownership and future interests, see Percopo, "The Impact of Co-Ownership on Florida Homestead", Fla. Bar J. 32 (May, 2012).

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The 5th District Court of Appeals distinguished the 1978 decision of the Florida Supreme Court in In re Estate of Wartels, holding instead that a cooperative apartment qualified for homestead protection from forced sale. Southern Walls, Inc. v. Stilwell Corporation, 810 So.2d 566 (Fla. 5th DCA 2002). The 5th DCA held that "in order to constitute a residence for purposes of claiming the exemption, a co-op must be a dwelling

that an individual has an ownership interest in that gives him or her the right to use and occupy it as his or her place of abode.” It then went on to analyze the Florida statutes relating to co-op apartments to conclude that the fact that the debtor acquired shares of stock in the cooperation and a long term lease as evidence of title instead of a deed is a “distinction without difference.”

In Phillips v. Hirshon, 958 So. 2d 425 (Fla. 3rd DCA, 2007) the Third District Court of Appeals followed Wartels and held that a cooperative could not be homestead. The Third DCA then certified the question to the Florida Supreme Court. The Florida Supreme Court originally accepted jurisdiction. Phillips v. Hirshon, 963 so. 2d 227 (Fla. 2007). However, “upon further consideration” the Florida Supreme Court “determined that we should exercise our discretion to discharge jurisdiction in this cause.” Levine v Hirshon, 980 So. 2d 1053 (Fla 2008).

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In the context of the tax exemption for homesteads, the 4th District Court of Appeals held that property occupied by a person who had conveyed the property to a qualified personal residence trust (OPRT) remained exempt. Nolte v. White, 784 So.2d 493 (Fla. 4th DCA 2001). In that case the Property Appraiser of Indian River County and the Director of the State of Florida Department of Revenue appealed a lower court decision allowing the exemption, arguing that Mrs. White did not have sufficient equitable title to claim homestead exemption because she did not hold a life estate in the property. The 4th DCA affirmed the summary judgment, adopting the rationale in Robbins v. Welbaum, 664 So.2d 1 (Fla. 3d DCA 1995) (taxpayers were entitled to homestead exemption even though the qualified personal residence trust limited taxpayers' use of their residence to earlier of ten years from trust's creation or one of taxpayer's death).

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Another tax case held that a corporation could not claim a homestead exemption. Prewitt Management Corp. v. Nikolits, 795 So.2d 1001 (Fla. 4th DCA 2001).

The Third District Court of Appeals held that a beneficial interest in a home titled in the name of a trustee is sufficient to qualify for the homestead exemption from forced sale. Callava v. Feinberg, 864 So. 2d 429 (Fla. 3rd DCA 2003).

A beneficial interest in a revocable trust is sufficient to allow the beneficiary residing on the trust property to claim the property as her homestead. In re Alexander, 346 B.R. 546 (Bankr. M.D. Fla. 2006).

In Cutler v. Cutler, 2007 WL 601866 (Fla. 3rd DCA 2007) the mother owned the property where she lived. Eight months before she died she deeded the property to an irrevocable trust for the benefit of her children retaining a life estate. She continued to live on the property until her death. One of the questions that the Third District was called upon to

decide was the question, was the home her “homestead” at the time of her death notwithstanding the fact that the home was owned by an irrevocable trust, which is not a “natural person.” The Third District held that her interest was sufficient to qualify as homestead.

In In re Cocke, 2007 WL 2027924 (Bankr. M.D. Fla. 2007) Judge Proctor held on remand that the interest of a grantor and beneficiary of a revocable trust was a sufficient interest to qualify as homestead.

(4) Occupancy with intent to reside

In In re Harle, 422 B.R. 310 (Bankr. M.D. Fla. 2010) Judge Jennemann noted that this element has both an objective and subjective component i.e. was the debtor actually occupying the residence at the relevant time and did the debtor intend to occupy it as her homestead at that time. Judge Jennemann went on to review the evidence on the actual occupancy where the debtor was moving from one residence to another.

In In re McClain, 281 B.R. 769 (Bankr. M.D. Fla. 2002) the debtor lived in a motor home that she did **not** claim as exempt on real property that she owned and did claim as exempt. The question was, “whether real property, upon which there is a non-exempt motor home, can qualify for the homestead exemption.” Judge Funk held that there must be a sufficient nexus “between a residence being claimed as exempt and a fixed property interest in Florida (the ‘physical permanency requirement’) in order for the residence to qualify for the homestead exemption. [Cites omitted]. Additionally, a debtor must intend to make the property ... his permanent residence.” Judge Funk went on to hold that “so long as a debtor actually lived on real property being claimed as exempt, a non-exempt tree-house or tent would establish the requisite degree of permanency.”

In a divorce one of the spouses is often required to move from the homestead. The judgment or agreement often provides that upon occurrence of a future event, the spouse that has

moved is entitled to money from the sale or refinancing of the home. Even though no longer living there, Judge Proctor in the Middle District held that such spouse is entitled to retain a claim to the proceeds if such spouse intends to invest those proceeds in a new homestead in Florida. In re Kalynych, 284 B.R. 149 (Bankr. M.D. Fla. 2002). Pursuant to the divorce, the ex-spouse was required to refinance and pay debtor \$15,000 within 4 years. Two (2) years remained before the refinancing was required. Judge Proctor held that the period of time within which a debtor must reinvest the proceeds in a new homestead is a reasonable period. Under the facts of this case, he held that the remaining period of two years was reasonable.

In Rossano v. Britesmile, Inc., 919 So. 2d 551 (Fla. 3rd DCA 2005) a contract to buy a new home was apparently conclusive on the issue of the debtor's intent to reinvest the proceeds since the appellate court reversed a contrary finding by the trial court.

In In re Fling, 449 B.R. 580 (Bankr. N.D. Fla. 2011) Judge Killian held that employment of a realtor to find a new home over a period of 12 to 13 months before the petition date as well as seriously looking at between 6 and 12 homes, including offers on some, demonstrated an intent to reinvest the proceeds within a reasonable time absent any contrary evidence.

In In re Vick, 2008 WL 2444526 (Bankr. S.D. Fla. 2008) Judge Cristol stated in dicta that it is not necessary to have an intent to reinvest the proceeds from a sale of the homestead into a new homestead where the sale of the homestead had not closed as of the date of the petition.

And in In re Dezon, 2006 WL 2372009 (Bankr. M.D. Fla. 2006) a debtor was entitled to keep the surplus from the foreclosure sale of his home. But see, Town of Lake Park v Grimes, 2007 WL 2480983 (Fla 4th DCA 2007).

In In re Isham, 19 Fla. L. Weekly Fed. B221 (Bankr. S.D. Fla 2006) the court addressed the relatively novel question, If a debtor's income and

expenses show that the debtor cannot afford the homestead, how can the debtor have the requisite intent to reside there in the future?

In In re Fodor, 339 B.R. 519 (Bankr. M.D. Fla. 2006) the court held that an alien had to have either a green card or permanent resident status to claim the homestead exemption.

This case was distinguished by the Third DCA in Grisolia v Pfeffer, 77 So. 3d 732 (Fla. 3d DCA 2011) where the decedent had a visa that allowed him to stay in the United States and prior to his death he was pursuing permanent residency status. His son, who resided with him, was a U.S. citizen.

In In re MacFarlane, 325 B.R. 908 (Bankr. M.D. Fla. 2005) the Court held that a debtor did not abandon his homestead if he or she left because of marital difficulties. Judge Briskman reached the same result in In re Minton, 402 B.R. 380 (Bankr. M.D. Fla. 2008).

In In re Castro, 2006 WL 4005571 (Bankr. S. D. Fla. 2006) Judge Cristol crafted a solution to the

issue, does a debtor really intend to reinvest the proceeds in a new home within a reasonable period of time? Judge Cristol gave the debtor a period of time to buy the new home, absent which the exemption would be denied and the money would have to be turned over to the trustee. Also in that case the debtor had spent some of the money post-petition and Judge Cristol held that the debtor did not have the requisite intent as to the “dissipated proceeds” so they would have to be paid over to the trustee.

In Coy v Mango Bay Property, 963 So. 2d 873 (Fla 4th DCA 2007) the 4th DCA reversed a holding that the ex-husband had abandoned his right to claim the former marital home as his homestead just because the ex-wife had exclusive possession.

In In re Vick, 2008 WL 2444526 (Bankr. S.D. Fla. 2008) the bankruptcy court held that a debtor was entitled to claim the home as homestead even though the debtor had entered into a contract to sell the home.

In re Lloyd, 394 B.R. 605 (Bankr. S.D. Fla. 2008) represents how difficult it can be for a creditor or trustee to establish that the debtor has abandoned their homestead where the debtor testifies that she intended to return.

b. Mobile homes.

The 4th DCA held that a mobile home permanently affixed to real estate resided in and owned by the head of household qualified as homestead under the Florida Constitution, despite fact that residence was not on leased premises nor was it a traditional house. Gold v. Schwartz, 774 So.2d 879 (Fla. 4th DCA 2001). The court noted that Section 222.05 of the Florida Statutes was not applicable because the person owned the real property, he didn't lease it.

c. Exceptions to the exemption.

(1) Equitable liens and constructive trusts.

Several cases over the past year have addressed the right to an equitable lien or constructive trust on homestead property. In In re Thiel, 270 B.R. 785 (Bankr. M.D. Fla. 2001) Judge Corcoran addressed the language in the Florida Supreme Courts opinion in Havoco of America,

Ltd. v. Hill, which said “When an equitable lien is sought against homestead real property, some fraudulent or otherwise egregious act by the beneficiary of the homestead protection must be proven.” He went on to hold that debtor was collaterally estopped from contesting a finding of fraud even though no punitive damages were awarded in the state court action and that the Florida Supreme Court’s decision in Palm Beach Savings & Loan v. Fishbein controlled on the issue of the innocent spouse.

However, in Williams v. Aloisi, 271 B.R. 676 (M.D. Fla. 2002) the U.S. District Court remanded a decision in favor of a debtor for a determination of whether or not the debtor “knowingly benefited” from her ex-husband’s fraud. The bankruptcy court found that she did not know of the condominium so she could not have known that her former husband used funds obtained by fraud to pay off the mortgage on the condo. The District Court determined that such a finding alone did not answer the question.

In In re Abrass, 268 B.R. 665 (Bankr. M.D. Fla. 2001) Judge Jennemann analyzed when and under what circumstances a creditor is entitled to an equitable lien on

homestead property. She concluded that not all circumstances that would normally result in an equitable lien on property will result in an equitable lien on homestead property, citing in part the language of the Florida Supreme Court in Hill. However, under the facts before her she found that the creditor was entitled to an equitable lien.

On the other hand, the Third District Court of Appeals reversed a decision of the trial court imposing an equitable lien upon a debtor's homestead for past due alimony payments. The Court held that fraud was required to impose such a lien. Robles v. Robles, 860 So. 2d 1014 (Fla. 3rd DCA 2003). However, in Sell v. Sell, 949 So. 2d 1108 (Fla. 3rd DCA 2007) the Third District Court of Appeals expanded this to allow imposition of an equitable lien for costs incurred as a result of the ex-spouse's reprehensible and contemptuous conduct.

For an article relating to equitable liens on homestead where a debtor has failed to pay alimony or child support, see Harry M. Hipler, Florida's Homestead Realty: Is It Exempt from Imposition of an Equitable Lien

for Nonpayment of Alimony and Child Support, 82 Fla. B.

J. (Aug. 2008)

In re Crum, 294 B.R. 402 (Bankr. M.D. Fla. 2003 illustrates the difficulty that creditors may face on tracing issues relating to a claim of an equitable lien. See also, Low Cost Auto Pawn, Inc. v. Greco, 851 So. 2d 768 (Fla. 2d DCA 2003).

Tracing issues (at least on the issues related to the “fraud”) as well as standing issues were largely ignored in In re Financial Federated Title and Trust, Inc., 347 F. 3d 880 (11th Cir. 2003) where a trustee of the corporate debtor successfully asserted an equitable lien against the homestead of principals of the debtor who were involved in a ponzi scheme utilizing the corporate debtor upon evidence that “most” of the money used to purchase the homestead came from such scheme. The opinion is not entirely clear on whether it is premised upon the fact that most of the money to purchase the homestead came from the debtor corporation or upon the fact that most of the money came from the ponzi scheme in which the debtor corporation participated.

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In Hirchert Family Trust v Hirchert, 2011 WL 2415787 (Fla. 5th DCA, 2011) the 5th District Court of Appeals found that breach of fiduciary duty was the equivalent of fraud resulting in an exception to the homestead protection afforded by the Florida Constitution.



In re Quraeshi, 289 B.R. 240 (S.D. Fla. 2002) deals with the difficult issue of apportionment where the property exceeds the permitted acreage. In Quraeshi the District Court addressed the problem of how to divide the net proceeds after the sale where the debtor's homestead only comprised 19% of the total acreage that was sold and there was a mortgage on the property. The court held that the debtor's share amounted to 19% of the net proceeds after deducting the expenses of sale and the mortgage on the property. Not discussed was whether or not a debtor has a right to carve out the most valuable part of the property in determining his or her percentage.

More equitable lien cases in 2005, 2006, 2007 and 2008:

In re Chauncey, 454 F. 3d 1292 (11th Cir. 2006).

In re Johnson, 336 B.R. 568 (Bankr. S.D. Fla. 2006).

In re Laing, 329 B.R. 761 (Bankr. M.D. Fla. 2005).

In re Potter, 320 B.R. 753 (Bankr. M.D. Fla. 2005).

In re Cochran, 19 Fla. L. Weekly Fed. B381 (Bankr. S.D. Fla. 2006).

Pelecanos v. City of Hallendale Beach, 914 So. 2d 1044 (4th DCA 2005).

Conseco Servs. LLC v. Cuneo, 904 So. 2d 438 (Fla. 3rd DCA 2005).

Dowling v. Davis, 2006 WL 2331070 (M.D. Fla. 2006).

Willis v Red Reef, Inc., 921 So. 2d 681 (Fla 4th DCA 2006).

Wallace v Wallace, 922 So. 2d 1008 (Fla. 1st DCA 2006).

In re Gosman, 362 B.R. 549 (Bankr. S.D. Fla 2007).

In Randazzo v. Randazzo, 980 So. 2d 1210 (Fla. 3rd

DCA, 2008) the Third District Court of Appeals affirmed a trial court judgment that the ex-wife's use of proceeds from sale of the former marital residence to buy a new home without paying the ex-husband his share of the proceeds

was sufficiently “egregious conduct” to entitle the ex-husband to an equitable lien on the ex-wife’s new home. This raises the question, what about other breaches of promises? Conversion of collateral? Use of loan proceeds for other than use represented to lender?

In re Hawkins, 377 B.R. 761 (Bankr. S.D. Fla. 2007). This case is particularly interesting because the creditor’s attorney decided to bring the civil action in state court to declare an equitable lien or constructive trust after the bankruptcy case, much to his chagrin.

In re Hecker, 2008 WL 283282 (11th Cir. 2008), a case not chosen for publication but worth reading.

In re Mazon, 387 B.R. 641 (M.D. Fla. 2008) is interesting on the issue of tracing.

Roth v. Roth, 973 So. 2d 580 (Fla. 2nd DCA, 2008) addressing the issue, when and under what circumstances is an ex-spouse entitled to an equitable lien on the other ex-spouses non-marital residence.

In Dowling v. Davis, 2007 WL 1839555 (M.D. Fla. 2007) the District Court held that a plaintiff cannot rely upon proceeds of a fraud committed by the debtor upon a third party to impose an equitable lien on debtor’s

homestead. The fraud must have been committed upon the person or entity claiming the equitable lien.

In Quiroga v Citizens Property Ins. Corp, 34 So. 3d 101 (3rd DCA, Fla. 2010) attorneys who sued the insurance company to collect damages to a homestead were denied a charging lien on the proceeds recovered.

For an article that outlines the history of the cases addressing the sanctity of the homestead exemption, see Hipler, “Florida’s Homestead Realty: Is it Exempt from Imposition of an Equitable Lien for Non-payment of Alimony and Child Support” Florida Bar Journal (July / August 2008).

For an article addressing the issue in the context of special assessment liens and the like, see Hipler, “Limitations on Establishing Unsafe Structures Liens and Special Assessments: Homestead Exemption, Special Benefit to Land, and Public Purpose and Facility Doctrine,” Florida Bar Journal (Feb. 2011).

In In re Champalanne, 425 B.R. 707 (Bankr. S.D. Fla. 2010) the Debtor and his spouse engaged in a series of transfers that resulted in them acquiring title to a Florida home within 1,215 days of the Debtor’s bankruptcy.

However, the Trustee did not file an objection to exemption. After the time for filing such an objection had passed, the Trustee filed an adversary proceeding seeking to assert an equitable lien on the homestead as well as a money judgment based upon the allegedly fraudulent transfers. The Trustee argued that §§522(o) and (p) superseded the Florida law limiting circumstances for imposing an equitable lien. The Bankruptcy Court disagreed, but did allow those counts seeking a money judgment (at least as to the non-debtor wife) to proceed.

(2) Can a debtor contractually waive his or her homestead exemption?

The Third District Court of Appeals certified this question to the Florida Supreme Court. DeMayo v. Chames, 934 So. 2d 548 (Fla. 3rd DCA 2006). And, the Florida Supreme Court answered the certified question in the negative. The Court summarized the arguments in favor of a waiver as follows:

“Chames essentially proposes three grounds for receding from Carter and Sherbill: (A) the 1984 amendment to article X, section 4, which substituted “a natural person” for “the head of family,” changed the purpose of the homestead exemption from one protecting the family home into a personal right that may be waived; (B) most states now permit waivers; and (C) permitting waiver is consistent

with other cases holding that various constitutional rights may be waived.”

Each of these arguments was considered and rejected.

Chames v. DeMayo, 972 So. 2d 850 (Fla. 2007).

For a case raising issues of waiver in the context of a marital settlement agreement, see Kerzner v Kerzner, 77 So. 3d 214 (Fla. 3d DCA 2011).

d. Rights of surviving spouse and heirs.

In In re Estate of Hamel, 821 So.2d 1276 (Fla. 2nd DCA 2002) the decedent entered into a contract to sell his home before he died. His will did not specifically address the home, but contained a residuary clause leaving the “rest, residue and remainder of decedent’s property” to his children. The court concluded that since the home was decedent’s homestead at the time of his death and the will did not direct the sale of the home, the proceeds from the sale belonged to his children free and clear of the claims of creditors.

In Traeger v. Credit First Nat’l Ass’n., 864 So 2d. 1188 (Fla. 5th DCA 2004) the Fifth District Court of appeals held that it is sufficient to establish the homestead as exempt against claims of the decease’s creditors that the will left an undivided interest in the decease’s former

homestead to a person who is within the intestate distribution provisions of Florida Statutes even though there are surviving heirs that have a higher priority under such statutes.

e. Judgment liens

In re MacGillivray, 285 B.R. 55 (Bankr. S. D. Fla. 2002) illustrates the problem that a debtor has acquiring a new homestead when there is an existing recorded judgment lien. The court held that the lien attached before it acquired homestead status. But see, In re Perez, 2008 W.L. 2374199 (Bankr. S.D. Fla. 2008).

In In re Ledzey, 2007 WL 295213 (Bankr. M.D. Fla. 2007) a home was conveyed by mistake to a judgment debtor. The court held that the lien of the judgment creditor did not attach.

f. Asserting exemption under Florida law

In Callava v. Feinberg, 864 So. 2d 429 (Fla. 3rd DCA, 2003) the Third District Court of Appeals allowed a party to assert her homestead exemption in an appeal from a judgment foreclosing an equitable lien even though the judgment debtor had not challenged an earlier judgment

establishing the equitable lien on the homestead property.

The court held that the homestead issue does not have to be raised until forced sale of the homestead.

See also, Mathew v. City of Lauderdale, 2007 WL 2119203 (Fla. 4th DCA, 2007).

However, in Zivitz v. Zivitz, 16 So. 3d 841 (2nd DCA, Fla 2009) a judgment creditor garnished an account with funds that resulted from the sale of a debtor's homestead. The judgment debtor failed to timely respond to the writ of garnishment by asserting the exempt status of the funds in the account. The trial court refused to allow the judgment debtor to raise the homestead issue later in the proceedings and the Second DCA affirmed.

The Third District Court of Appeals allowed the debtor to assert homestead protection after the home was sold at a sheriff's sale. Beltran v. Kalb, 2011 WL 904244 (Fla. 3rd DCA 2011).

- g. Obtaining clear title
 - h. Marshalling of assets.
2. PERSONAL PROPERTY
- a. Types of property
 - b. Amount and valuations

- c. Claim by both husband and wife
- d. Asserting claim under Florida law
- e. Conduct affecting right to assert claim.

In Dyer v. Beverly & Tittle, P.A., 777 So2d 1055 (Fla. 4th DCA 2001) the 4th DCA rejected appellee's argument that appellant waived the homestead defense because he did not assert it until the appeal where the record did not show that he abandoned the property or alienated it in a manner provided by law. The 4th DCA relied upon Sherbill v. Miller Mfg.Co., 89 So.2d 28 (Fla.1956) where the Florida Supreme Court concluded that the issue of whether the debtor's property was homestead was not waived or barred by the doctrine of res judicata in a second suit even though it was not raised in the first suit.

See In re Jordan, 335 B.R. 215 (Bankr. M.D. Fla. 2005).

B. STATUTORY EXEMPTIONS

1. MOBILE HOMES, ETC.

In In re Heckman, 395 B.R. 737 (Bankr. N.D. Fla. 2008) Judge Killian held that a debtor who claims a mobile home as exempt pursuant to Fla. Stat. §222.05 is also entitled to claim the wild card. See also, In re Lisowski, 395 B.R. 771 (Bankr. M.D. Fla. 2008).

In In re Schumacher, 400 B.R. 831 (Bankr. M.D. Fla. 2008) the Bankruptcy Court applied the Yettaw factors to conclude that an RV was exempt as a dwelling house.

2. WAGES

In re Lawton, 261 B.R. 774 (Bankr. M.D. Fla. 2001) addressed the issue of stock options. Judge Jennemann said “Employee stock options given to general employees and not tied to their individual performances are characterized as assets. Stock options given to executives in lieu of or in addition to a salary and determined by their individual performance are characterized as income.” The court specifically noted that “[d]ecisions made as a director have a direct bearing on the success or failure of the corporation which would ultimately affect the total amount of compensation received upon option exercise.” According to Judge Jennemann the key factor that distinguishes stock options that are wages versus those that are an asset is whether the options are awarded to an executive responsible for the company’s success, as opposed to a general employee, so that the value of the options are *directly* tied to the company’s success or failure.” She went on to find that the debtor’s stock options were from a “general grant”

given to full-time employees and were not pegged to performance. Therefore, in her opinion, they were not exempt.

In In re Riker, 282 B.R. 724 (Bankr. S. D. Fla. 2002) an attorney claimed a referral fee from a personal injury case as exempt. He filed the complaint for the client pre-petition and performed some discovery before referring the case to another attorney. After the filing of his petition, the case was settled and he was entitled to a referral fee of \$30,000. The Bankruptcy Court devoted most of its opinion to the issue of whether or not the referral fee was property of the estate. After determining it was, it simply held that the referral fee was only exempt to the extent of the remaining \$1,000 personal property exemption with no discussion of whether or not it was exempt as wages.

In Vining v. Martyn, 858 So. 2d 365 (Fla. 3rd DCA 2003) the Third District Court of Appeals held, without a great deal more analysis, that professional fees were not exempt.

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The courts are still struggling with payments to insiders from a closely held business. In Brock v. Westport Recovery Corp., 832 So. 2d 209 (Fla. 4th DCA 2002) the court affirmed a trial court decision and said “Based on the evidence before him, the trial judge could have concluded that . . . Brock’s compensation

was made up of discretionary distributions from a family-owned business. There was no formal employment agreement between Brock and the business. The business was family-owned. Brock's earlier sworn filing characterized his earnings as disbursements from profits. Brock's two week pay stub did not correspond with his year to date earnings. Brock did not satisfactorily explain why his distributions from the corporation decreased from \$108,000 in 1999 to \$56,000 in 2000. We therefore affirm the trial court's ruling that the section 222.11(2)(b) exemption does not apply." Unfortunately the creditor's victory was really a loss, since the court went on to hold that the creditor was not entitled to a continuing writ of garnishment based upon the statute in effect at that time. The case does, however, indicate the difficulty faced by many small business owners who may attempt to assert their entitlement to retain payments to them as "wages."

Another case emphasizing the issues that the owner of a closely held business has in claiming wages is found in In re McDermott, 425 B. R. 848 (Bankr. M.D. Fla 2010). This was affirmed on appeal, 2011 WL 740727 (MD Fla. 2011).

See also, In re Cook, 454 B.R. 204 (Bankr. N.D. Fla. 2011).

For a critical analysis of the cases relating to small business

owners, see Hersch & Hill,”So This Isn’t Working? – When a Wage Isn’t Protected,” 77 Fla. B. J. 18 (Dec., 2003).

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In In re Stalnaker, case no. 03-40936 (Bankr. N.D. Fla., March 23, 2004) Judge Killian held that a deferred compensation plan was exempt as wages. The plan was a non-qualified 457 plan that enabled certain employees to make an election to defer a portion of their salaries until a later date. The decision was affirmed on appeal to the District Court.

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Recently, the question of whether or not a debtor’s claim against a third party for “lost wages” is exempt. This comes up in a number of contexts such as personal injury actions and employment related claims. The main outline cites cases that hold that claims for “lost wages” are not exempt. However, it has been brought to the author’s attention that there are cases holding to the contrary. See example, In re Coltellarò, 204 B.R. 640 (Bankr. S. D. Fla. 1997). See also, Sunshine Resources, Inc. v. Simpson, 763 So. 2d 1078 (Fla. 4th DCA 1999). It is difficult to reconcile these cases with the language of the statute, which requires that the monies be paid or payable for labor or services. In these cases the money was payable because labor or services were not performed

through some fault of the third party. On the other hand, where labor or services were actually performed and the damage claim is for a greater amount of wages, this argument may have some merit.

See In re Stevenson, 374 B.R. 891 (Bankr. M.D. Fla. 2007) re qualification for head of family.

“Gratuities” included in a W-2 employee’s paycheck are within the exemption. In re Holmes, 414 B.R.868 (Bankr. S.D. Fla. 2009).

In In re Weinshank, 406 B.R. 413 (Bankr. S.D. Fla. 2009) the Court addressed the question, is a single debtor who is not the head of a household entitled to claim wages deposited in a bank account as exempt? Prior to this decision, there was a question whether only heads of a family could claim as exempt wages in a bank account. The Court in Weinshank held that single debtors are also entitled to claim wages in a bank account as exempt.

Sections 77.041 and 222.12, Florida Statutes, address a procedure for asserting a debtor’s wage exemption in a garnishment action filed by a judgment creditor. In the case of Caproc Third Avenue, LLC v. Donisi Insurance, Inc., 2011 WL 2135563 (Fla. 4th DCA 2011) the 4th DCA held that it is not sufficient for the attorney of the creditor to simply deny under oath

Debtor's affidavit. The party initiating the garnishment must sign the affidavit under oath. See also, Crop Production Services, Inc. v Baxter, 2010 WL 5621323 (N.D. Fla. 2010).

In the past, §222.11(c) allowed creditors to insert in the loan agreement a provision under the terms of which a debtor who is head of the family agreed to allow garnishment of his or her wages. Such agreements were not common but some creditors did make them standard "boiler plate" in their loan agreements. These provisions were generally buried in the fine print. In the 2010 legislative session, amendments were passed which now require that any waiver of the head of family wage exemption be contained in a separate document with 14-point type and that such document substantially conform to the one set forth in the statute. The form, by its terms, requires the creditor to sign that he or she has "fully explained this document to the consumer."

3. MOTOR VEHICLES
4. LIFE INSURANCE

In Faro v. Porchester Holdings, Inc., 792 So.2d 1262 (Fla. 4th DCA 2001) the 4th DCA held that the exemption of Section 222.14 applies to the certificate of deposit purchased with the cash surrender value proceeds of Faro's life insurance policies.

In re Youngblood, 2005 WL 3577884 (Bankr. M.D. Fla. 2005).

For an article relating to issues under life insurance policies, see Jonathan E. Gopman, Matthew N. Turko, & Howard M. Hujsa, Unraveling the Mysteries of the Florida Exemptions for Life Insurance and Annuity Contracts, Part 1, 82 FLA. B. J. 52 (Dec. 2008); Part 2, 83 FLA. B. J. 55 (Jan. 2009).

5. ANNUITIES

See Judge Killian's decision in In re Turner, 332 B.R. 461 (Bankr. N.D. Fla. 2005).

For articles relating to the question, are private annuities exempt as well as other issues relating to annuities, see Jonathan E. Gopman, Matthew N. Turko, & Howard M. Hujsa, Unraveling the Mysteries of the Florida Exemptions for Life Insurance and Annuity Contracts, Part 1, 82 FLA. B. J. 52 (Dec. 2008); Part 2, 83 FLA. B. J. 55 (Jan. 2009). See also, Alan S. Gassman, et al, "Creditors' Rights Under Private Annuity and Grantor Retained Annuity Trusts", 83 Fla. B. J. 49 (Aug. 2009).

6. RETIREMENT PLANS

The case of In re Hughes, 293 B.R. 528 (Bankr. M.D. Fla. 2003) presented the question, does a loan from an IRA to the

beneficiaries' closely held corporation disqualify the plan if the loan is repaid within 60 days. Judge Paskay held, "Whether or not an account qualifies as a tax exempt IRA account is dealt with in 26 U.S.C. § 408, specifically sub clause (e)(2)(A). This sub clause provides if during the taxable year, the individual holder of the account engages in any transaction which is prohibited by 26 U.S.C. § 4975, such account ceases to be an individual retirement account as of the first day of such taxable year (emphasis supplied)." Based upon his analysis of these sections, Judge Paskay held that the IRA lost its exempt status. However, it should be noted that his analysis of 26 U.S.C. Section 4975 may not be correct. Such section talks in terms of transactions by "disqualified persons" and the definition of "disqualified persons" does not appear to address transactions by a debtor with his IRA. In addition, Judge Paskay dealt with a situation where all of the money from the IRA was loaned to the closely held corporation and then repaid. What if a debtor only borrows a portion of the IRA? Wouldn't the monies left in the plan, while no longer in a qualified IRA, nonetheless be "proceeds" from a qualified IRA? Aren't proceeds exempt?

In In re Blais, 2004 WL 1067577, 17 Fla. L. Weekly (Fed) D472 (Bankr. S.D. Fla. 2004) the bankruptcy court did an analysis

of the operation of a 401(k) plan and determined that the plan, as operated, did not qualify. Accordingly, the exemption was denied.

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The bankruptcy court in In re Kauffman, 299 B.R. 641 (Bankr. M.D. Fla. 2003) held that an ex-wife's rights in her former husband's retirement plan were not exempt.

An IRA is a "retirement plan" within the meaning of §522(d)(10). Rousey v. Jacoway, 544 U.S. 320, 125 S.Ct. 1561 (2005).

See, Gans & Lynch, "How Protected Are Your Clients' Retirement Accounts After the 2005 Bankruptcy Act?" 79 Fla. B. Journal 14 (Nov. 2005).

The Eleventh Circuit in In re Baker, 590 F. 3d 1261 (11th Cir. 2009) held that a debtor's profit sharing plan did not have to qualify as an ERISA plan in order for the debtor to claim it as exempt under Section 222.21 of the Florida Statutes. As a practical matter the amendments to Florida 222.21 have so increased the breath of that exemption that such plans may be exempt even if not qualified under the Internal Revenue Code.

In Robertson v. Deeb, 16 So. 3d 936 (2nd DCA, Fla. 2009) a judgment debtor inherited an IRA from his father. A judgment creditor garnished the account. The Second District Court of

Appeals affirmed the trial court judgment holding that an inherited IRA is not exempt. In its 2011 session the Florida Legislature remedied this by amending §222.21 of the Florida Statutes to provide that money or other assets or other interest in an inherited IRA are exempt from the claims of creditors of the former owner, beneficiaries and participants. This became effective May 31, 2011 and has retroactive application.

For an article addressing Roth IRA as an asset protection strategy, see Pratt and Roshkind, “Roth IRA Conversions as an Asset Protection Strategy: Does It Always Work?” 85 Florida Bar Journal 38 (Feb. 2011).

7. ALIMONY AND SUPPORT
8. WORKMEN’S COMP.
9. DISABILITY BENEFITS
10. UNEMPLOYMENT COMPENSATION
11. DEFERRED COMPENSATION PLANS
12. OTHER PUBLIC ASSISTANCE
13. HEALTH AIDS

See, In re Allard, 342 B.R. 102 (Bankr. M.D. Fla. 2005) re a custom van.

In In re Kahn, 2007 WL 707376 (Bankr. M.D. 2007) Judge Briskman held that the issuance of a disabled parking sticker for

debtor's van authorized by their doctor was not sufficient to come within the exemption. The vehicle was not uniquely designed to accommodate the disability.

For a thorough review of the law relating to exemption of health aids, see Judge Williamson's decision in In re Dowell, 456 B.R. 578 (Bankr. M.D. Fla. 2011).

14. EARNED INCOME TAX CREDIT
15. PREPAID COLLEGE PLANS
16. CRIME VICTIM'S COMPENSATION
17. FRATERNAL BENEFIT SOCIETY BENEFITS
18. DAMAGES FOR INJURIES
FROM CERTAIN HAZARDOUS OCCUPATIONS
19. PARTNER'S INTEREST IN PARTNERSHIP
PROPERTY
20. CERTAIN VETERAN'S BENEFITS
21. COVERDELL EDUCATION SAVINGS ACCOUNTS
22. HURRICANE SAVINGS
23. MEDICAL SAVINGS ACCOUNTS
24. PROCEEDS OF PROCEEDS

In Faro, supra, the 4th DCA held that the exemption of Section 222.14 applies to the certificate of deposit purchased with the cash surrender value proceeds of a judgment debtor's life insurance policies.

The bankruptcy court in In re Harrelson, 311 B.R. 618 (Bankr. M.D. Fla. 2004) held that investments in bonds and mutual funds made with proceeds from exempt workmen's compensation benefits retained their exempt status.

Rental proceeds from rental of an exempt mobile home were determined to be exempt. In re Oullette, 2009 WL 1936896 (Bankr. M.D. Fla. 2009).

Do social security benefits that have "accumulated" in a bank account retain their exempt status? In Walker v Treadwell, 699 F. 2d 1050 (11th Cir. 1983), the 11th Circuit held that social security benefits did not retain their exempt status when accumulated, at least in those instances where the debtor is claiming exemptions pursuant to 11 U.S.C. §522(d). The Eleventh Circuit reasoned that the wording of 11 U.S.C. §522(d)(10) limited social security benefits to a "right to receive," which does not include benefits already received. See also, In re Crandall, 200 B.R. 243 (Bankr. M.D. Fla. 1995). Since Florida adopted Section 222.201 of the Florida Statutes incorporating 11 U.S.C. §522(d)(10), does this precedent apply to all cases where a debtor has accumulated social security benefits and seeks to claim them as exempt? What about other accumulated benefits under other provisions of 11 U.S.C. §522(10)? See, In re Schena, 2010 WL

4026807 (Bankr. D. N.M. 2010). Recently the 8th Circuit rejected the 11th Circuit's resolution of the conflict between the Social Security Act and the apparent limitation to future benefits in 11 U.S.C. §522(10).

25. COMMINGLING PROCEEDS
26. EXCEPTION FOR CHILD SUPPORT
27. THE \$4,000 WILD CARD.

Effective July 1, 2007 a new exemption was added to the statutory exemptions allowed to a person domiciled in Florida. Specifically, F.S.A §222.25(4) provides “(4) A debtor’s interest in personal property, not to exceed \$4,000, if the debtor does not claim or receive the benefits of a homestead exemption under s. 4, Art. X of the Florida Constitution. This exemption does not apply to a debt owed for child support or spousal support.” This statute, like most new exemption statutes, will require interpretation on a number of issues. For example,

- (1) Can a debtor stack the \$4,000 on the \$1,000 allowed by the Florida Constitution or the \$1,000 allowed for a motor vehicle?
- (2) What if a person owns a home that they intend to keep but because they do not have any equity they do not claim it as exempt in a bankruptcy proceeding?

- (3) If they do not claim it as exempt can they reaffirm?
- (4) Is continuing to live in a home after filing a bankruptcy “receiving benefits.”
- (5) If a debtor has claimed the home as exempt for ad valorem tax purposes is that “receiving the benefits.”
- (6) If a debtor has judgments that have been duly recorded, will failure to claim an exemption create title problems in the future?
- (7) *Can a debtor, who has not claimed his home as homestead, “strip off” an unsecured mortgage?*

As of press time, there are at least seven opinions that attempt to address some of these issues. They are:

In re Gatto, 380 B.R. 88 (Bankr. M.D. Fla. 2007).

In re Franzese, 383 B.R. 197 (Bankr. M.D. Fla. 2008).

In re Hernandez, 2008 WL 1711529 (Bankr. S.D. Fla. 2008).

In re Magelitz, 386 B.R. 879 (Bankr. N.D. Fla. 2008).

In re Martias, 2008 WL 906777 (Bankr. S.D. Fla. 2008).

In re Morales, 381 B.R. 917 (Bankr. S.D. Fla. 2008).

In re Shoopman, 2008 W.L 817109 (Bankr. S.D. Fla. 2008).

Here are more:

In re Abbott, 408 B.R. 903 (Bankr. S. D. Fla. 2009)

In re Archer, 416 B.R. 900 (Bankr. S.D. Fla 2009)

In re Bennett, 395 B.R. 781 (Bankr. M.D. Fla. 2008)

In re Brown, 406 B.R. 568 (Bankr. M.D. Fla. 2009)

In re Ellis, 395 B.R. 751 (Bankr. M.D. Fla. 2008)

In re Heckman, 395 B.R. 737 (Bankr. N.D. Fla. 2008)

In re Kent, 411 B.R. 743 (Bankr. M.D. Fla. 2009)

In re Oliver, 395 B.R. 792 (Bankr. S.D. Fla. 2008)

In re Rogers, 396 B.R. 100 (Bankr. M.D. Fla. 2008)

In re Sanon, 403 B.R. 737 (Bankr. M.D. Fla. 2009)

Osborne v. Smith, 398 B.R. 355 (S.D. Fla. 2008)

The central theme of these opinions seems to focus on whether or not the debtors intend to continue to live in their home. Even where the debtor continues to live in the home, some of cases have allowed the wild card exemption where the debtor is likely to lose the home because a foreclosure is eminent.

In In re Heckman, 395 B.R. 737 (Bankr. N.D. Fla. 2008) Judge Killian held that a debtor that claims his mobile home as exempt pursuant to Fla. Stat. §222.05 is also entitled to claim the wild card exemption. See also, In re Lisowski, 395 B.R. 771 (Bankr. M.D. Fla. 2008).

In In re Fyock, 391 B.R. 883 (Bankr. M.D. Fla. 2008) Judge Paskay held that a debtor that claimed his homestead as exempt based upon tenancy by the entirety was entitled to claim the wild card.

For an analysis of the current authorities on this issue as well as on the question whether or not a debtor filing individually can claim the home as tenancy by the entirety and still get the wild card exemption, see Rubina K. Shaldjian, The Complications of Fla. Stat. §222.25(4): Does Florida’s Wild Card Exemption Allow Married Debtors to Double Dip? 22 St. Thomas L. Rev 231 (Winter, 2010).

Some of the questions relating to the wild card exemption may be answered in the near future. The Eleventh Circuit has certified the following question to the Florida Supreme Court,

“Whether a debtor who elects not to claim a homestead exemption and indicates an intent to surrender the property is entitled to the additional exemptions for personal property under Fla. Stat. § 222.25(4).”

In re Dumoulin, 2009 WL 1090334 (11th Cir. 2009). The Florida Supreme Court has heard oral arguments and a decision should be forthcoming. Osborne v Dumoulin, (Fla. St. C 09-751).

The Florida Supreme Court has now rendered its opinion. Osborne v. Dumoulin, 55 So.3d 577 (Fla. 2011). What may surprise some is that it did not decide in favor of one party or the other. It simply rephrased the certified question and answered it. Left open was the question, how did the answer mesh with bankruptcy procedure?

Thereafter, the 11th Circuit issued its decision affirming the lower court decisions in favor of debtor. In re Dumoulin, 2011 WL 1772160 (11th Cir. 2011). The argument that debtor initially claimed the homestead as exempt and only later amended was addressed in a footnote. In the footnote the 11th Circuit cited the cases holding that “Courts have ‘no discretion to deny amendments to claims of exemption unless a showing of bad faith by the debtor or prejudice to a creditor is made by clear and convincing evidence.’” Contrast In re Allen, 2011 WL 2493065 (Bankr. S.D. Fla. 2011) and In re Orozco, 444 B.R. 472 (Bankr. S.D. Fla. 2011) with In re Wilson, 446 B.R. 555 (Bankr. M.D. Fla. 2011).

The opinion of the Florida Supreme Court did not establish a hard and fast rule. To the contrary, the

opinion suggests that it is a question of fact and there may be circumstances where a debtor in a bankruptcy case receives the benefit of the homestead exemption without claiming it. Specifically the court refers to a situation where a married debtor with joint debts claims the home as TBE while the wife is able to claim the homestead protection from forced sale for both. *In In re Kehoe, 2012 WL 1077171 (Bankr. M.D. Fla. 2012) Judge Briskman addressed the argument of the trustee for an exception to Dumoulin but denied the trustee's objection.*

What other circumstances are there where a debtor does not claim the homestead on Schedule C but still “receives the benefit” of Article X, §4? Does a debtor who indicates he or she does not intend to surrender the home but instead intends to reaffirm receive such a benefit? No, according to Judge Glenn in *In re Rodale*, 2011 WL 2899368 (Bankr. M.D. Fla. 2011).

There are other practical problems that potentially result from a failure to claim the homestead as exempt. For example, as everyone knows all of debtor's property becomes property of the bankruptcy estate. 11 U.S.C.

§541(a). If a debtor claims the property as exempt, §522 says it is not property of the estate. Who owns what is an open question when the home is claimed as exempt; but there is no question that it no longer belongs to debtor if the home is not claimed as exempt. As a result:

- (1) Does the debtor have an insurable interest in the property if the home is damaged or destroyed?
- (2) Can the debtor apply for a modification of the mortgage if it doesn't own the home?
- (3) Will debtor be required to obtain court approval of a reaffirmation if it doesn't own the home?
Will a creditor be willing to allow the debtor to reaffirm?
- (4) Is the debtor liable to the bankruptcy estate to care and maintain the property? For rent? For damages under an unjust enrichment theory?
- (5) Can the Trustee compel a "turnover?" See the surprising result in In re Iuliano, 2011 WL 1627172 (M.D. Fla. 2011)
- (6) Will the debtor lose his homestead tax exemption?

28. Stacking exemptions.

Now that the amount of the personal property exemptions has increased in certain circumstances, it is common to see debtors “stacking” their exemption claims. For example, if a car has equity of \$6,000, debtors assert that the car is exempt by stacking their exemption of \$1,000 under the Florida Constitution, the \$1,000 car exemption and the \$4,000 wild card exemption. Is this permissible? To date, the courts that have considered this issue all agree that stacking is permissible. See, In re Bezeras, 383 B.R. 796 (Bankr. M.D. Fla. 2007); In re Gatto, 380 B.R. 88 (Bankr. M.D. Fla. 2007); In re Hafner, 383 B.R. 350 (Bankr. N.D. Fla. 2008); and In re Mootosammy, 387 B.R. 291 (Bankr. M.D. Fla. 2008).

C. COMMON LAW IMMUNITY – TENANTS BY ENTIRETIES

In Beal Bank v. Almand and Associates, 780 So. 2d 45 (Fla. 2001) the Florida Supreme Court answered the following certified question in the affirmative: In an action by the creditor of one spouse seeking to garnish a joint bank account titled in the name of both spouses, if the unities required to establish ownership as a tenancy by the entireties exist, should a presumption arise that shifts the burden to the creditor to prove that the subject account was not held as a tenancy by the entireties?

The Court said, “Although we understand the considerations that originally led to this Court’s decision not to adopt a presumption of a tenancy by the entireties in personal property similar to that in real property, we conclude that stronger policy considerations favor allowing the presumption in favor of a tenancy by the entireties when a married couple jointly owns personal property.”

Thus the Florida Supreme Court has extended the “presumption” that property owned by husband and wife is owned as tenants by the entireties to personal property, shifting the burden of proof to the creditor to prove by a preponderance of evidence that a tenancy by the entireties was not created. Absent an express disclaimer of tenancy by the entireties ownership, a rebuttable presumption now arises in favor of tenancy by the entireties if all of the unities exist.

An express designation of ownership as tenancy by the entireties is conclusive. If the husband and wife have specifically designated ownership of an asset as “tenancy by the entireties,” such designation will end the inquiry. Absent such a designation, at least in the context of bank accounts, a creditor must show that the debtor was given an option to select ownership as tenancy by the entireties but selected another form of ownership.

If the account is held as “joint tenants with rights of survivorship” that is not an “express disclaimer” of the intent to hold property as TBE

where the account application does not offer the ability to claim the account as TBE. Mathews v. Cohen, 382 B.R. 526 (M.D. Fla. 2007).

However, if the account application offers TBE accounts and the husband and wife choose a different account, then this effectively disclaims a TBE account and precludes evidence that the parties did not understand the significance of the selection. Wexler v. Rich, 80 So. 3d 1097 (Fla. 4th DCA 2012).

The court in Cacciatore v. Fisherman's Wharf Realty, 821 So. 2d 1251 (Fla. 4th DCA 2002) held that the Beal decision applied to all forms of personal property, not just bank accounts. The court said, "Consistent with that view, we hold that where a judgment creditor of one spouse seeks to levy under writ of execution against a stock certificate titled in the name of both spouses, if the unities required to establish ownership as a tenancy by the entireties exist, a presumption of such tenancy arises that shifts the burden to the creditor to prove that the stock was not so held. We believe the soundness of such holding is enhanced by our recognition, as a matter of common knowledge, that the alienation of a stock certificate held in spouses' joint names, just as title to real property held in spouses' joint names, requires greater formality than does alienation of the content of the joint bank accounts present in Beal Bank."

Appellee also argued that irrespective of whether the holding of Beal Bank is limited solely to joint bank accounts, or is viewed as

applicable to personalty in general, there should be no presumption of tenancy by the entireties in the stock because the words “*with right of survivorship*” were not present.

The 4th DCA was of the opinion that the holding in Beal Bank did not require, in order for the presumption to arise, the presence of the words “with right of survivorship,” any more than it requires the presence of words describing each of the other unities characteristic of a tenancy by the entireties. “Rather, the presumption arises from taking title in the spouses’ joint names. The creditor then has the burden to prove by the preponderance of the evidence that one of the necessary unities (including, if such be the case, the right of survivorship) did not exist at the time the certificate was acquired.”

However, in a recent opinion Judge Funk of the Middle District held to the contrary in a case involving personal property other than bank accounts. In In re McAnany, 294 B.R. 406 (Bankr. M.D. Fla. 2003) he said, “The Court agrees with the Trustee’s position that the Florida Supreme Court’s decision in Beal Bank does not extend the presumption of tenancy by the entireties to all personal property. If the Florida Supreme Court wanted to extend the presumption of tenancy by the entireties to all personal property it clearly could have.”

Since Florida law applies and the decisions of district courts of appeal are binding upon lower courts of this state, his decision is questionable in light of Cacciatore.

In an unreported opinion the Eleventh Circuit affirmed a decision holding that stock certificates held by husband and wife as joint tenants with rights of survivorship were immune where debtors were not offered the option of choosing tenants by the entirety on the application. In re Mathews, 307 Fed Appx. 266 (11th Cir. 2009).

In In re Mathews, 360 B.R. 732 (Bankr. M.D. Fla. 2007) Judge Funk receded from his opinion in In re McAnany and held that there is a presumption that personal property is held as TBE. However, he held that as to the stock certificates and a mutual funds account the trustee successfully rebutted the presumption by showing that debtor was offered the option of TBE on the application or form but selected joint tenants with rights of survivorship.

In In re Blais, 2004 WL 1067577, 17 Fla. L. Weekly D472 (Bankr. S. D. Fla. 2004) the bankruptcy court held that the presumption established by the Florida Supreme Court in Beal Bank applied to household goods and other items of personal property.

In In re Peraeu, 2007 WL 907545 (Bankr. M.D. 2007) debtor and his spouse had claims arising out of an injury to debtor. The case was settled post-petition without the knowledge or consent of the trustee. A

single check was issued settling the claims of the debtor and the non-filing spouse. Judge Proctor agreed with the cases that have held that there is now a presumption that property is held as TBE, but held that this presumption was rebutted because one of the unities, unity of interest, was not present.

In a recent article in the Florida Bar Journal, the author questions whether or not the law on when and under what circumstances personal property is held as tenants by the entirety is as clear as some of the courts may have held. Buzby-Walt, "Are Florida Laws on Tenancy by the Entireties as Clear as We Think," Florida Bar Journal 52 (Sept. / Oct., 2011). The article contains a good analysis of the development of the law in this area. The author also points out that in 2008 the Florida legislature adopted Section 655.79 of the Florida Statutes, which appears to establish that a joint account of husband and wife is TBE unless otherwise specified in writing as distinct from the presumption created by the Florida Supreme Court in Beal Bank.

In Benninghoff v. Potter, 2011 WL 3348079 (M.D. Fla. 2011) considered the effect of the presumption in connection with a joint bank account without mention of Fla. Stat. §655.79.

In Bridgeview Bank Group v Callaghan, 84 So. 3d 1154 (Fla. 4th DCA 2012) the judgment creditor contended it had the right to introduce evidence to rebut the presumption of TBE in connection with real

property owned by husband and wife. The Fourth DCA held that there isn't a presumption to rebut in connection with real estate where there is no indication of the deed that property was held in some form of ownership other than TBE.

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In re McRae, 282 B.R. 704 (Bankr. N.D. Fla. 2002) Judge Killian held that the payment of joint creditors post petition by the non-debtor spouse did not affect the determination whether or not, and to what extent, property held as tenants by the entirety can be administered by the trustee, the relevant time for determination of such exemption being the date of the filing of the petition. Judge Killian also reiterated his prior opinion in Boyd that the proceeds received by the trustee from administration of the non-exempt portion of joint assets are distributed according to the distribution scheme of Section 726, and not solely to joint creditors. This results in a split of authority in Florida, with some Bankruptcy Courts holding that payment of joint debts post-petition as well as the failure of joint creditors to file a proof of claim results in all assets held as tenants by the entirety being exempt under Section 522.

On appeal from the decision in McRae Judge Paul agreed that the relevant time for determining exemptions was the date of the filing of the petition. However, on the issue of distribution of proceeds, he disagreed and reversed. He held that only joint creditors are entitled to share in a

distribution of jointly held property. Since the only joint creditor in McRae was paid post petition, he held that the objection to exemptions filed by the trustee should be denied. In re McRae, 308 B.R. 572 (N.D. Fla. 2003).

This opinion raises some difficult questions relating to administration of estates. For example, in a joint case does a trustee have to establish three classes of creditors for purpose of paying dividends? In addition, there is a significant timing issue. An objection to exemptions must be filed long before a claims bar date. How will anyone know whether or not joint creditors will file a claim? And, what about a joint creditor that files a claim that is reaffirmed by the debtor(s)?

Another interesting issue beyond the scope of this presentation relates to the effect as precedent of a decision by one district judge in a multi-judge district. It is the author's understanding that there is a split of authority on the issue of whether Judge Paul's opinion is precedent that dictates future decisions by the bankruptcy judges in the Northern District.

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The case of In re Daniels, 309 B.R. 54 (Bankr. M.D. Fla. 2004) addressed the issue of tenancy by the entireties in connection with motor vehicle titles. In Daniels one car was titled in "husband or wife" and the other in "husband—wife." The car that was titled with an "or" was not

tenancy by the entirety but the car titled with an “—“ was tenancy by the entirety.

The immunity of tenancy by the entirety property in bankruptcy is still alive and well notwithstanding the U.S. Supreme Court's decision in Craft. In re Sinnreich, 391 F. 3d 1295 (11th Cir. 2004).

The presumption that property is owned as tenants by the entirety is not rebutted by any inference that may be drawn from title to the property as “joint tenants with rights of survivorship.” See, In re Mitchell, 344 B.R. 171 (Bankr. M.D. Fla. 2006) where the court granted summary judgment for the debtor.

Assuming there is a presumption that jointly held property is held as tenancy by the entirety, are tax refunds resulting from a joint return presumed to be TBE property? Another case holding the presumption set forth in Beal Bank applies to all personal property is In re Kossow, 325 B.R. 478 (Bankr. S.D. Fla. 2005) relating to tax refunds. For another case involving a TBE claim as it relates to a tax refund, see In re Freeman, 2008 WL 2078144 (Bankr. M.D. Fla. 2008). But according to Judge Glenn, the answer is “no.” In re Kant, 2006 WL 4919043 (Bankr. M.D. Fla. 2006). See also, In re Rice, 442 B.R. 140 (Bankr. M.D. Fla. 2010).

If a tax refund is not TBE, how do you determine the portion that belongs to the bankruptcy estate?

And another case holding that a car is not owned as TBE if titled in husband or wife. Xayavong v. Sunny Gifts Inc., 891 So. 2d 1075 (5th DCA 2004).

In In re Aranda, 2010 WL 5018320 (Bankr. S.D. Fla. 2010) the presumption of TBE ownership was applied to a deed conveying property to debtors as “joint tenants with right of survivorship and as tenants in common.” The Bankruptcy Court reasoned that the two forms of ownership were inconsistent so the deed was ambiguous. As a result of the ambiguity, the presumption in favor of TBE applied.

And for the application of TBE to proceeds, see Passalino v. Protective Group Securities, Inc., 886 So. 2d 295 (Fla. 4th DCA 2004).

For a detailed analysis of evidence relating to various items of personal property, see In re Caliri, 347 BR 788, 2006 WL 2382518 (Bankr. M.D. Fla. 2006).

In In re Stewart, 2007 WL 879178 (Bankr. M.D. Fla. 2007) Judge Proctor was faced with the situation where both spouses filed separately and both claimed their joint property as exempt as TBE notwithstanding joint debt. Judge Proctor denied the TBE exemption.

If TBE funds are used to prefer a creditor, can the transfer be avoided pursuant to 11 U.S.C. §547? See In re Kepley, 2007 WL 2696567 (MD Fla 2007).

In In re Adams, 2007 WL 5279793 (Bankr. M.D. Fla. 2007) the debtor claimed as exempt stock in a professional association. Since the statutes on ownership of stock in a professional association restrict the ownership of stock to professionals, the claim of exemption was denied.

For an example of the evidence necessary to establish ownership as TBE, see Berlin v. Pecora, 968 So. 2d 47 (Fla. 4th DCA, 2007).

Pereau v Abbott, 2008 WL 2074412 (M.D. Fla. 2008) addressed the question of whether or not the tort claims for damages to the injured spouse as well as loss of consortium to the other spouse that were the subject of a state court action filed by husband and wife were exempt as TBE property where only one of the spouses filed bankruptcy.

What happens when a person moves to Florida from a state that doesn't recognize tenancy by the entireties as a form of ownership? In Republic Credit Corp. v. Upshaw, the Fourth DCA held that if it wasn't owned as tenancy by the entireties the move to Florida did not result in becoming property owned as tenants by the entireties.

Can a chapter 13 debtor strip down or off a wholly unsecured mortgage on property owned as TBE where the other spouse is not a debtor? According to Judge Cristol the answer is "no." In re Alvarez, 2012 WL 1425097 (Bankr. S.D. Fla. 2012). See also, In re Pierre, 468 B.R. 419 (Bankr. M.D. Fla. 2012).

Judge Cristol's reasoning may also raise the question, how can a trustee sell TBE property without the joinder of the non-debtor spouse? This was the issue in In re Helm, 2012 WL 1616791 (Bankr. S.D. Fla. 2012). Judge Kimball addressed the issue of whether the entire TBE property became property of the bankruptcy estate or merely 50% as contended by Debtors. Judge Kimball held that the entire property became property of the estate and could be sold pursuant to §363(h) with the proceeds available to pay only joint creditors and any surplus being returned to the debtors.

III. FEDERAL NON-BANKRUPTCY EXEMPTIONS

FEMA assistance. 22 CFR §206.110(g).

Accumulated Social Security Benefits.

Do social security benefits that have “accumulated” in a bank account retain their exempt status? In Walker v Treadwell, 699 F. 2d 1050 (11th Cir. 1983), the 11th Circuit held that social security benefits did not retain their exempt status when accumulated, at least in those instances where the debtor is claiming exemptions pursuant to 11 U.S.C. §522(d). The Eleventh Circuit reasoned that the wording of 11 U.S.C. §522(d)(10) limited social security benefits to a “right to receive,” which does not include benefits already received. See also, In re Crandall, 200 B.R. 243 (Bankr. M.D. Fla. 1995). Since Florida adopted Section 222.201 of the Florida Statutes incorporating 11 U.S.C. §522(d)(10), does this precedent apply to all cases where a debtor has accumulated social security

benefits and seeks to claim them as exempt? What about other accumulated benefits under other provisions of 11 U.S.C. §522(10)? See, In re Schena, 2010 WL 4026807 (Bankr. D. N.M. 2010). Recently the 8th Circuit rejected the 11th Circuit's resolution of the conflict between the Social Security Act and the apparent limitation to future benefits in 11 U.S.C. §522(10).

IV. FEDERAL LIENS

The U. S. Supreme Court appears to have resolved the question of whether or not a federal tax lien against one spouse attaches to property held as tenants by the entirety. The Court in United States v. Craft held that for the purpose of the federal tax lien statute, 26 U.S.C. § 6321, “respondent’s husband’s interest in the entirety property constituted ‘property’ or ‘rights to property’” U. S. v. Craft, 535 U.S. 274, 122 S.Ct. 1414, 1425, 152 L.Ed.2d 437 (2002). Though the Court acknowledged that each spouse has a property interest in the entirety estate, it further explained that “each tenant possesses individual rights in the estate sufficient to constitute ‘property’ or ‘rights to property’ for the purpose of the lien....” *Id.*, 122 S.Ct. at 1419.

The opinion leaves a number of unanswered questions.

Prior to the Craft decision it was generally recognized that the federal tax lien statutes do not create property rights, but rather attach consequences, federally defined, to rights which are created under state law. *See*, United States v. Bess, 357 U.S. 51, 55, 78 S.Ct. 1054, 1057 (1958). Resort must first be made to

underlying state law to determine the existence and nature of an interest to which the federal tax lien could be asserted. *Aquilino v. United States*, 363 U.S. 509, 512-514, 80 S.Ct. 1277, 1280- 1281 (1960). If the taxpayer's interest under state law is considered "property" or a "right to property," the tax lien attaches to that interest, and "the tax consequences thenceforth are dictated by federal law." *See, Medaris v. United States*, 884 F.2d 832, 833 (5th Cir.1989), quoting *U. S. v. National Bank of Commerce*, 472 U.S. at 722, 105 S. Ct. at 2925.

The Court in *Craft* acknowledged this relationship between state and federal law. But it went on to conclude that the taxpayer had interests in property owned as tenants by the entirety. The Court said, "A common idiom describes property as a bundle of sticks a collection of individual rights which, in certain combinations, constitutes property. [cite omitted] State law determines only which sticks are in a persons bundle. Whether those sticks qualify as property for purposes of the federal tax lien statute is a question of federal law. In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien."

Reviewing Michigan law, the Court noted that Michigan law gave the taxpayer "some of the most essential property rights: the right to use the property, to receive income produced by it, and to exclude others from it." The taxpayer

also “possessed the right to alienate (or otherwise encumber) the property with the consent of ... his wife.... It is true ... that he lacked the right to unilaterally alienate the property, a right that is often in the bundle of property rights. [cite omitted]. There is no reason to believe, however, that this one stick , the right of unilateral alienation, is essential to the category of property.”

The Court went on to hold, “that the ... husband’s interest in the entirety property constituted property or rights to property for the purposes of the federal tax lien statute.”

But what does this mean? Can the IRS only levy upon the “sticks” in the bundle that are rights belonging to the taxpayer? Must they get the consent of the taxpayer’s spouse to alienate the property? The Court expressly declined to address the issue of valuation, and therefore left unanswered the question of whether, for the purpose of a federal tax lien, each tenant by the entirety possessed something other than 100% of the equity.

There have not been any cases in Florida dealing with the issues raised by the Craft decision. However, cases in other jurisdictions are illustrative of a few of the many issues raised by that decision.

In Hatchett v. U.S., 330 F. 3d 875 (6th Cir. 2003) the Court of Appeals held, among other things, that: (1) government could levy against and seize land, and mortgage payments owed on land, that was held by taxpayer and spouse as tenants by the entirety; (2) Supreme Court’s Craft decision applied retroactively to action, which was pending before Court of Appeals when Craft was rendered;

and (3) the government could sell the whole of real properties held by taxpayer and spouse as tenancies by the entirety and collect a portion of the proceeds. Like the Supreme Court decision in Craft the opinion in Hatchett gives little guidance on the issue of the value of the taxpayer's interest in the property. Is it 50% or something less?

This was the question faced by the bankruptcy court in In re Basher, 291 BR 357 (Bankr. E. D. Pa. 2003) in the context of a Chapter 13. The court concluded that the value of the IRS lien was not zero as contended by the debtor nor was it 50% as contended by the IRS because the non-taxpayer spouse had a greater actuarial life expectancy. However, the court could not reach a decision on the record before it.

On a different issue, the bankruptcy court in In re Greathouse, 295 B.R. 562 (Bankr. Md. 2003) held that the mere fact that a hypothetical creditor such as the Internal Revenue Service (IRS) could have executed on real property that Chapter 7 debtor owned as tenant by the entirety with his non-debtor spouse did not permit the trustee, in exercise of his strong-arm powers, to successfully object to debtor's claim of exemption in this entirety property, and to thereby make property available for payment of all creditor claims, in case in which there was no federal tax creditor and no joint creditors who could have enforced their claims against this property.

See also, Burton, "Pavlov's Dog, the Chicken and the Egg," ABI Journal (Nov. 2002).

The title of this section has been changed from “Federal Tax Liens” to “Federal Liens.” This change was dictated by a review of other federal statutes with language similar to the language in the tax code. For example, in In re Dahlman, 304 B.R. 892 (Bankr. M.D. Fla. 2003) the bankruptcy court held that the lien of federal government for a fine or restitutionary obligation that was imposed, pursuant to the Anti-Terrorism and Effective Death Penalty Act (AEDPA), in a bank fraud prosecution attached to debtor’s interest in property that he owned as tenant by the entirety with his non-debtor wife, although extent of debtor’s interest in this entireties property still had to be determined.

See, Bhandari & Jorgensen, “Valuing Interests in Tenancy by the Entirety Under Craft,” 79 Fla. B. Journal 336 (March 2005).

See U.S. v. Fleet 498 F.3d 1225, 2007 WL 2480543 (11th Cir. 2007) holding a civil forfeiture was collectable from property owned as TBE and homestead.

There also appears to be some authority to disregard state exemption laws in the context of a disgorgement proceeding brought by a governmental entity. See Federal Trade Commission v Leshin, 2011 WL 617500 (S.D. Fla. 2011).

V. REMEDIES FOR ABUSE

In a case that may have major significance in the future for attorneys that counsel clients with financial problems, the Eleventh Circuit certified the following question to the Florida Supreme Court, “Under Florida law, is there a cause of action for aiding and abetting a fraudulent transfer when the alleged

aider-abettor is not a transferee?” Freeman v. First Union National, 329 F. 3d 1231 (11th Cir. 2003).

Unfortunately, at the time that the Freeman case was briefed and argued the Eleventh Circuit may not have had the benefit of an opinion by the Fifth District Court of Appeals, which addressed that issue. Bankfirst v. USB Paine Webber, 842 So. 2d 155 (Fla. 5th DCA 2003) held that “The order dismissing Bankfirst’s claim against UBS Paine Webber, Thomas Lavecchia, Jonathan Alper, and Mark Koteen is affirmed based on our conclusion that neither section 222.30 nor chapter 726, Florida Statutes, creates a cause of action against a party who allegedly assists a debtor in a fraudulent conversion or transfer of property, where the person does not come into possession of the property.”

Thereafter the Third District Court of Appeals also decided that there is no cause of action in Florida for conspiracy to commit a fraudulent transfer. Danzas Taiwan, Ltd. v. Freeman, 868 So. 2d 537 (Fla. 3rd DCA 2003) and Beta Real Corp. v. Graham, 839 So. 2d 890 (Fla. 3rd DCA 2003).

Debtor’s attorneys and other professionals that advise people in financial distress can breathe a sigh of relief. The Florida Supreme Court answered the certified question “no.” Freeman v First Union, 865 So. 2d 1272 (Fla. 2004). See also, Kleinfeld, “The Florida Supreme Court Finds No Liability for Aiding and Abetting a Fraudulent Transfer,” 78 Fla. B. J. 22 (June, 2004).

The question is, does the Freeman case completely resolve the issue? The decision in Freeman construes Chapter 726 of the Florida Statutes and concludes

that there is no cause of action under such chapter against a third party for transfers where they were not a transferee. It does not, however, address the issue of whether or not a common law cause of action exists for “defrauding” creditors. If one exists, then there would also be a cause of action against third parties for conspiracy or aiding and abetting.

In footnote 4 of its opinion, the Florida Supreme Court reserved that issue for a later date. It said,

“We caution that our answer to the certified question in this case is confined to the context of FUFTA. We do not address whether relief is available under any other theory of liability or cause of action. See, e.g., Bankfirst v. UBS Paine Webber, Inc., 842 So.2d 155, 157 (Fla. 5th DCA 2003) (Harris, Senior Judge, dissenting) (stating that the non- transferee defendants “devised and implemented a plan by which the debtor was able to transfer his money” and opining, “I believe BankFirst stated a cause of action for civil conspiracy”).”

The Fourth District Court of Appeals recently held that a payment to an insider within one year is recoverable under Chapter 726. Mied, Inc. v. Summit Healthcare, Inc., 849 So.2d 397 (Fla. 4th DCA 2003). What makes this case somewhat remarkable is that the insiders held a judgment that presumably was a lien upon property and that was entered outside the one year period. This may not bode well for insiders that attempt to secure their loans. Even if the loans are secured outside the one year, payments made during the one year may nonetheless be recoverable.

For a case involving the fraudulent conversion of non-exempt assets into exempt assets, see In re Jennings, 332 B.R. 465 (Bankr. M.D. Fla. 2005).

Can a transfer of an exempt asset to an exempt asset be set aside under

§548? See, Ray, “Avoidance of Transfers of Entireties Property – No Harm, No Foul?” 25 ABI Journal 12 (Sept. 2006). *In In re Lumbar, 457 B.R. 748 (8th Cir. BAP 2011) the 8th Circuit’s BAP held that a transfer of exempt property to exempt property can be set aside as a fraudulent transfer.*

In In re Mazon, 368 B.R. 906 (Bankr. M.D. 2007) the debtors dissipated non-exempt assets post-petition that they had failed to disclose. Judge Williamson held that it was proper to surcharge otherwise exempt assets for such dissipation except for assets that are exempt pursuant to the Florida Constitution. See also, In re Scrivner, 2007 WL 1783863 (10th Cir BAP, 2007) **but Scrivner was reversed by 10th Cir – 535 F. 3d 1258 (10th Cir. 2008).**

In the unpublished opinion of the Eleventh Circuit in In re Hecker, 2008 WL 283282 the Eleventh Circuit allowed sanctions denying the debtor’s claim of exemption where debtor had failed to obey the Bankruptcy Court’s order(s).

If TBE funds are used to prefer a creditor, can the transfer be avoided pursuant to 11 U.S.C. §547. The answer is yes, according to In re Kepley, 2007 WL 2696567 (MD Fla 2007).

See In re Kelley, 2007 WL 2492732 (MD Fla 2007) re payment of a life insurance loan against CSV of policy as fraudulent conversion of non-exempt to exempt assets.

In In re Asunmaa, 2010 WL 1379790 (Bankr. M.D. Fla. 2010) the Bankruptcy Court sustained an objection to the debtor’s claim that funds in a Roth

IRA were exempt pursuant to Fla. Stat. §222.30. The court found several factors indicating an intent to hinder, defraud or delay creditors, including:

- (1) The transfer was made ten (10) days before the bankruptcy petition;
 - (2) It was made after consultation with a bankruptcy lawyer;
 - (3) It was made when debtors were insolvent;
 - (4) It was made at a time when several lawsuits were filed against debtors;
- and
- (5) Debtors did not list the transfer in the Statement of Financial Affairs.

For a similar result under §522(o) of the Bankruptcy Code, see In re Osejo, 447 B.R. 352 (Bankr. S.D. Fla. 2011). For a case in which the Trustee was not successful in convincing the Bankruptcy Court that the transfer was made with requisite intent under §522(o) of the Bankruptcy Code, see In re Klinglesmith, 2011 WL 2471582 (Bankr. M.D. Fla. 2011).

VII. BANKRUPTCY PRACTICE AND PROCEDURE

A.1 PROCEDURES FOR DETERMINING EXEMPTIONS

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In Schwab v. Reilly, 130 S. Ct. 2652 (U.S. 2010) the United States Supreme Court “clarified its prior decision in Taylor v. Freeland relating to the effect of a claim of exemption on schedule C equal to the value listed for the value of the property claimed as exempt by holding that when the Bankruptcy Code defines the property a debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar

amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describes the asset and declares the “value of [the] claimed exemption” in that asset to be an amount within the limits that the Code prescribes, an interested party is entitled to rely upon that value as evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt.

Debtors’ misconduct in connection with the case can result in loss of the right to amend Schedule C to claim items as exempt. In In re Green, 268 B.R. 628 (Bankr. M.D. Fla. 2001) debtors, who waited 18 months to amend their schedules to disclose their life insurance policies and individual retirement accounts (IRAs) after initially concealing these assets, were precluded from amending their schedules to claim the assets as exempt. Debtors had made numerous withdrawals from the subject accounts both prepetition and post petition, and, by the time of court’s decision, still had not documented the recipients of the withdrawals or otherwise accounted for use of the funds. The court found that creditors had been prejudiced, since debtors’ delay caused trustee to expend extraordinary legal fees and investigative costs.

The right to amend has recently come up in connection with the “wild card” exemption. Debtors, when faced with a challenge to their personal property, have sought leave to amend and delete their homestead

from Schedule C with mixed results. Contrast In re Allen, 2011 WL 2493065 (Bankr. S.D. Fla. 201) and In re Orozco, 444 B.R. 472 (Bankr. S.D. Fla. 2011) with In re Wilson, 446 B.R. 555 (Bankr. M.D. Fla. 2011). See also, *In re Ballou*, 2011 WL 4530314 (Bankr. M.D. Fla. 2011).

The trustee in In re Gentry, 459 B.R. 861 (Bankr. M.D. Fla. 2011) tried a different approach in an attempt to avoid the amendment by the debtor claiming the home as exempt. The trustee objected to the amended exemption claim on the theory that the debtor did not intend to permanently reside in the home on the petition date because the statement of intent indicated that the debtor intended to surrender the home. It didn't work. The bankruptcy court overruled the trustee's objection.

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As noted in the original outline, when a first meeting is continued the time for objecting to exemptions does not begin to run until the conclusion of the continued meeting. However, in some jurisdictions a caveat should be added. If the meeting is continued indefinitely, it may be deemed to have been concluded and the time starts to run immediately. See Smith v. Kennedy (In re Smith), 235 F. 3d 472 (9th Cir. 2000).

The issue of indefinite continuances as well as the issue of the effect of conversion on the time for objecting to exemptions and on whether the debtor's exemption rights are determined as of the date of the

original filing or on the date of conversion were the subject of an article by Professor Scott Norberg presented at the Southeastern Bankruptcy Law Institute in 2002.

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And, a bankruptcy court in the Southern District of Florida held that in a chapter 11 case the absolute priority rule prohibits a chapter 11 debtor from retaining any property, including exempt property, if confirmation is sought under Section 1129(b). In re Gosman, 282 B.R.45 (Bankr. S. D. Fla. 2002).

See also the article by White and Medford, “Exempt Property and the Absolute Priority Rule,” ABI Journal (Nov. 2002).

In In re Shahid, 18 Fla. L. Weekly Fed. B278 (Bankr. N.D. Fla. 2005) Judge Mahoney held that an extension of time to object to exemptions granted upon motion by the trustee does not extend the time as to any other creditor in the absence of express language to the contrary.

The use of software to compatible with ECF has created issues relating to the intent of the debtor as reflected on Schedule C. For example, it is now commonplace for some programs to list all assets, including those that are not exempt, on Schedule C with a zero value claimed as exempt. However, where the value of the property is also listed as zero or unknown, this raises a question whether or not the asset is claimed as exempt. Another example is a case where property is subject

to a lien. Should the debtor list the entire value of the asset as exempt or just the equity? If the debtor only lists the equity, does this mean that the remainder is property of the estate?

In In re Brubaker, 426 B.R. 902 (Bankr. M.D. Fla. 2010) Judge Paskay entered an order requiring the Debtor to turn over the non-exempt portion of the monies in a bank account. While that is not in and of itself remarkable, he held that the Debtors were required to do so notwithstanding pre-petition checks had cleared the account post-petition such that the money was no longer in the account.

A.2 PROPERTY ACQUIRED POST-PETITION.

Section 541(a)(5) of the Bankruptcy Code provides that property acquired by a debtor within 180 days after the petition date is property of the estate under certain circumstances. The question is, can this property be claimed as exempt? See In re Nofziger, 2007 WL 570006 (M.D. Fla. 2007).

A.3 ***WHO HAS THE RIGHTS TO DEFENSES AND COUNTERCLAIMS?***

In In re Larkin, 468 B.R. 431 (Bankr. S.D. Fla. 2012) the bankruptcy court held that defenses to a mortgage foreclosure on homestead property that did not seek monetary relief could not be compromised by the trustee without consent of the debtor. Those that did seek monetary relief as well as counterclaims are not exempt and

belong to the bankruptcy estate such that a trustee can reach a compromise with the secured creditor.

B. DEBTOR'S AVOIDANCE POWERS **AND "STRIP-OFFS"**

1. Use of §522(f) to Clear Title.

In In re Richardson, 311 B.R. 302 (Bankr. S.D. Fla. 2004) the bankruptcy court held that a debtor in a chapter 13 did not have standing to assert the avoidance powers under §522(h).

In In re Pearlstein, 349 B.R. 317 (Bankr S.D. Fla. 2006) Judge Friedman held that since the judgment lien did not attach to homestead property there was no lien to avoid pursuant to §522(f).

For an article that discusses the split of authority on the use of section 522(f) to clear title to property where there is a recorded judgment lien, see Robert C. Meyer, Section 522(f): Forward to the Past or Back to the Future, 82 Fla. B. J. (Nov. 2008).

The Bankruptcy Court in In re Cabrera, 2009 WL 4666460 (Bankr. S.D. Fla. 2009) held that a federal credit union's lien on accounts was superior to debtor's right to claim the monies in the account as exempt.

2. Strip Offs.

For a case involving stripping off a second mortgage where there is no equity over and above the first mortgage, see In re Dang, 467 B.R. 227 (Bankr. M.D. Fla. 2012). See also, In re Scantling, 465 B.R. 671 (Bankr. M.D. Fla. 2012).

C. POST BANKRUPTCY EFFECT OF EXEMPTION CLAIM

Availability of exempt property to pay a domestic support obligation. 11 U.S.C. §522(c)(1) provides that “[P]roperty exempted under this section is not liable during or after the case for any debt of the debtor that arose ... before the commencement of the case, except – (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a)(in which case, notwithstanding applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5).”

The question is, after bankruptcy can the holder of a domestic support obligation recover that obligation from a former debtor from that former debtor’s exempt assets, including a debtor’s homestead?

In In re Mayhugh, 427 B.R.549 (Bankr. S.D. Fla. 2010) Debtor moved to reopen her case to file a motion to avoid a pre-petition judgment lien on her homestead. It was undisputed that at all relevant times prior to the petition date the property in question was the debtor’s homestead. However, the debt owed to the judgment creditor was excepted from discharge and the judgment creditor contended that the debtor had abandoned her homestead after the petition date. Judge Mark refused to reopen the case to allow such a motion on the theory it would be unfair to “deprive” the judgment creditor of a possible remedy. There was no discussion of the impact of 11 U.S.C. §522(c). See, In re Cunningham, 513 F.3d 318 (1st Cir. 2008). By refusing to reopen the case to allow a lien to be avoided pursuant to §522(f), the effect is to negate the benefit of §522(c) since

§522(c) by its terms doesn't apply to "a debt secured by a lien that is (A)(i) not avoided under subsection (f)..." For debtor's attorneys this emphasizes the importance of filing §522(f) motions during the case to avoid potential post-bankruptcy problems.

D. IMPACT OF CHANGES TO THE BANKRUPTCY CODE

Without question the greatest changes that we have seen over the past two years were the result of the changes in the Bankruptcy Code. These changes raise issues that will be the subject of litigation for years to come. There are opinions on a few of these issues, but the vast majority have not been addressed. The following attempts to identify some of these issues as well as any cases in Florida that may have addressed them.

1. Which state law determines exemptions and does that law have extra-territorial effect?

a. If the debtor's domicile has not been located in a single state for the 730 days preceding the petition, then look to the domicile for the greater part of the 180 day period preceding the 730 day period.

b. Note that the test is "domicile." Domicile is not necessarily the same as a physical address. Accordingly if a debtor has left the state with the intent to return or is in the military

service, he or she may still have a single domicile for the 730 days before the petition. See the section in this outline relating to domicile issues.

c. What if the law of the other state does not allow a non-resident to claim exemptions? Judge Killian has held that in such circumstances the debtor is entitled to the federal exemptions. In re Underwood, 342 B.R. 358 (Bankr. N.D. Fla. 2006). The last sentence of §522(b) makes it clear that absent a right to claim the applicable state exemption, a debtor is entitled to the exemptions provided in §522(d).

d. See also, Bartell, “The Peripatetic Debtor: Choice of Law and Choice of Exemptions,” 22 Emory Bankr. Dev. Journal 401 (Spring 2006).

e. If you are required to look to the exemption laws of another state, how do you determine if those laws have extraterritorial effect? This was the question that confronted the Bankruptcy Court in the Southern District of Florida in In re Javine, 387 B.R. 301 (Bankr. S.D. Fla. 2008). The Court decided,

“Accordingly, if the language of a state's homestead statute restricts its application to property located within the state, the statute cannot be given extraterritorial effect by this Court. If the plain language of a state's homestead statute is silent as to its extraterritorial effect, the Court will look to that state's case law precedent to determine if the state's homestead statute can be applied to property outside of the state. If the state's homestead statute is silent as to its extraterritorial effect and there is no case

law precedent determining the propriety of its extraterritorial application, the Court believes it is appropriate to interpret the state's homestead law to apply extraterritorially*305 based upon the strong policy of liberally construing exemptions in favor of the debtor as espoused by the Eighth and Ninth Circuit Courts of Appeal.”

f. Which state’s law applies to determine whether property is immune as “tenancy by the entirety?” Is the choice of law provision set forth in §522(b)(3)(A) separate and distinct from the immunity granted to TBE property under §522(b)(3)(B)? See, In re Zolnierowicz, 380 B.R. 84 (Bankr. M.D. Fla. 2007). Also see Sheehan, “Exemption of ‘Out of State’ Property Held as Tenants by the Entireties,” 24 NabTalk (Vol. 1, 2008). But see, In re Kirshner, 2007 WL 3232258 (Bankr. S.D. Fla. 2007). See also, McNeilly, “Exemptions and the Mobile Debtor,” NABTalk 17 (Spring, 2009).

2. The \$125,000 cap for persons owning their home for less than 1215 days. 11 U.S.C. §522(p). See Gans & Lynch, *supra*; Nelson, “How Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Affect Homestead?” 79 Fla. B. Journal 22 (Nov. 2005); and Ahern, “Homestead and Other Exemptions Under the Bankruptcy Abuse Prevention and Consumer Protection Act,” 13 Am. Bankr. L. Inst. L. Rev. 585 (Winter 2005).

a. Does it apply in states that have “opted out.” An Arizona bankruptcy judge held it does not. In re McNabb, 326

B.R. 785 (Bankr. D. Ariz. 2005). However, every bankruptcy judge in Florida that has considered the issue has held that the \$125,000 cap applies notwithstanding Florida's election to opt out of the federal exemptions:

In re Kaplan, 331 B.R. 483 (Bankr. S.D. Fla. 2005).

In re Buonopane, 344 B.R. 675 (Bankr. M.D. Fla. 2006)

In re Landahl, 338 B.R. 920 (Bankr. M.D. Fla. 2006).

In re Wagstaff, 19 Fla. L. Weekly Fed B192 (Bankr. S.D. Fla. 2006).

b. Where husband and wife jointly own the homestead, are each entitled to \$125,000? Judge Williamson held they are. In re Rasmussen, 2006 WL 2588731 (Bankr. M.D. Fla. 2006). See also, In re Limperis, 2007 WL 1586502 (Bankr. S.D. Fla. 2007).

c. What happens to a jointly owned homestead where only one spouse files? In In re Buonopane, 359 B.R. 346 (Bankr. M.D. Fla. 2007) Judge Williamson held that the TBE exemption is separate and distinct from the exemption under state law that is limited to \$125,000 by virtue of the 1215 day requirement found in 11 U.S.C. §522(p). Accordingly, a homestead that is acquired within 1215 days of the bankruptcy is not limited to \$125,000 where the property is held as TBE, there are no joint creditors and only one spouse files bankruptcy. See also, In re Hinton, 378 B.R.

371 (Bankr. M.D. Fla. 2007). See also, In re Aranda, 2010 WL 5018320 (Bankr. S.D. Fla. 2010) holding that neither §522(o) nor §522(p) applied to property claimed as exempt by virtue of its ownership as TBE.

d. What happens if a portion of the property is not homestead and the \$125,000 cap applies?

e. What does “any amount of interest that was acquired by the debtor” mean? What if debtor owned the property for more than 3.3 years but the property did not acquire homestead status prior to 3.3 years? The cases outside of Florida are split. In In re Greene, 346 B.R. 835 (Bankr. Nev. 2006) the Bankruptcy Court in Nevada held that the acquisition of homestead status was within the 1215 day period and rendered the homestead subject to the \$125,000 cap. On the other hand, the Court in In re Rogers, 354 B.R. 792 N.D. Tex. 2006) held that the \$125,000 limit did not apply where the debtor acquired fee title to the property prior to the 1215 days even though the property became the debtor’s homestead within the 1215 days. What if the debtor has a remainder interest and the life tenant dies within the 3.3 years? What if the debtor is beneficiary of a revocable trust and has lived on the trust property for over 3.3 years and the trust becomes irrevocable as a result of death of the settler?

In In re Reinhard, 377 B.R. 315 (Bankr. N.D. Fla. 2007) Judge Killian decided that the relevant time is the date that the debtor acquired the property and not the date that it became the debtor's homestead. Judge Killian's opinion was cited with approval by the 5th Circuit in affirming the Bankruptcy Court's judgment in In re Rogers. In re Rogers, 513 F. 3d 212 (5th Cir. 2008).

In In re Burns, 395 B.R. 756 (Bankr. M.D. Fla. 2008) the Bankruptcy Court held that the equity in the property had to exceed twice the limit where the property is owned by husband and wife and both filed bankruptcy.

f. When do you calculate whether or not the equity exceeds the \$125,000, the date of the acquisition or the date of the petition?

g. What if the equity is enhanced though pay off of the mortgage or substantial improvements to the home during the 1215 day period?

In In re Burns, 395 B.R. 756 (Bankr. M.D. Fla. 2008) the Bankruptcy Court held that payment of regular mortgage payments is not the acquisition of an interest.

h. What if the debtors owned the property for more than 1215 days but it appreciated in value more than \$125,000 during

the 1215 days? In In re Sainlar, 344 B.R. 669 (Bankr. M.D. Fla. 2006) Judge Briskman held that where the property was acquired more than 1215 days before the petition the fact that it appreciated in value during the 1215 days is not sufficient to invoke the cap.

But what if the debtor acquired the home within the 1215 day period but the equity at the time was less than \$125,000?

And, what does “in the aggregate” mean in the context of the \$125,000 cap?

i. What are the respective rights of a debtor and the trustee where the \$125,000 cap applies? Who has the right to possession? Who has to pay to preserve and maintain the property? Does the Trustee have an obligation to pay the mortgage to preserve the \$125,000 cap for the benefit of the debtor? Must the trustee seek authority to sell the property pursuant to §363(h)? What about the requirement of §363(h) that the benefit to the estate of a sale of the property free of the interests of co-owners outweigh the detriment to the co-owners?

j. Does §522(p) create an exemption where a dependent of the debtor resides on the property even though the property doesn't qualify as the debtor's homestead?

k. What does the exception for “any amount of such interest does not include any interest transferred from a debtor's

previous residence ...into the debtor's current residence..." mean?

Does the word "interest transferred" really mean "proceeds?"

Does the debtor have to be able to trace in order to get the benefit of this exception?

1. Note the exception in §522(p)(1) for §§544 and 548.

What is the effect of this exception in Florida?

3. Fraudulent transfers or conversions within 10 years. 11 U.S.C.

§522(o).

a. It provides for the "value of an interest" in debtor's homestead to be "reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period" before filing "with the intent to hinder, delay or defraud a creditor" and that a debtor "could not exempt, or that portion that a debtor could not exempt" under the applicable exemption law. Accordingly the elements necessary to "reduce" a debtor's claim of exemption are:

- (1) disposition of property of the debtor,
- (2) that is not exempt,
- (3) within the 10 years preceding the petition,
- (4) with intent to hinder, delay or defraud a creditor, and
- (5) use of the proceeds from such disposition

(6) to acquire a homestead or burial plot that is exempt under applicable law.

For a case under §522(o) of the Bankruptcy Code finding in favor of the Trustee, see In re Osejo, 447 B.R. 352 (Bankr. S.D. Fla. 2011). For a case in which the Trustee was not successful in convincing the Bankruptcy Court that the transfer was made with requisite intent under §522(o) of the Bankruptcy Code, see In re Klinglesmith, 2011 WL 2471582 (Bankr. M.D. Fla. 2011).

b. If a creditor or the trustee is able to prove all of these elements, the result only reduces the exemption claim; it does not defeat the exemption claim. Accordingly, a debtor will still receive the benefit of any appreciation in the value of the homestead.

c. Presumably the courts will use the same “badges of fraud” to determine the applicability of this provision as they use in other fraudulent transfer or conversion cases. However, the “constructive fraud”, i.e. transfers for less than reasonably equivalent value when a debtor is insolvent or rendered insolvent, doesn’t appear to apply. *In In re Cook, 460 BR 911 (Bankr. N.D. Fla. 2011) the Trustee objected to Debtors’ claim that their homestead was exempt. The Trustee presented evidence of some*

of the “badges of fraud.” The Debtors had purchased the home using a non-exempt tax refund to make the down payment. Judge Killian held that evidence of some of the badges of fraud did not necessarily meet the Trustee’s burden of proof necessary to defeat Debtors’ claim that their homestead was exempt where Debtors had been looking for a home after selling their more expensive home, the Debtor’s could not get credit because of their financial condition and the down payment was in line with typical owner financing. An appeal of Judge Killian’s decision is presently pending in the U.S. District Court for the Northern District of Florida, Case No. 5:12-cv-00008-MP-GRJ.

d. In In re Mathews, 360 B.R. 732 (Bankr. M.D. Fla. 2007)

Judge Funk held that a loan secured by property that was owned as TBE, the proceeds from which were in the form of a check to the debtor alone but which were deposited into a joint account and then used to pay off a mortgage on debtor’s homestead did not come with the limitation of §522(o).

4. Limit on IRA’s to \$1,000,000 (or such amount as the court determines is required in the interest of justice). 11 U.S.C. §522(n). But note the amount of rolled over from a certain qualified plans under §§402 and 403 of the Internal Revenue Code are excluded from this amount.

5. Availability of exempt property to pay a domestic support obligation. 11 U.S.C. §522(c)(1) provides that “[P]roperty exempted under this section is not liable during or after the case for any debt of the debtor that arose ... before the commencement of the case, except – (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a)(in which case, notwithstanding applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5).”

This section has been cited by trustees without much success for the proposition that a trustee can administer an exempt asset for the benefit of the holder of a claim for a domestic support obligation. See example, In re Quezada, 368 B.R. 44 (Bankr. S.D. Fla. 2007). See also, In re Duggan, 2007 WL 2386577 (Bankr. M.D. Fla. 2007).

6. The limitation on equity in a homestead resulting from debtor’s misconduct.

Section 522(q)(1) lists several areas of misconduct which will result in a cap being placed upon debtor’s equity in a homestead. One of these is “any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.” In In re Burns, 395 B.R. 756 (B. M.D. Fla. 2008) Judge Jennemann held that (a) a debtor must have acquired the homestead within the same 1,215 day period specified in §522(p), (b) payment of mortgage payments was not acquiring an interest, and (c) that willful or reckless misconduct required a showing of “highly unreasonable

conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.”