There's No Place Like Homestead

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There's No Place Like Homestead

Kara Scott
Legal Education Attorney

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Overview

- What is homestead?
- Exemption from taxation
- Exemption from forced sale
- Restrictions on alienation and devise
- Spousal waiver and inter-spousal transfer laws

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Florida's "Legal Chameleon"

- Partial exemption from ad valorem taxes
- Exemption from forced sale
- Limitations on sale and devise

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Partial Tax Exemption

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Partial Exemption from Ad Valorem Taxes

Art. VII, Sec. 6, Florida Constitution

- Permanent residence of owner or dependent
- Real estate may be held:
  - By the entireties
  - Jointly
  - In common
  - As a condominium
  - Indirectly by stock ownership
  - Membership in a corporation owning a fee or a leasehold

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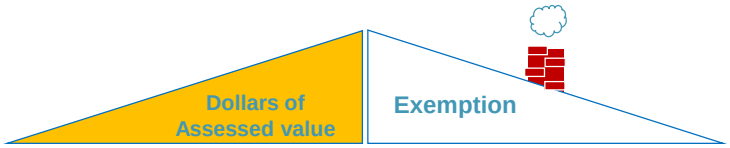
Partial Exemption from Ad Valorem Taxes

Art. VII, Sec. 6, Florida Constitution

- 1st $25k of assessed value exempt except assessments for special benefits
- $25k of assessed value greater than $50k exempt other than school district levies
- One exemption per individual or family unit



$75k – up	Taxable (no exemption)
$50k - $75,000	2d $25,000 exemption
$25k - $50,000	Taxable (no exemption)
$0 - $25,000	1st $25,000 exemption

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Partial Exemption from Ad Valorem Taxes

Other Homestead Exemptions

Art. VII Sec. 6(d) - Persons 65 or older

Sec. 196.075, F.S.

County or municipality may grant either or both:

- Up to $50k on permanent residence of owner
  - Household income < $36,614 in 2024 (adjusted annually)
- Exemption on permanent residence equal to assessed value
  - Property owned at least 25 years
  - Just value < $250k on 1st year of application
  - Household income <$36,614 in 2024 (adjusted annually)

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Partial Exemption from Ad Valorem Taxes

Other Homestead Exemptions

Art. VII Sec. 6(e) Veteran's Exemptions
Sec. 196.082, F.S.

- Veterans 65 or older
- Partially or totally permanently disabled
- Disability is combat-related
- Honorable discharge
- Discount of ad valorem taxes on homestead property
- % discount = % of veteran's permanent, service-connected disability as determined by VA

Partial Exemption from Ad Valorem Taxes

Veterans' Homestead Exemptions (cont'd)

Sec, 196.24, F.S.
- $5,000 exemption where 10% or more disability from misfortune during wartime service

Sec. 196.081, F.S.
- Discount of ad valorem taxes on homestead of honorably discharged veteran with a service-connected total and permanent disability exempt from taxation with VA letter
- Veteran must be permanent resident of FL on Jan. 1 of the tax year applying, or permanent resident of FL on Jan. 1 of the year the veteran died
- VA letter prima facie evidence veteran or surviving spouse entitled to exemption
- Exemption carries over to surviving spouse after veteran's death so long as spouse
  - Holds title to homestead and permanently resides thereon, or
  - Exemption up to most recent assessment transferrable to new property
  - Exemption ends upon remarriage

Partial Exemption from Ad Valorem Taxes

Art. VII Sec. 6(f)

- Legislature may provide up to 100% ad valorem exemption on homestead for surviving spouse of 1st responder who died in the line of duty or surviving spouse of veteran who died while on active duty.
- Also, for a 1st responder who is totally and permanently disabled through injuries sustained in the line of duty

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Partial Exemption from Ad Valorem Taxes

First Responders' Exemptions

Article VII, Sec. 6(f)(3) – Sec. 196.102, F.S. – Disability

- Homestead of 1st responder exempt from taxation if
  - Total and permanent disability resulting from injuries sustained in the line of duty in FL or during operation in another state or country authorized by FL or political subdivision of FL
- 1st responder must be permanent resident of FL on Jan. 1 of the year exemption claimed
- Prima facie evidence established by providing
  - SS Administration documentation of permanent disability, and
  - Certificate from organization that employed applicant as first responder

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Partial Exemption from Ad Valorem Taxes

First Responders' Exemptions (cont'd)

Article VII, ,Sec. 6(f)(2) – Sec. 196.081, F.S. – Death in Line of Duty

- Homestead of surviving spouse of 1st responder who died in line of duty while employed by state exempt from taxation with letter from state authority
- 1st responder and surviving spouse must be permanent residents of FL on Jan. 1 of the year 1st responder died
- Letter by the surviving spouse attesting to 1st responder's death in the line of is duty prima facie evidence surviving spouse entitled to the exemption.
- Exemption to surviving spouse so long as spouse
  - Holds title to the homestead and permanently resides thereon
  - Exemption up to amount of most recent assessment transferrable to new property
  - Exemption ends upon remarriage

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Exemption from Forced Sale

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Exemption from Forced Sale

Art. X, Sec. 4(a), Florida Constitution

There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon … the following property owned by a natural person:

- 160 acres outside a municipality
- One-half acre within a municipality
- Contiguous land and improvements thereon
- Exemption limited to residence of owner or the owner's family
- Exemptions can inure to surviving spouse and heirs
- No limitation on value

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Exemption from Forced Sale (cont.)

Art. X, Sec. 4(a), Florida Constitution

- Owned by natural persons only
  - *Dejesus v. A.M.J.R.K. Corp, et al.* 43 Fla. L. Weekly D331a (Fla. 2d DCA 2018)
- Owner need not reside on property so long as owner's family does
- Proceeds from sale protected if preserved for purchase of new homestead
  - Must be held separate from other funds
    - *Orange Brevard Plumbing Heating v. La Croix* 137 So.2d 201 (Fla. 1962)

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Exemption from Forced Sale (cont.)

Art. X, Sec. 4(a), Florida Constitution

Abandonment of Homestead

- Abandonment eliminates homestead protection
  - Determined by specific facts
  - Temporary absence does not constitute abandonment
- FL Supreme Court 3-Part Test
  - Actual principal residence
  - Intention to live on property
  - Intention to return when absent
    - *Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 13 So.2d 448 (1943)

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Exemption from Forced Sale

Art. X, Sec. 4(a), Florida Constitution

Liens That Can Attach to Homestead

- Purchase money mortgages
- Voluntary liens (other than PMM)
  - Secondary mortgages
  - Property Assessed Clean Energy (PACE) liens
- Taxes and special assessments
- Association liens (HOA, Condo)
  - Sec. 718.116, 720.3085 F.S.
- Liens for construction & improvements
- Federal liens including tax liens

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Exemption from Forced Sale

Art. X, Sec. 4(a), Florida Constitution

Liens That Can Attach to Homestead (cont'd)

- Code Enforcement Board liens attach but are unenforceable against homestead
  - (TN 16.04.03)
  - *Demura v. County of Volusia,* 618 So.2d 754 (Fla. 5th DCA 1993)

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Exemption from Forced Sale

Art. X, Sec. 4(a), Florida Constitution

Liens That Can Attach to Homestead (cont'd)

- Marital Dissolution
  - Can homestead be subject to an equitable lien for unpaid alimony and child support?

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Non-Traditional Types of Homestead

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Exemption from Forced Sale

Types of Homestead Property

- Generally, any property owned by someone who resides thereon
- Single or multi-family residence

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Could this be Homestead?

- Can unimproved land be homestead?
- If you own and actually occupy the land as your homestead
- Mobile home on owned land can be homestead for tax exemption. F.A.C. Rule 12D-7.0135
- What about mobile home on leased land? Sec. 222.05, F.S.

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Six Criteria - Homestead of Non-Traditional Abodes

1. Intent to make non-traditional abode a homestead.
2. Whether owner has another residence.
3. Whether owner has established continuous habitation.
4. Whether owner maintains at least a possessory right to the land.
5. Whether non-traditional abode allows for long term habitation verses mobility.
6. Whether physical configuration of the abode permits habitation.

In Re Yettaw, 316 B.R. 560 (Bankr. M.D. Fla. 2004)

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Could this be Homestead?

Exemption may be extended to a houseboat if the houseboat "is specially designed to serve as a permanent dwelling."

Miami Country Day School v. Bakst, 641 So.2d 467 *(Fla. 3rd Dist. Ct. App.1994)*

Limitations on Alienation & Devise

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Limits on Alienation and Devise

Art. X, Sec. 4(c), Florida Constitution

The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

1. Cannot alienate or encumber without spousal joinder
2. Cannot effectively devise homestead if survived by spouse or minor child

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Limits on Alienation

Art. X, Sec. 4(c), Florida Constitution

Spousal Joinder

- Unmarried individual may freely sell or encumber
- Marital status should be stated in instrument of conveyance
  - ex) "Sue, an unmarried woman"
- Married individual must be joined by spouse
  - ex) "John and Sue, husband and wife"
  - Or, use "a married couple"
- Conveyance of non-homestead property should identify homestead:
  - ex) "Property is not homestead of grantor(s), which is_____"

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Limits on Alienation

Art. X, Sec. 4(c), Florida Constitution

Spousal Joinder (cont'd)

- Spouses should both join in same instrument
- Spouse can join via Power of Attorney
  - POA must be executed with formalities of a deed
    - Two witnesses
    - Acknowledged
    - Notarized
    - POA can be from:
      - One spouse to the other
      - One or both spouses to 3d party

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Limits on Alienation

Art. X, Sec. 4(c), Florida Constitution

Conveyances Between Spouses

- One spouse can convey to the other without grantee spouse's execution *Sec. 689.11, F.S.*
- To create tenancy by the entireties
  - One spouse can convey to other by deed stating intent to create
  - Spouse in title can convey to both spouses
- Conveying fee simple between spouses may still require joinder
  - TN 16.02.04
- Guardian can be appointed for incompetent spouse
  - Sec. 744.441, F.S.

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Limits on Alienation

Art. X, Sec. 4(c), Florida Constitution

Failure of Spousal Joinder

- Deed lacking spousal joinder void *ab initio*
- Mortgage lacking spousal joinder voidable
  - Executing (non Fannie/Freddie) mortgage may obligate non-borrowing spouse on underlying note
    - Ehrlich v. Mangicapra, 626 So.2d 702 (Fla. 4th DCA 1993)
- Mortgage may be reformed where non-signing spouse was present at closing and aware loan proceeds used to purchase
  - Countrywide v. Kim, 88 So.2d 250 (Fla. 4th DCA 2005)

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Limits on Devise

Art. X, Sec. 4(c), Florida Constitution

The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child.

Sec. 732.401, F.S. Descent of Homestead

- If not devised as authorized by law and the constitution, homestead descends in same manner as other intestate property
- If decedent survived by spouse and 1 or more descendants, surviving spouse takes life estate; vested remainder to descendants in being at time of decedent's death, *per stirpes*

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Limits on Devise

Sec. 732.401, F.S. Descent of Homestead (cont'd)

- Instead of a life estate, surviving spouse may choose
  - Undivided 1/2 interest in the homestead as tenant in common
  - Remaining undivided 1/2 interest vests in
    - Decedent's descendants in being at the time of death, per stirpes
- Does not apply to property decedent owned by the entireties or as Joint Tenants with Rights of Survivorship (JTWROS)

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Limits on Devise

Sec. 732.4015, F.S. Devise of Homestead

- Term "owner" includes grantor of a trust described in Sec. 733.707(3) (revocable trust) evidenced by written instrument in existence at time of the grantor's death
  - Treated as if the interest held in trust was owned by the grantor
- "Devise" includes:
  - Disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead

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Limits on Devise

Devise of Homestead—Survival by Spouse and Minor Children

- If owner survived by spouse and minor children
  - Homestead may not be devised in any fashion
- Property descends by operation of law
  - Life estate to spouse
  - Remainder to lineal descendants (children, grandchildren, etc.)

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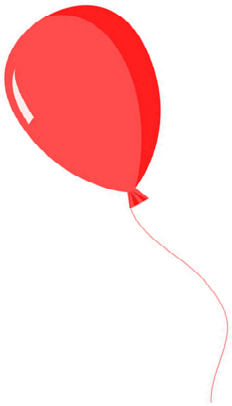
Limits on Devise

Art. X, Sec. 4(c), Florida Constitution

Devise of Homestead — Survival by Spouse Only

- If owner survived by spouse but not minor children
  - Any devise of less than 100% to spouse fails
  - Failed devise results in:
    - Life estate to spouse
    - Remainder to lineal descendants (children, grandchildren, etc.)



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Limits on Devise

Ballard v. Pritchard, 332 So. 3d 570 (Fla. 2d DCA 2021)

- Juanita Carter dies 2002, survived by spouse Pinkney & adult sons Ronald and Robert
- Will devises life estate in homestead to spouse Pinkney; remainder to Ronald
- Robert, who received nothing, dies 2017. Has one heir, Lindsey
- Lindsey petitions probate estate to determine homestead, alleging failure of devise
- Trial court upholds devise to Pinkney/remainder to Ronald, who quitclaims to children. Ronald dies in 2020
- Lindsey appeals
- On appeal, 2d DCA reverses, holding:
  - Juanita restricted to devise fee simple in homestead to spouse Pinkney
  - Therefore, devise failed, resulting in life estate in Pinkney; remainder in Ronald AND Robert

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Protected Homestead

- Homestead property that passes to the surviving spouse and/or heirs by descent or devise
- Exempt from claims of creditors
- Exemption only inures to the owner's spouse or heirs

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Non-Protected Homestead

- If no spouse or minor children, homestead can be devised to non-heir
  - not protected against claims of creditors
  - property becomes a probate asset

The Florida Supreme Court has defined "heirs" for homestead purposes to include "any family member within the class of persons categorized in the intestacy statute" *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997)

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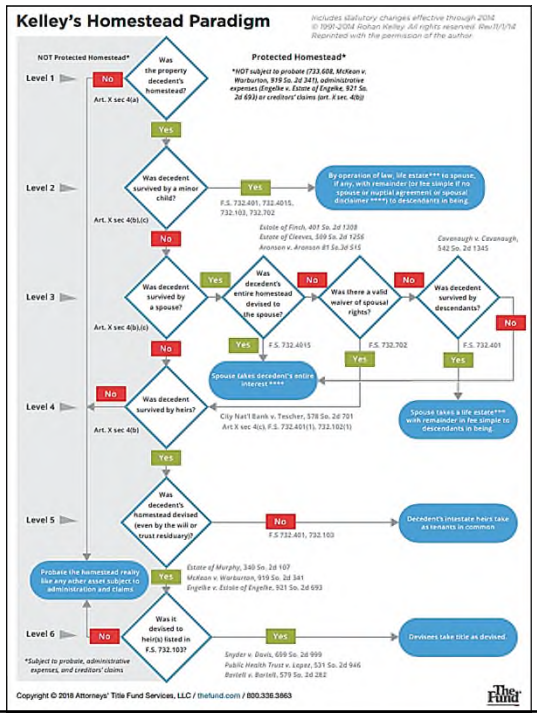
Limits on Devise

- Kelley's Homestead Paradigm
- Best "user friendly" guide
- Available in materials



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Spousal Waiver Law

Sec. 732.7025, F.S.

Waiver of homestead rights through deed.—(1) A spouse waives his or her rights as a surviving spouse with respect to the devise restrictions under s. 4(c), Art. X of the State Constitution if the following or substantially similar language is included in a deed: "By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."

(2) The waiver language in subsection (1) may not be considered a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death. Such language may not be considered a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

- Effective July 1, 2018
- Does not affect requirement for joinder
- Does not affect protection from creditors

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Doc Stamps Waived on Transfer of Homestead to Spouse

Sec. 201.02, F.S.

(7) Taxes imposed by this section do not apply to …

(b) A deed or other instrument that transfers or conveys homestead property or any interest in homestead property between spouses, if the only consideration for the transfer or conveyance is the amount of a mortgage or other lien encumbering the homestead property at the time of the transfer or conveyance.

- Transfer of homestead property to spouse
- No longer subject to transfer tax on half of underlying mortgage balance

Thank you
for your time and attention

For more information please contact:

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ARTICLE VII
FINANCE AND TAXATION

SECTION 6. Homestead exemptions.—

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of twenty-five thousand dollars and, for all levies other than school district levies, on the assessed valuation greater than fifty thousand dollars and up to seventy-five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years. The exemption shall not apply with respect to any assessment roll until such roll is first determined to be in compliance with the provisions of section 4 by a state agency designated by general law. This exemption is repealed on the effective date of any amendment to this Article which provides for the assessment of homestead property at less than just value.

(b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the proportion which the interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the Legislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law.

(d) The legislature may, by general law, allow counties or municipalities, for the purpose of their respective tax levies and subject to the provisions of general law, to grant either or both of the following additional homestead tax exemptions:

(1) An exemption not exceeding fifty thousand dollars to a person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, who has attained age sixty-five, and whose household income, as defined by general law, does not exceed twenty thousand dollars; or

(2) An exemption equal to the assessed value of the property to a person who has the legal or equitable title to real estate with a just value less than two hundred and fifty thousand dollars, as determined in the first tax year that the owner applies and is eligible for the exemption, and who has maintained thereon the permanent residence of the owner for not less than twenty-five years, who has

attained age sixty-five, and whose household income does not exceed the income limitation prescribed in paragraph (1).

The general law must allow counties and municipalities to grant these additional exemptions, within the limits prescribed in this subsection, by ordinance adopted in the manner prescribed by general law, and must provide for the periodic adjustment of the income limitation prescribed in this subsection for changes in the cost of living.

(e)(1) Each veteran who is age 65 or older who is partially or totally permanently disabled shall receive a discount from the amount of the ad valorem tax otherwise owed on homestead property the veteran owns and resides in if the disability was combat related and the veteran was honorably discharged upon separation from military service. The discount shall be in a percentage equal to the percentage of the veteran's permanent, service-connected disability as determined by the United States Department of Veterans Affairs. To qualify for the discount granted by this paragraph, an applicant must submit to the county property appraiser, by March 1, an official letter from the United States Department of Veterans Affairs stating the percentage of the veteran's service-connected disability and such evidence that reasonably identifies the disability as combat related and a copy of the veteran's honorable discharge. If the property appraiser denies the request for a discount, the appraiser must notify the applicant in writing of the reasons for the denial, and the veteran may reapply. The Legislature may, by general law, waive the annual application requirement in subsequent years.

(2) If a veteran who receives the discount described in paragraph (1) predeceases his or her spouse, and if, upon the death of the veteran, the surviving spouse holds the legal or beneficial title to the homestead property and permanently resides thereon, the discount carries over to the surviving spouse until he or she remarries or sells or otherwise disposes of the homestead property. If the surviving spouse sells or otherwise disposes of the property, a discount not to exceed the dollar amount granted from the most recent ad valorem tax roll may be transferred to the surviving spouse's new homestead property, if used as his or her permanent residence and he or she has not remarried.

(3) This subsection is self-executing and does not require implementing legislation.

(f) By general law and subject to conditions and limitations specified therein, the Legislature may provide ad valorem tax relief equal to the total amount or a portion of the ad valorem tax otherwise owed on homestead property to:

(1) The surviving spouse of a veteran who died from service-connected causes while on active duty as a member of the United States Armed Forces.

(2) The surviving spouse of a first responder who died in the line of duty.

(3) A first responder who is totally and permanently disabled as a result of an injury or injuries sustained in the line of duty. Causal connection between a disability and service in the line of duty

shall not be presumed but must be determined as provided by general law. For purposes of this paragraph, the term “disability” does not include a chronic condition or chronic disease, unless the injury sustained in the line of duty was the sole cause of the chronic condition or chronic disease.

As used in this subsection and as further defined by general law, the term “first responder” means a law enforcement officer, a correctional officer, a firefighter, an emergency medical technician, or a paramedic, and the term “in the line of duty” means arising out of and in the actual performance of duty required by employment as a first responder.

History.—Am. S.J.R. 1-B, 1979; adopted 1980; Am. S.J.R. 4-E, 1980; adopted 1980; Am. H.J.R. 3151, 1998; adopted 1998; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998; Am. H.J.R. 353, 2006; adopted 2006; Am. H.J.R. 631, 2006; adopted 2006; Am. C.S. for S.J.R. 2-D, 2007; adopted 2008; Am. S.J.R. 592, 2011; adopted 2012; Am. H.J.R. 93, 2012; adopted 2012; Am. H.J.R. 169, 2012; adopted 2012; Am. C.S. for H.J.R. 275, 2016; adopted 2016; Am. C.S. for H.J.R. 1009, 2016; adopted 2016; Am. H.J.R. 877, 2020; adopted 2020.

ARTICLE X
MISCELLANEOUS

SECTION 4. Homestead; exemptions.—

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

History.—Am. H.J.R. 4324, 1972; adopted 1972; Am. H.J.R. 40, 1983; adopted 1984; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

TN 16.04.03
Code Enforcement Board Liens and Homestead

Revision Date: 12/2014

A certified copy of a county code enforcement lien was recorded against a married couple for a zoning code violation on Blackacre. They are selling Whiteacre which they claim is their homestead. May an affidavit of homestead status be relied on to eliminate the lien as an exception in a policy on Whiteacre?

Under Sec. 162.09, F.S., a CEB order imposing a fine creates a lien against the land on which the violation exists and on any other real property owned by the violator when a copy of the order certified by the board's record custodian is recorded. *Monroe County v. McCormick,* 692 So.2d 214 (Fla. 3d DCA 1997). Thus, the lien would have attached to Whiteacre as well as Blackacre. See **TN 18.06.02**. However, the statute further provides that no CEB lien may be enforced against homestead property. In fact, the court in *Demura v. County of Volusia,* 618 So.2d 754 (Fla. 5th DCA 1993), held that the Florida Constitution prohibits the creation of CEB liens against homestead property. See also *Miskin v. City of Fort Lauderdale,* 661 So.2d 415 (Fla. 4th DCA 1995); *Fong v. Town of Bay Harbor Islands,* 864 So.2d 76 (Fla. 3d DCA 2003).

For insuring purposes, a homestead affidavit may be relied on to establish the homestead status of Whiteacre under the same factual conditions as are set forth in **TN 16.04.08**. Use of a homestead affidavit is limited to transactions involving real property other than that which was the subject of the code violations. A judicial determination of homestead may be required to insure without exception for a code enforcement board lien on homestead property that is the subject of the transaction.

Related Documents

- TN 18.06.02 Code Enforcement Board Liens Resource - Title Note

- TN 16.04.08 Proof for Determination of Homestead Resource - Title Note

No. 92-2232
District Court of Appeal of Florida, Fifth District

Demura v. County of Volusia

618 So. 2d 754 (Fla. Dist. Ct. App. 1993)
Decided Jun 2, 1993

No. 92-2232.

April 30, 1993. Rehearing Denied June 2, 1993.

Appeal from the Circuit Court, Volusia County, C. 755 McFerrin Smith, III, J. *755

Howard L. Cauvel of Rano, Cauvel, Johnson Ceely, P.A., DeLand, for appellants.

Steven J. Guardiano and T.I. Harris, Asst. Volusia County Attys., DeLand, for appellee.

COBB, Judge.

The appellants Joseph A. Demura and Diane L. Demura, appeal the dismissal of their quiet title action against the County of Volusia. The action sought to remove a cloud from the title of real property which the Demuras claimed as homestead, the alleged cloud being a judgment lien against the Demuras personally, claimed by Volusia County pursuant to an "Order Imposing Fine-Lien." The fine had been imposed by the County against the Demuras because of noncompliance with an order of the County Code Enforcement Board.

The County moved to dismiss the Demuras' action on the basis that there was no contention that it had sought to foreclose the lien. The County argued that Article X, Section 4 of the Constitution of the State of Florida does not extinguish liens, but merely prohibits forced sale of property while it is homestead. Pursuant to the County's motion, the trial court entered the following order of dismissal:

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE came on for hearing and argument of counsel for both parties on the Motion to Dismiss of the Defendant, COUNTY OF VOLUSIA. The Court finds the Defendant COUNTY has not sought to foreclose its Code Enforcement Board lien on the homestead real property of the Plaintiff, and accordingly, neither the statutory nor constitutional prohibitions of Sec. 162.09(3), Florida Statutes, and Art. X, § 4(a), Fla. Const., against foreclosure of liens on homestead real property apply in the instant case. It is clear that the statutory and constitutional prohibitions relate solely to foreclosure and not to the creation of a lien.

The Court bases its finding upon the authority of *Point East One Condominium v. Point East Developers, Inc.,* 348 So.2d 32 (Fla. 3rd DCA 1977), as cited in 756 *756 1985 Op. Att'y Gen. Fla. 85-26 (March 26, 1985), and further finds that the lien in the instant case remains valid as to the Plaintiff's homestead real property and to any purchasers of said real property, who would be on notice as to the recorded Volusia County Code Enforcement line. It is therefore

> ORDERED AND ADJUDGED that the Defendant COUNTY OF VOLUSIA'S Motion to Dismiss is hereby granted, and this case is hereby dismissed with prejudice.

The statements of law in the order of dismissal are clearly contrary to the constitutional law of Florida. Article X, Section 4 of the Constitution of the State of Florida provides in pertinent part:

> (a). There shall be exempt from forced sale under process of any court, *and no judgment,* decree or execution *shall be a lien thereon,* except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the natural person:

(1) a homestead, . . .; (Emphasis added). Chapter 162, Florida Statutes (1991), governs local Code Enforcement Boards, giving these boards the power to "impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities, where a pending or repeated violation exists." Section 162.02, Fla. Stat. (1991).

Section 162.09(3), Florida Statutes (1991), provides in pertinent part:

> A certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator. Upon petition to the circuit court, such order may be enforced in the same manner as a court judgment by the sheriffs of this state, including levy against personal property, but such order shall not be deemed to be a court judgment except for enforcement purposes. A fine imposed pursuant to this part shall continue to accrue until the violator comes into compliance or until judgment is rendered in a suit to foreclose on a lien filed pursuant to this section, whichever comes first. After three months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney to foreclose on the lien. No lien created pursuant to the provision of this part may be foreclosed on real property which is a homestead under s. 4 Art. X of the State Constitution.

Although the statute merely provides that any lien created pursuant to an administrative fine may not be foreclosed on real property which is homestead, the Constitution itself goes much farther: No such lien *exists* as to such homestead property. Since that is true, the mere recording of the order against the Demuras cannot constitute a cloud against their homestead property. It is arguable that the action which the Demuras should have filed (assuming, *arguendo,* that any action at all was necessary) was a declaratory judgment action seeking a determination that the property at issue is, in fact, homestead property at this time. It may very well be, however, that the homestead status of the property is not in factual dispute.

We note that if the property is, indeed, homestead property, then the Demuras may sell it and, contrary to the finding by the trial court, there

would be no lien on the property then in the hands of the purchasers. On the other hand, if the Demuras failed to invest the proceeds of that sale into another homestead within a reasonable period of time, those proceeds could be reached by creditors such as the County. *See, e.g., Orange Brevard Plumbing and Heating Company v. LaCroix,* 137 So.2d 201, 206 (Fla. 1962). It is also true, of course, that if the Demuras were to retain ownership of the property but abandoned it as
757 their homestead, the *757 County's order against them could then be enforced as a lien against the property.

Accordingly, we quash the order of dismissal entered by the trial judge in this case because of its erroneous statements of law and the cloud upon the title of the appellants' homestead, if in fact it is homestead, created by the order of dismissal itself. We agree, however, that a quiet title suit will not lie and the action below will be subject to final dismissal absent an appropriate amendment of the cause by the Demuras.

JUDGMENT QUASHED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

HARRIS and GRIFFIN, JJ., concur.

FLORIDA'S HOMESTEAD REALTY: IS IT EXEMPT FROM IMPOSITION OF AN EQUITABLE LIEN FOR NONPAYMENT OF ALIMONY AND CHILD SUPPORT?

Vol. 82, No. 7 July/August 2008 Pg 34 by Harry M. Hipler Family Law

When payor former spouses/parents obligated by court order to pay alimony and/or child support fall behind, the focus of the law is on helping parents and former spouses collect delinquent support with minimum costs.[1] Regardless of the reasons why alimony and child support are not paid — loss of employment, underemployment, chronic disease, injury, obstinacy — there are many available collection methods, including income withholding;[2] r evocation of driver's licenses, motor vehicle and vessel registrations;[3] s uspension of professional, recreational, and occupational licenses of parents;[4] denial of passports;[5] federal and state tax refund offsets;[6] l iens on property;[7] a ttachment and garnishment of financial accounts including IRAs;[8] qualified domestic relations orders (QDROs) to recover all or a portion of alimony or child support arrearage from the owner of a retirement plan,[9] and contempt of court.[10] All methods are cumulative and can be used until the amount owed plus interest is paid in full.[11]

Can a circuit court impose an equitable lien against homestead realty owned by a payor former spouse/parent for delinquent support? If a payor former spouse/parent owns homestead realty, does Fla. Const. art. X, §4(a) constitute a complete defense to an equitable lien when a former spouse/parent tries to recover delinquent child support or alimony from a payor former spouse/parent? Florida district courts of appeal have ruled that courts may impose an equitable lien on homestead realty beyond the exceptions provided in Fla. Const. art. X, §4 when a nonpayor former spouse/parent has used the homestead exemption to avoid alimony and child support obligations by the use of fraud and egregious conduct.[12] In *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001), the Florida Supreme Court held that the homestead realty exemption in the Florida Constitution protects a homestead acquired by a debtor using nonexempt assets with the intent to hinder, delay, or defraud creditors.[13] *Havoco of America* appears to be controlling authority to shield homestead realty from *all* claims of creditors, including those by former spouses/parents against payor former spouse/parent owing delinquent child support and/or alimony. However, footnote 12 of *Havoco of America*[14] q uestions and leaves open for future consideration rulings by district courts of appeal that permit

equitable liens on homestead realty when a payor former spouse/parent has used the homestead exemption to avoid his or her alimony and child support obligation.[15] This article will discuss why it is a violation of Fla. Const. art. X, §4(a)(1) to impose an equitable lien on homestead realty owned by a payor former spouse/parent, where the payor former spouse/parent has used the homestead exemption to avoid his or her alimony or child support obligation.

• *Homestead realty exemption: Is it a shield, sword, or both?*

Florida's homestead exemption is one of the most protective in the United States.[16] It grants nearly absolute protection from forced sale from the claims of creditors, except in three special circumstances: 1) payment of taxes and assessments thereon owed to the state, counties, and municipalities (*e.g.*, real estate assessments and taxes); 2) obligations contracted thereon for the purchase, improvement, or repair (*e.g.*, mortgage pledge); 3) obligations contracted with persons in repairing or improving the realty or house, field, or other labor performed on the realty (*e.g.*, construction liens).[17] There are four basic requirements that must be met for realty to qualify as homestead in Florida: An *owner* must be a *natural person*, who establishes or intends to establish the realty as a *permanent residence* within the *size and contiguity* requirements of the constitution.[18] The value of protected homestead realty within and outside of a municipality is unlimited.[19] Fla. Const. art. X, §4(a) applies automatically upon establishment of these requirements, and it can only be lost if the homeowner permanently abandons its use as a permanent residence.[20] On account of Florida's liberal homestead realty exemption from forced sale,[21] The homestead exemption can be viewed as both a shield and a sword to defeat creditors' claims.[22]

Homestead Protection Under *Havoco of America*

In 1981, Havoco filed suit against Hill in a damages action. A jury found for Havoco in the amount of $15,000,000 in damages. The U.S. district court entered judgment in accordance with the jury verdict on December 19, 1990, and it became enforceable shortly thereafter. Hill, a life long resident of Tennessee, purchased Florida realty on December 30, 1990, for $650,000 in cash. He claimed that he intended to retire and make Destin his primary residence. The Florida Supreme Court was asked by the federal appellate court to decide whether Fla. Const. art. X, §4 exempted homestead realty from forced sale, when the debtor acquired the homestead using nonexempt funds with the specific intent of hindering, delaying, or defrauding creditors. The Florida Supreme Court answered the certified question affirmatively, and held that Hill's homestead realty was exempt from forced sale.[23]

Arguments in Support of Protection from Imposition of an Equitable Lien

• *Fla. Const. art. X, §4 is plain, clear, and unambiguous.*

The plain and unqualified language of Fla. Const. art. X, §4 supports the principle that homestead exemption provides absolute protection from forced sale regardless of the method the homestead was obtained, except in three enumerated exceptions. Strict construction principles direct that all branches of government — executive, judicial, and legislative — follow the exact wording of Fla. Const. art. X, §4. No branch of government can deviate from the constitution's clear and plain language.[24]

• *A referendum is required to alter provisions of the Florida Constitution.*

The electorate, not the legislature or judiciary, has the exclusive authority to alter provisions of Fla. Const. art. X, §4.[25] If a change to the Florida Constitution is in order, then referral to the Constitutional Revision Commission is available to decide if an amendment should be placed on the ballot for voter approval.[26] In *Strand v. Escambia County,* 32 Fla. L. Weekly S587, September 6, 2007, as amended September 28, 2007, the Florida Supreme Court affirmed its obligation to correct legally erroneous precedent, even if a decision departs from long established precedent. *Strand* held that Fla. Const. art. VII, §12, requires a referendum whenever bonds financing capital improvements are "payable from ad valorem taxation" by tax increment financing (TIF), and if they mature more than 12 months after issuance. Established precedent before *Strand* indicated that local governing bodies could issue bonds payable from ad valorem taxation and TIF without approval by a referendum.[27] Regardless of how *Strand* is ultimately decided — the high court in *Strand* has granted rehearing — the opinion is noteworthy because the Florida Supreme Court affirmed its obligation to correct legally erroneous precedent when necessary to follow Florida law. Although stare decisis is based on the need for stability and consistency in the law, if established precedent has been wrongly decided, it is incumbent on the state's highest court to correct an error in legal analysis and follow the Florida Constitution.[28] Similarly, decisions by district courts of appeal permitting an equitable lien on homestead realty beyond the exceptions provided in Fla. Const. art. X, §4 are questionable, because they amend Fla. Const. art. X, §4 without a referendum. Decisions decided before and after *Havoco of America* are contrary to the mandate and plain wording of Fla. Const. art. X, §4. The only way to authorize a court to impose an equitable lien on homestead realty beyond the exceptions provided in Fla. Const. art. X, §4 is by referendum.

• "*There's no place like the old homestead.*"

The homestead realty exemption provides for the constitutional sanctity of the home, so that a homeowner's residence remains beyond the reach of creditors.[29] The rationale

behind this public policy is, *first*, homestead protection promotes the stability and welfare of the state and relieves it from the burden of supporting destitute families. *Second*, homestead exemption protects the homeowner and family from creditors' demands and financial misfortune.[30]

Homestead protection, however, can have a detrimental effect on the debtor's original family if support is ignored by the payor former spouse/parent. If homestead realty is exempt from the imposition of an equitable lien in which a payor former spouse/parent has used the homestead exemption to avoid a support obligation, then homestead exemption treats two separate families owed support from the same payor differently. Does this different treatment of families run afoul of the equal protection clause of the U.S. and Florida constitutions? No, because applying homestead realty protection in favor of an owner and family does not set up an unjustifiable standard based on race, religion, or some other arbitrary and capricious classification.[31] Further, different owners and their families are still entitled to claim homestead realty protection from levy, albeit at different homesteads. Even with different treatment, public policy concerns are met, as the homestead provision uniformly applies to all owners and their families if a judgment is entered against its owner and an attempt is made to levy on the homestead realty.[32]

In contrast, it can be argued that homestead exemption should not permit a payor former spouse/parent from claiming its benefits against the same person to whom a duty of support is owed, or else the homestead exemption will overcome its intended purpose.[33] Further, when a nonpayor former spouse/parent has used homestead exemption to avoid a support obligation, such financial circumstance has been voluntarily brought about by the current payor former spouse/parent. Clearly, a diminished financial ability of the payor spouse can have a devastating effect on the financial welfare of the former spouse and family. Therefore, the homestead provision should not be used to help a payor former spouse/parent avoid paying court-ordered support at the expense of a former spouse/parent and family.[34]

The homestead provision is a fundamental principle of public policy. Even if the homestead exemption provision treats similarly situated persons differently, the overriding public policy concerns favor the sanctity of the home and should defeat all creditors' claims, except those that fall within an exception of Fla. Const. art. X, §4.[35]

• *Homestead protection applies to all debtors regardless of class, status, or conduct.*
A deeply rooted history in favor of the sanctity of the home is paramount over an immoral or criminal act of a debtor.[36] Fla. Const. art. X, §4 prevails over illegal acts of individuals having a right to claim a homestead realty exemption. Florida law provides penalties to those violating criminal laws, but eliminating homestead rights guaranteed by the Florida Constitution is not part of the punishment. Homestead exemption applies to all individuals regardless of their class, status, or conduct.[37]

• *Neither the courts nor the legislature can carve out exceptions to the Florida Constitution*.
Courts have authority to carve out exceptions to enforcement of statutes and causes of action. They can refuse to allow an action to proceed, or impose sanctions against a responsible party, including dismissal, where a party falsifies evidence, engages in spoliation of evidence, if a debtor voluntarily brings about his or her own financial decline from a deliberate divestment, and acts of bad faith.[38] In contrast, if the judiciary carves out exceptions to homestead protection by creating an equitable lien for fraud, nonpayment of child support and alimony, or any other inequitable or egregious conduct of a homeowner, such judicially made exceptions will run afoul of Fla. Const. art. X, §4.[39] Likewise, the legislature cannot enact statutes that modify or are contrary to the Florida Constitution. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court was called upon to decide the constitutionality of F.S. §1002.38 (Florida's opportunity scholarship program (OSP)) allowing qualified students to attend private schools at state expense. The Supreme Court held that the OSP statute was a violation of Fla. Const. art. IX, §1(a) because the constitutional provision specifically required the state to provide a "uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education …."[40]

No branch of government has the authority to alter the Florida Constitution. A debtor's right to exempt homestead realty from levy flows exclusively from Fla. Const. art. X, §4. This constitutional provision supersedes any attempt by the judiciary or legislature of eliminating a debtor's right to exempt homestead realty from creditors' claims. Homestead protection is a strict limitation on the power of the judiciary and legislature to modify homestead exemption.

Homestead Waiver, Forced Sale, and the Three Enumerated Exceptions
Can a homeowner waive homestead exemption by executing an unsecured instrument? In *Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007), the Florida Supreme Court was called upon to determine whether a homeowner can waive homestead exemption by

executing a promissory note, retainer agreement, or any other unsecured instrument without formally mortgaging homestead realty. The high court held that when an attorney was retained in a dissolution of marriage action, a waiver of homestead exemption specifically provided for in a retainer agreement was invalid and, therefore, the circuit court could not award a lien for unpaid attorneys' fees on the client's homestead realty.[41] According to *Chames*, when there is a possibility of a forced sale upon entry of a judgment, there can be no waiver, because it is not permitted in Fla. Const. art. X, §4. *Chames* is consistent with the position that where the payor former spouse/parent uses the homestead exemption to avoid a support obligation, a court cannot impose an equitable lien on homestead realty, because it is not provided for in Fla. Const. art. X, §4.

Ethical Obligations

There is no cause of action against a debtor's attorney, certified public accountant, or financial advisor if they are paid fees to facilitate a fraudulent transfer of physical assets. In *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004), the Florida Supreme Court answered a certified question from the federal appellate 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?"[42] The Supreme Court held that the Uniform Fraudulent Transfer Act (UFTA) did not create a cause of action against an advisor bank for aiding and abetting a fraudulent transfer. *Freeman* determined that there is a distinction between common law fraud and deceit, on one hand, and remedies under UFTA, on the other hand. Fraud under UFTA does not rise to the level of egregious and reprehensible conduct that will make an advisor legally liable for aiding and abetting a fraudulent transfer to a third party. Further, it is the advisor's legal obligation to preserve a client's assets from attack and levy by thoroughly creating an asset protection plan when offering advice on homestead exemption planning, and to zealously defend against creditors' attacks if they try to levy and attach their assets.[43] In a trilogy of decisions — *Havoco of America, Freeman,* and *Chames* — the Florida Supreme Courthas viewed the provisions of Fla. Const. art. X, §4 and UFTA in a manner that strictly follows their plain language rather than judicially creating exceptions.

Conclusion

There are many available methods to collect delinquent child support and alimony, including the time-honored method of contempt of court, but imposing an equitable lien on homestead realty is *not* one of them. When a nonpaying former spouse/parent has used the homestead exemption to avoid an alimony or child support obligation, creation of an equitable lien on homestead realty goes beyond the three exceptions

provided for in Fla. Const. art. X, §4. There are strong public policy reasons why Fla. Const. art. X, §4, should be strictly followed. First, it flows from a deeply rooted history and sanctity of the home dating back to the mid-1800s enactment of the Florida Constitution. Second, the homestead provision is a dominant rule of public policy and a fundamental value of the people. Third, thereis a strict limitation on the power of the judiciary and legislature to alter and amend the constitution and its homestead exemption provisions. The landmark decisions *of Havoco of America* and *Chames* support the fundamental principle that courts cannot judicially create exceptions to Fla. Const. art. X, §4. *Bush v. Holmes* supports the basic rule that the legislature cannot enact statutes contrary to the Florida Constitution. A basic foundation of the Florida Constitution is that only the electorate can alter and amend its provisions. The Florida Supreme Court should follow the unqualified language of Fla. Const. art. X, §4 without carving out exceptions when called upon to decide the issue left open by footnote 12 of *Havoco of America*. The high court should conclude that it is a violation of Fla. Const. art. X, §4 to impose an equitable lien on homestead realty, where a payor former spouse/parent has used the homestead exemption to avoid an alimony or child support obligation.

[1] *See* U.S. Government Accounting Office. GAO-06-491. Child Support Enforcement. More Focus on Labor Costs and Administrative Cost Audits Could Help Reduce Federal Expenditures (2006), *available at* www.gao.gov/new.items/d06491.pdf; U.S. Government Accounting Office. GAO 04-377 Child Support Enforcement. Better Data and More Information on Undistributed Collections Are Needed (2004), www.gao.gov/new.items/d04377.pdf. Florida support payments can be ordered paid through a state depository. *See also* Fla. Stat. §§61.09, 61.181, 61.1826, 61.1811, 61.1812, 61.1814, 61.1816, 61.30 (2007).

[2] Fla. Stat. §§61.12, 61.1301, 61.30 (2007).

[3] Fla. Stat. §§61.13016, 322.058, 328.42 (2007).

[4] Fla. Stat. §§61.13015, 409.2598, 455.203, 559.79 (2007).

[5] 42 U.S.C. §§652(k), 654(31).

[6] 42 U.S.C. §664 (2007); 45 C.F.R. §303.72 (2007).

[7] For nonexempt real property, Fla. Stat. §55.10(1) (2007) provides that a judgment, order, or decree becomes a lien on real property in any county when a certified copy is recorded in the official records of the county. *See also Kaecek v. Knight*, 447 So. 2d 900 (Fla. 2d D.C.A. 1984).

[8] In a Ch. 61 contempt proceeding, a trial court may properly look to a former spouse's individual retirement account (IRA) to determine whether that spouse has the ability to pay a purge amount in a contempt order. Fla. Stat. §222.21(2)(a) (2007) does not shield IRA assets from a court order to pay Ch. 61 obligations. *See Siegel v. Siegel*, 700 So. 2d 414 (Fla. 4th D.C.A. 1997).

[9] T. Voit, *QDROs — A Powerful Tool for Child Support Enforcement*, 79 Fla. B. J. 38 (January 2005).

[10] An order of contempt for failure to pay child support or alimony must include factual findings containing the existence of a prior valid order of support, the failure to pay all or part of the ordered support, the present ability of the offending party to pay the support, and the willful refusal of the offending party to comply with the prior court order. *See* Fla. Fam. L. R. P. 12.615(d) (1); *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *Faircloth v. Faircloth*, 339 So. 2d 650 (Fla. 1976); *Lawrence v. State, Department of Revenue ex rel. Walker*, 755 So. 2d 139 (Fla. 2d D.C.A. 1999).

[11] *See generally Koon v. Boulder County Dept. of Social Services*, 494 So. 2d 1126 (Fla. 1986); *State, Dept. of Health and Rehabilitative Services v. Franklin*, 630 So. 2d 661 (Fla. 2d D.C.A. 1994). For decisions holding that interest becomes due and owing when the obligation is created, *see Engineered Installation, Inc. v. Higley, Inc*., 670 So. 2d 929 (Fla. 1996); *Plunkett v. Plunkett*, 843 So. 2d 978 (Fla. 4th D.C.A. 2003); *Wiederhold v. Wiederhold*, 696 So. 2d 923 (Fla. 4th D.C.A. 1997). At least one appellate court has held that child support payments must be applied first to current support obligation, then to accrued interest on arrearages, and finally to the principal amount due on unpaid support. *See Vitt v. Rodriguez*, 960 So. 2d 47 (Fla. 4th D.C.A. 2007).

[12] *See Sell v. Sell*, 949 So. 2d 1108 (Fla. 3d D.C.A. 2007); *Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d D.C.A. 2003); *Partridge v. Partridge*, 790 So. 2d 1280 (Fla. 4th D.C.A. 2001); *Dyer v. Beverly & Title, P.A*., 777 So. 2d 1055 (Fla. 4th D.C.A. 2001); *Smith v. Smith*, 761 So. 2d 370 (Fla. 5th D.C.A. 2000); *Brose v. Brose*,750 So. 2d 717 (Fla. 2d D.C.A. 2000*)*; *Rosenblatt v. Rosenblatt,* 635 So. 2d 132 (Fla. 2d D.C.A. 1994*)*; *Radin v. Radin,* 593 So. 2d 1231 (Fla. 3d D.C.A. 1992*)*; Gepfrich v. Gepfrich, 582 So. 2d 743 (Fla. 4th D.C.A. 1991); *Smith v. Smith*, 761 So. 2d 370 (Fla. 5th D.C.A. 2000); *Isaacson v. Isaacson*, 504 So. 2d 1309 (Fla. 1st D.C.A. 1987).

These district courts of appeal decisions should be distinguished from cases where a lien is granted to a spouse to secure a special equity claim in homestead realty. *See Wallace v. Wallace*, 922 So. 2d 1008 (Fla. 1st D.C.A. 2006); *Hieke v. Hieke*, 782 So. 2d 443 (Fla. 4th D.C.A. 2001). In the latter instance, funds can be traced as a result of a spouse's own funds and labor performed that were applied to renovate, improve, and repair homestead realty to enhance or maintain the homestead realty, which amounts to an ownership interest. Further, Fla. Const. art X, §4(a), specifically provides three exceptions to a homestead exemption, and a special equity claim in homestead realty falls within a constitutional exception.

[13] *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Conseco Services, LLC v. Cunco*, 904 So. 2d 438 (Fla. 3d D.C.A. 2005).

[14] *Havoco of America v. Hill,* 790 So. 2d 1018, 1028 (Fla. 2001). *Havoco of America* did not specifically address an award of an equitable lien on homestead realty when a former spouse avoids payment of a child support or alimony obligation. According to long-standing principles, the Florida Supreme Court will refuse to address claims made outside the scope of a certified question. It will only decide matters specifically addressed by district courts of appeal, and will refuse to address a claim not subjected to a strict jurisdictional process set forth in Fla. Const. art. V, §3 (b) (2007). *See Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007), at footnote 2. In opting out of deciding this issue, footnote 12 of *Havoco of America* follows these fundamental principles of law.

[15] After the decision in *Havoco of America*, there have been several decisions on whether an equitable lien can be awarded on homestead realty when the payor former spouse has used the homestead exemption to avoid a support obligation. In *Partridge v. Partridge*, 912 So. 2d 649 (Fla. 4th D.C.A. 2005), *rev. den..,* 942 So. 2d 413 (Fla. 2006), the appellate court affirmed the entry of a judgment of foreclosure for an equitable lien on homestead realty to satisfy the payor former spouse's support obligation because the former spouse's conduct was contemptuous: "Contemptuous conduct may certainly be the functional equivalent of fraud, and it represents the kind of reprehensible conduct justifying foreclosure." *Id.* at 650. Similarly, in *Sell v. Sell*, 949 So. 2d 1108 (Fla. 3d D.C.A. 2007), an appellate court held that attorneys' fees should be paid from the fund from the sale of marital homestead, because the former husband's conduct was fraudulent, egregious, and consistently contemptuous in attempting to nullify a trial court's property distribution, support, and attorney fee awards: "the exemption enshrined in [a]rticle X, §4 is not absolute.... Homestead may be subjected to equitable liens where fraud, reprehensible, or egregious conduct is demonstrated." *Id*. at 1112. In *Linda Hope v.*

Robert Schlein and Katherine Schlein, Broward Circuit Court, Case No. 94-19802-41, a circuit court on March 30, 2004, in an unpublished opinion, awarded an equitable lien in homestead realty owned by the payor former spouse's current wife. A supplemental complaint in aid of execution was filed by Linda Hope against the payor former spouse and his current wife, Robert Schlein and Katherine Schlein. Homestead realty was purchased by Robert Schlein and Katherine Schlein and placed into the name of the payor former spouse's current spouse, Katherine Schlein. The circuit court held that the conduct by the payor former spouse in not paying his alimony obligation amounted to fraud and egregious conduct justifying the court to impose an equitable lien on the homestead realty. An appeal was filed with the district court of appeal in Case Nos. 4D04-2137 and 4D04-2138 on June 2, 2004, but was later voluntarily dismissed upon settlement.

[16] *See* J. Adkisson and C. Riser, Homstead Exemptions: State Resources, Asset Protection, Concepts and Strategies for Protecting Your Wealth, *available at* www.assetprotectionbook.com/homestead_exemptions.htm.

[17] Fla. Const. art. X, §4(a) (2007).

[18] *See id*.; *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988) (natural person); *City of Jacksonville v. Bailey*, 30 So. 2d 529 (Fla. 1947); *Cain v. Cain*, 549 So. 2d 1161 (Fla. 4th D.C.A. 1989); *McGann v. Halker*, 530 So. 2d 440 (Fla. 3d D.C.A. 1988); *Dean v. Heimbach*, 409 So. 2d 157 (Fla. 1st D.C.A. 1982) (permanent residence); *Raulerson v. Peeples*, 81 So. 271 (Fla. 1919) (owner); Fla. Const. art. X, §4(a)(1) (2007); *First Leasing and Funding of Florida, Inc. v. Fielder,* 591 So. 2d 1152 (Fla. 2d D.C.A. 1992) (size and contiguity requirements). For a brief summary of homestead protection and its requisites in Florida, *see* John C. Cooper and Thomas C. Marks, Jr., Florida Constitutional Law: Cases and Materials 617-619 (4th ed. 2006).

[19] Fla. Const. art. X, §4(a)(1) (2007). Within a municipality, the property can occupy no more than one-half acre of contiguous land and is limited to the residence of the owner or the owner's family. Outside of a municipality, the property including the residence can occupy no more than 160 acres of contiguous land and improvements. Although the value of protected homestead exemption is unlimited, only that part of the debtor's realty used as a residence is exempt from execution and levy. That part of the realty leased to other inhabitants is not exempt from levy and execution. *See In re*

Englander,95 F.3d 1028 (11 Cir. 1996); *Menard v. University Radiation Oncology Associates, LLP*, 976 So. 2d 69 (Fla. 4th D.C.A. 2008); *First Leasing and Funding of Florida, Inc. v. Fielder*, 591 So. 2d 1152 (Fla. 2d D.C.A. 1992).

[20] *City of Jacksonville v. Bailey*, 30 So. 2d 529 (Fla. 1947); *Cain v. Cain*, 549 So. 2d 1161 (Fla. 4th D.C.A. 1989); *McGann v. Halker*, 530 So. 2d 440 (Fla. 3d D.C.A. 1988); *Dean v. Heimbach*, 409 So. 2d 157 (Fla. 1st D.C.A. 1982).

[21] Not only does Florida grant debtors homestead realty protection from forced sale pursuant to the Florida Constitution, there are many other exemptions from forced sale that are granted to debtors by statute. *See* Fla. Stat. §222.18 (2007) (disability income); Fla. Stat. §§222.13, 222.14 (2007) (life insurance policies and annuities); Fla. Stat. §§222.11, 222.15, 222.16 (2007) (wages of a head of a family); Fla. Stat. §222.21(2)(a) (2007) (pension and retirement plans).

[22] After *Havoco of America*, Florida's homestead protection can be viewed as both a shield and sword. The homestead realty exemption now protects a homestead acquired by a debtor using nonexempt assets with the intent to hinder, delay, or defraud creditors. Even before *Havoco of America,* many individuals used Florida's protective homestead exemption to shelter their assets. One famous celebrity was O.J. Simpson, who was civilly sued after he was acquitted of murder in 1995. In 1997, a jury found him liable for wrongful death and ordered him to pay the victims families $33.5 million. He purchased a multi-million dollar home in Florida in 1996, because the value of homestead realty is unlimited and exempt from levy and execution by judgment creditors. Other celebrities included former Baseball Commissioner Bowie Kuhn, who sold his New Jersey home for $1,000,000 and moved to Ponte Vedra Beach just before his New York law firm became insolvent. Marvin Warner of the failed Ohio-based Home State Savings Bank sold his Ohio horse farm and purchased a 160-acre-horse farm outside of Coral Gables for $2,200,000. *See* Albert Crenshaw, *Keeping Some Hiding Places*, The Washington Post, March 20, 2005, at F01; Jackie Spinner, *Bill Would Deny Bankruptcy Ploy to Rogue Executives,* The Washington Post, July 12, 2002, at E03; David Morrow, *Key to Cozier Bankruptcy: Location, Location, Location,* The New York Times, January 7, 1998; Larry Rohter, *Rich Debtors Finding Shelter Under a Populist Florida Law*, The New York Times, July 25, 1993.

[23] *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001). *See also Willis v. Red Reef, Inc.*, 921 So. 2d 681 (Fla. 4th D.C.A. 2006).

[24] *Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007); *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Stewart v. Tramel*, 697 So. 2d 821 (Fla. 1997); *Butterworth v. Caggiano,* 605 So. 2d 56 (Fla. 1992); *Cross v. Strader Consti. Corp.,* 768 So. 2d 465 (Fla. 2d D.C.A. 2000); *Robbins v. Robbins*, 360 So. 2d 10 (Fla. 2d D.C.A. 1978).

[25] *See* Fla. Const. art. XI, §§1, 2, 3, 4, 5, 6 (2007). law, an amendment must relate to a single subject before the electorate can vote to adopt its provisions.

[26] *Id*. *See also Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 963 So. 2d 210 (Fla. 2007); *Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans,* 938 So. 2d 501 (Fla. 2006).

[27] *Strand v. Escambia County*,32 Fla. L. Weekly S587, September 6, 2007, as amended September 28, 2007. The Florida Supreme Court granted rehearing in *Strand* and is now considering whether to approve, modify, or recede from *Strand* and determine if a referendum is required for TIF paid from ad valorem taxation. The reader should keep informed on the outcome of *Strand* and TIF.

[28] *See State v. Green*, 944 So. 2d 208 (Fla. 2006); *Rotemi Realty, Inc. v. Act Realty Co., Inc.,* 911 So. 2d 1181, 1188 (Fla. 2005); *State v. J.P.,* 907 So. 2d 1101 (Fla. 2004); *Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003); *Puryear v. State*, 810 So. 2d 901 (Fla. 2002); *State v. Gray*, 654 So. 2d 552 (Fla. 1995); *Haag v. State*, 591 So. 2d 614 (Fla. 1992).

[29] *Public Health & Trust v. Lopez*, 531 So. 2d 946 (Fla. 1988); *Traeger v. Credit First Nat. Ass'n*, 864 So. 2d 1188 (Fla. 5th D.C.A. 2004); *Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d D.C.A. 2003); *Southern Walls, Inc. v. Stilwell*, 810 So. 2d 566 (Fla. 5th D.C.A. 2002); *Partridge v. Partridge*, 790 So. 2d 1280 (Fla. 4th D.C.A. 2002).

[30] *Id.*

[31] *See Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001); *Fredman v. Fredman*, 960 So. 2d 52 (Fla. 2d D.C.A. 2007), *rev. den*., 968 So. 2d 556 (Fla. 2007).

[32] *See Murphy v. Farquhar*, 22 So. 681 (Fla. 1897); *Taylor v. Maness*, 941 So. 2d 559 (Fla. 3d D.C.A. 2006); *Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d D.C.A. 2003); *Dean v. Heimbach*, 409 So. 2d 157 (Fla. 1st D.C.A. 1982).

[33] *Anderson v. Anderson*, 44 So. 2d 652 (Fla. 1950); *Dep't of Revenue v. Bush*, 838 So. 2d 653 (Fla. 2d D.C.A. 2003).

[34] *Id.*

[35] *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992); *In re Estate of Nicole Santos*, 648 So. 2d 277 (Fla. 4th D.C.A. 1995); *Robbins v. Robbins*, 360 So. 2d 10 (Fla. 2d D.C.A. 1978).

[36] Florida's homestead exemption protection from forced sale appears to date back to the mid-1800s. *See* Fla. Const. art. IX, §§1-3 (1868); Fla. Const. art. IX, §§1-3 (1885). It was intended to prevent families and their heirs from losing their homes on account of unpaid debts. *See Hill v. First National Bank of Marianna,* 75 So. 614 (Fla. 1917); *Milton v. Milton*, 58 So. 718 (Fla. 1912); *Palmer v. Palmer*, 35 So. 983 (Fla. 1904); *Miller v. Finegan*, 7 So. 140 (Fla. 1890); *Drucker v. Rosenstein*, 19 Fla. 191 (1882); *Davis v. Davis*, 864 So. 2d 458 (Fla. 1st D.C.A. 2003); *Bank Leumi v. Lang*, 883 F. Supp. 883 (S.D. Fla. 1995).

[37] *Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007); *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Stewart v. Tramel*, 697 So. 2d 821 (Fla. 1997); *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992); *Robbins v. Robbins*, 360 So. 2d 10 (Fla. 2d D.C.A. 1978).

[38] *See Martino v. Wal-Mart Stores, Inc.,* 908 So. 2d 342 (Fla. 2005); *Department of Revenue v. Jackson,* 846 So. 2d 486 (Fla. 2003); *Andrews v. Palmas De Majorca Condominium*, 898 So. 2d 1066 (Fla. 5th D.C.A. 2005); *Wait v. Wait,* 886 So. 2d 318 (Fla. 4th D.C.A. 2004); *Conness v. Conness,* 607 So. 2d 493 (Fla. 4th D.C.A. 1992); *Blender v. Blender*, 760 So. 2d 950 (Fla. 4th D.C.A. 1999); *Maosola v. Lusskin*, 727 So. 2d 328 (Fla. 4th D.C.A. 1999).

[39] *Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007); *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Stewart v. Tramel*, 697 So. 2d 821 (Fla. 1997); *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992); *Southern Walls, Inc. v. Stilwell*, 810 So. 2d 566 (Fla. 5th D.C.A. 2002); *Robbins v. Robbins*, 360 So. 2d 10 (Fla. 2d D.C.A. 1978); *In re Estate of Nicole Santos*, 648 So. 2d 277 (Fla. 4th D.C.A. 1995). Even before *Havoco of America*, at least one appellate court ruled that the equitable defense of unclean hands did not form a basis for denying homestead protection against a devisee. *See Monks v. Smith,* 609 So. 2d 740 (Fla. 1st D.C.A. 1992).

[40] Fla. Const. art. IX, §1 (a) (2007); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

[41] *Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007). It is too early to tell if *Chames* will have a chilling effect on attorneys' representing clients with few liquid assets in domestic relations cases. There is always the possibility that a marital estate will have realty other than homestead realty to be distributed to the parties, but homestead realty was and still is the major asset of the parties that can be sold by the parties upon the entry of a final judgment of dissolution of marriage (FJDM). After *Chames*, homestead realty is no longer subject to an attorney's charging lien. Other possible attorney charging liens on marital assets that should not be impacted by *Chames* include nonhomestead realty, stocks and securities, cash accounts, and valuable personal property if they are not liquidated and sold by the parties before entry of a FJDM. A promissory note and mortgage can be executed by one spouse and recorded as a lien on homestead realty, but there is the possibility that in doing so on tenancy by the entireties realty at the onset of a FJDM, the mortgage may not be valid. Upon entry of the FJDM, however, the homestead realty will be owned as tenants in common by each party, and it can be argued that the note and mortgage became enforceable at that time. *See Pitts v. Pastore,* 561 So. 2d 292 (Fla. 2d D.C.A. 1990); *Sudholt v. Sudholt*, 389 So. 2d 301 (Fla. 5th D.C.A. 1980).

[42] *Freeman v. First Union National Bank*, 865 So. 2d 1272, 1277 (Fla. 2004).

[43] *Id. See also Bankfirst v. UBS Paine Webber, Inc*., 842 So. 2d 155 (Fla. 5th D.C.A. 2003); *Beta Real Corporation v. Graham*, 839 So. 2d 890 (Fla. 3d D.C.A. 2003); *Yusem v. South Florida Water Management District*, 770 So. 2d 746 (Fla. 4th D.C.A. 2000).

Harry M. Hipler *is a sole practitioner in Dania Beach and practices in the areas of family law, commercial litigation, and municipal law. He received his J.D. in 1975 from the University of Florida, and an LL.M. in taxation from the University of Miami in 1981.*

This column is submitted on behalf of the Family Law Section, Scott Rubin, chair, and Susan W. Savard and Laura Davis Smith, editors.

Family Law

Newer Column **Older Column**

RSA 12D-7.0135
Current through Reg. 49, No. 177; September 12, 2023

Section 12D-7.0135 - Homestead Exemptions - Mobile Homes

(1) For purposes of qualifying for the homestead exemption, the mobile home must be determined to be permanently affixed to realty, as provided in rule Chapter 12D-6, F.A.C. Otherwise, the applicant must be found to be making his permanent residence on realty.
(2) Where a mobile home owner utilizes a mobile home as a permanent residence and owns the land on which the mobile home is located, the owner may, upon proper application, qualify for a homestead exemption.
(3) Joint tenants holding an undivided interest in residential property are each entitled to a full homestead exemption to the extent of each joint tenant's interest, provided all requisite conditions are met. Joint tenants owning a mobile home qualify for a homestead exemption even though the property on which the mobile home is located is owned in joint tenancy by more persons than just those who own the mobile home. Each separate residential or family unit is entitled to a homestead exemption. The value of the applicant's proportionate interest in the land shall be added to the value of the applicant's proportionate interest in the mobile home and this value may be exempted up to the statutory limit.
(4) If a mobile home is owned as an estate by the entireties, the homestead exemptions of Section 196.031, F.S. and the additional homestead exemptions are applicable if either spouse qualifies.
(5) No homestead exemption shall be allowed by the property appraiser if there is no current license sticker on January 1, unless the property appraiser determines prior to the July 1 deadline for denial of the exemption that the mobile home was in fact permanently affixed on January 1 to real property and the owner of the mobile home is the same as the owner of the land.
RSA 12D-7.0135

Rulemaking Authority RSA 195.027(1), RSA 213.06(1) FS. Law Implemented RSA 193.075, RSA 196.012, RSA 196.031, 196.041, 196.081, 196.091, 196.101, 196.202 FS.
New 5-13-92.

The 2023 Florida Statutes

Title XV
HOMESTEAD AND EXEMPTIONS
Chapter 222
METHOD OF SETTING APART HOMESTEAD AND EXEMPTIONS

222.05 Setting apart leasehold.—Any person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his or her own which he or she may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his or her homestead, shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid.

History.—s. 5, ch. 1715, 1869; RS 2002; GS 2524; RGS 3879; CGL 5786; s. 1, ch. 77-299; s. 1198, ch. 95-147.

316 B.R. 560 (2004)
In the Matter of Leroy George YETTAW, Debtor.
No. 8:03-bk-09968-TEB.
United States Bankruptcy Court, M.D. Florida, Tampa Division.
October 14, 2004.
561*561 LeRoy George Yettaw, New Port Richey, FL, Pro se.
Beth Ann Scharrer, Seminole, FL, trustee.
ORDER ON CREDITOR, WALLACE CALNEY'S, OBJECTION TO DEBTOR'S CLAIM OF EXEMPTION
THOMAS E. BAYNES, JR., Bankruptcy Judge.
THIS CAUSE came before the Court at a Final Evidentiary Hearing on February 10, 2004, upon the Objection to Claim of Exemption filed by Wallace Calney, a creditor in Debtor's case. The Court, having heard arguments of counsel, reviewed the evidence and the record, and being otherwise advised, finds as follows:
BACKGROUND
The evidence at the Final Evidentiary Hearing established Debtor filed his Chapter 7 bankruptcy case in 2003. In the schedules, Debtor claims his 1988 Winnebago Chieftain motor home, valued at $18,000.00, to be exempt under the Florida Constitution as homestead. *See* Fla. Const. art. X, § 4; Fla. Stat. Ch. 222.01, et seq. Debtor acquired the motor home for $15,000.00 some few months before filing bankruptcy. Financially, he was unable to obtain employment due to extensive health problems. Debtor sold his homestead, took the proceeds and bought the motor home and parked it at a motor home park.
Debtor pays $300.00 a month rent which includes sewage, water and electricity. Debtor was denied Social Security disability, but appears to receive necessary medication on a charitable basis. He has a minimal part-time job and minimal expenses. The motor home itself is not capable of running, does not have a valid registration, and is used solely for the purposes of a residence—having not been moved since entering the RV park. According to Debtor's testimony and other 562*562 evidence, it is possible to rejuvenate mechanics of the motor home, (if Debtor were financially able), therefore, it must be concluded that the motor home is inoperable. Debtor asserts the vehicle is his residence, and it is his intent to reside there as it is very economical for him considering his dire financial position.
DISCUSSION
The bankruptcy courts in the State of Florida, as well as the state courts, deal with the question of whether untraditional mobile abodes could be transferred into homestead, thereby benefiting from the homestead exemption created in the Florida Constitution, on a fairly regular basis. As may be gathered, the two most unique "residences" are motor homes and boats. In fact, the Florida Legislature enacted Fla. Stat. Ch. 222.05 which expanded the definition of "dwelling house" to exempt mobile and modular homes held by a debtor where the debtor merely leases the land. Clearly, Fla. Stat. Ch. 222.05 comes into play when determining whether non-traditional abodes other than mobile homes, such as motor homes and boats, may be a dwelling house entitled to the homestead exemption. *See* *Miami Country Day School v. Bakst*, 641 So.2d 467, 469-70 (Fla. 3rd Dist.Ct.App.1994).

While the characterization of homestead is grounded in the Florida Constitution and statutory law, it is also a product of state public policy. It is quite clear the Florida state courts, as well as the federal bankruptcy courts, have determined the issue of homestead should be liberally construed in favor of the individual claiming the exemption. *See* *In re Bubnak*, 176 B.R. 601, 602-03 (Bankr.M.D.Fla. 1994) (holding a motor home met the requirements for a homestead exemption); *In re Mangano*, 158 B.R. 532, 534-35 (Bankr.S.D.Fla.1993) (holding a motor home met the requirements for a homestead exemption); *In re Meola*, 158 B.R. 881, 882-83 (Bankr.S.D.Fla.1993) (holding a travel trailer met the requirements for a homestead exemption); *In re Imprasert*, 86 B.R. 721, 722 (Bankr.M.D.Fla.1988) (holding temporary absence from home did not constitute abandonment of homestead); *Butterworth v. Caggiano*, 605 So.2d 56, 59-61 (Fla.1992) (holding property entitled to homestead exemption is not subject to civil or criminal forfeiture). As the Florida Supreme Court states in *Public Health Trust v. Lopez*, 531 So.2d 946, 948 (Fla. 1988),

As a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.

The burden of proof lies with the objecting party, the creditor here, to prove by a preponderance of the evidence that the Debtor is not entitled to the exemption claimed. *See* *In re McClain*, 281 B.R. 769, 773 (Bankr.M.D.Fla.2002); *In re Ehnle*, 124 B.R. 361, 363 (Bankr.M.D.Fla.1991). Ultimately, however, the policy must be construed with criteria for homestead where there are "unconventional" or "nontraditional abodes." The Court, upon reviewing all the cases dealing with motor homes and analogous abodes such as motor boats, concludes the courts, both federal and state, look to the following criteria to determine whether or not the public policy of homestead exemption shall apply. The criteria include, but are not limited to:

1) The Debtor's intent to make the non-traditional abode his homestead. *See, e.g.*, *In re Mead*, 255 B.R. 80, 84 (Bankr. 563*563 S.D.Fla.2000) (holding a boat met the requirements for homestead exemption).

2) Whether the debtor has no other residence. *See, e.g.*, *Miami Country Day School v. Bakst*, 641 So.2d at 469.

3) Whether the evidence establishes a continuous habitation. *See, e.g.*, *In re Brissont*, 250 B.R. 413, 414-15 (Bankr. M.D.Fla.2000) (holding a mobile boat did not meet the requirements for homestead exemption).

4) Whether the debtor maintains at least a possessory right associated with the land establishing a physical presence. *See, e.g.*, *In re Dean*, 177 B.R. 727, 729 (Bankr.S.D.Fla.1995).[1]

5) Whether the nontraditional abode has been physically maintained to allow longterm habitation versus mobility. *See, e.g.*, *In re McClain*, 281 B.R. at 773.

6) Whether the physical configuration of the abode permits habitation, otherwise the physical characteristics are immaterial. *See, e.g.*, *In re Mangano*, 158 B.R. at 534 (holding use, rather than design or size, is the key factor in determining the homestead status of a nontraditional abode).

Reviewing the record in light of the relevant criteria, the Court finds the fact that Debtor sold his homestead and used all the proceeds to buy the motor home is sufficient to establish an intent to make the motor home the Debtor's homestead. The record establishes Debtor has no other

residence. The evidence establishes habitation to be continual and consistent with homestead as the vehicle no longer has a license, is not in operating condition and Debtor does not have the ability to bring the mobile home back in service. The Debtor's lease upon the land, which includes the services necessary to make the motor home habitable, establishes a possessory right sufficient to maintain a homestead.

Finally, the record reflects the motor home is maintained for long-term habitation, as evidenced by Debtor acquiring all the necessary requirements for habitation including, but not limited to, water, sewer, and electrical service. The motor home is physically configured to serve as Debtor's living quarters and the record clearly reflects this use of the motor home. The Court understands full well there is evidence that the lease is month-to-month and there is the ever present ability to unhook the particular services to the mobile home, but this does not outweigh the evidence establishing the criteria for homestead.

CONCLUSION

As Chief Bankruptcy Judge Mark of the Southern District in *In re Mangano*, 158 B.R. at 535, states,

Certain members of the public (and the media) believe that Florida's homestead exemption allows wealthy debtors to shelter a disproportionate amount of their wealth from creditors .... In this case, the Court is confronted with the opposite end of the spectrum—debtors with virtually no property other than the vehicle in which they live. Here, there is room for judicial discretion within the confines of the Bankruptcy Code, Florida Statutes and Florida Constitution.

Judge Mark's findings are consistent with this case. Federal and state law leads this Court to the conclusion that under the facts in this case, the 1988 Winnebago Chieftain motor home as maintained by the Debtor should be considered a dwelling house and allowed a homestead exemption 564*564 under the Florida Constitution and Florida Statutes. *See* Fla. Const. art. X, § 4; Fla. Stat. Ch. 222.05. Therefore, the Objection to Claim of Exemption filed by the Creditor, Wallace Calney, should be overruled.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Objection to Claim of Exemption filed by Creditor, Wallace Calney, is hereby overruled.

[1] The law does not require the debtor own the land, *see* Fla. Stat. Ch. 222.05, *In re Mead*, 255 B.R. at 83-84.

641 So.2d 467 (1994)
MIAMI COUNTRY DAY SCHOOL, Appellant,
v.
Irving BAKST and Jackie Bakst, Appellees.
No. 94-208.
District Court of Appeal of Florida, Third District.
August 17, 1994.
468*468 Perse & Ginsberg and Joseph T. Robinson and Todd R. Schwartz, Miami, for appellant.
Ackerman, Bakst & Cloyd and Michael Bakst, West Palm Beach, for appellees.
Before BARKDULL, HUBBART and BASKIN, JJ.
BASKIN, Judge.
Miami Country Day School [School] appeals a non-final order ruling that the houseboat owned by Jackie Bakst qualifies as homestead pursuant to Article X, section 4 of the Florida Constitution, and section 222.05, Florida Statutes (1993). We affirm.
The School obtained a money judgment against Irving and Jackie Bakst for failure to pay tuition. To satisfy the judgment, the School sought to levy on a houseboat owned by Jackie Bakst. The 3,000 square foot houseboat, her sole residence since 1986, is fully equipped for occupancy and includes four bedrooms, three bathrooms, and a garden. The houseboat was towed to its present location; it was never equipped with a motor and is connected to the dock via walkways and gangplanks. Bakst does not own the land or body of water beneath the houseboat, which is docked at a marina pursuant to a rental agreement. The marina provides hookups for necessary connections including water and electric supplies. Bakst sought to avoid a forced sale by asserting that the houseboat was exempt property. The trial court ruled that the houseboat qualified as homestead. The School appeals.
In determining whether Bakst's houseboat is entitled to an exemption, we follow well-settled law and liberally construe the homestead exemption in favor of the party claiming the exemption and in furtherance of the exemption's purpose. *Butterworth v. Caggiano*, 605 So.2d 56 (Fla. 1992), and cited cases. "As a matter of public policy, the purpose of the homestead exemption 469*469 is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law." *Public Health Trust of Dade County v. Lopez*, 531 So.2d 946, 948 (Fla. 1988). Applying those principles, we hold that the trial court properly ruled that Bakst is entitled to a homestead exemption for her houseboat.
Article X, section 4 provides, in pertinent part: "[t]here shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, ... the following property owned by a natural person: (1) a homestead... ." Section 222.05, Florida Statutes (1993), sets forth when certain homesteads located on leased properties are entitled to the exemption, and provides that "any person owning and occupying any dwelling house, including a mobile home used as a residence, ... on land not his own which he may lawfully possess, by lease or otherwise, and claiming such house ... as his homestead, shall be entitled to the exemption of such house ... from levy and sale aforesaid." Although section 222.05 does not expressly state that a houseboat is entitled to homestead exemption, the language of the section is

noninclusive thereby permitting designation of a houseboat as homestead if it is a dwelling house. Pursuant to section 222.05, the term dwelling house *includes* a mobile home and a modular home: that language suggests that the legislature intended to enlarge the definition of the term "dwelling house" rather than to limit the term to modular and mobile homes or to list every possible type of dwelling house. *In re Mangano*, 158 B.R. 532 (Bankr.S.D.Fla. 1993); *In re Meola*, 158 B.R. 881 (Bankr.S.D.Fla. 1993); *see Yon v. Fleming*, 595 So.2d 573, 577 (Fla. 4th DCA), *review denied*, 599 So.2d 1281 (Fla. 1992). Therefore, Bakst, whose sole permanent residence is the houseboat, is entitled to homestead exemption if the houseboat she owns is a dwelling house.

Under the circumstances of this case, we hold that the houseboat is a dwelling house;[1] thus, the trial court properly determined that Bakst is entitled to the exemption. The houseboat is similar to a mobile home which the legislature has determined is a dwelling house; although both may be moved, they are self-contained living environments, designed for use as residences rather than transportation. *See In re Scudder*, 97 B.R. 617, 619 (Bankr.S.D.Ala. 1989) (houseboat subject to homestead exemption). Here, Bakst uses the houseboat as her sole, permanent residence.[2] It is fully equipped for occupancy and supplied with utilities via dock connections. In addition, the houseboat cannot be used as a vehicle: it has never been equipped with a motor and was towed to its present location. Therefore, this case is unlike *In re Major*, 166 B.R. 457 (Bankr. M.D.Fla. 1994), in which the court held that a boat, which had an inoperable motor because the owners lacked funds to repair the motor, was not subject to homestead exemption. The *Major* court recognized that the exemption may be extended to a houseboat because "a houseboat ... is specially designed to serve as a permanent dwelling." *Major*, 166 B.R. at 458. Our holding is supported by Florida bankruptcy courts, applying Florida homestead law, which have drawn an analogy to mobile homes and have held that a travel trailer, *Meola*, 158 B.R. at 881, and a motor home, *Mangano*, 158 B.R. at 532, are dwelling houses. Based on that analogy, the *Meola* and *Mangano* courts concluded that such property is entitled to homestead exemption under Article X, section 4 and section 222.05.

We hold that the trial court correctly ruled that Bakst is entitled to a homestead exemption 470*470 for her houseboat. The decision we reach today is in keeping with the spirit of Florida homestead law which endeavors "to shelter the family and provide it a refuge from the stresses and strains of misfortune." *Collins v. Collins*, 150 Fla. 374, 377, 7 So.2d 443, 444 (1942). Accordingly, the order is affirmed.

Affirmed.

[1] Because the statute does not define the term "dwelling house," the term "must be given its ordinary and commonly accepted meaning as it is used in the particular statutory context." *Hancock Advertising, Inc. v. Department of Transp.*, 549 So.2d 1086, 1088 (Fla. 3d DCA 1989) (citation omitted), *review denied*, 558 So.2d 17 (Fla. 1990); *see Butterworth v. Caggiano*, 605 So.2d 56, 58-59 (Fla. 1992). Dwelling house is defined as "a house or sometimes part of a house that is occupied as a residence... ." *Webster's Third New Int'l Dictionary* 706 (1986).

[2] There is no dispute that Bakst fulfilled the homestead permanency requirement. *Cooke v. Uransky*, 412 So.2d 340 (Fla. 1982).

No. 2D20-2967
Florida Court of Appeals, Second District

Ballard v. Pritchard

332 So. 3d 570 (Fla. Dist. Ct. App. 2021)
Decided Dec 22, 2021

No. 2D20-2967

12-22-2021

Lindsay BALLARD, as personal representative of the Estate of Robert Williams, deceased, Appellant, v. Kristen PRITCHARD and Kevin Williams, Appellees.

Chelsea Scott and Keathel Chauncey of Fresh Legal Perspective, PL, Tampa, for Appellant. Caitlein J. Jammo of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, for Appellees.

SILBERMAN, Judge.

Chelsea Scott and Keathel Chauncey of Fresh Legal Perspective, PL, Tampa, for Appellant.

Caitlein J. Jammo of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, for Appellees.

SILBERMAN, Judge.

Lindsay Ballard, as personal representative of the
572 Estate of Robert Williams, deceased *572 (Ballard), appeals an order that determines the homestead status of real property concerning the Estate of Juanita Carter, deceased (the Decedent). Because the Decedent made an invalid devise of homestead property, the property passed immediately at her death pursuant to the statutory laws of intestacy. Thus, we reverse the circuit court's order determining that the homestead property passed pursuant to the devise in the Decedent's Last Will and Testament (the Will).

It is undisputed that when the Decedent passed away on February 17, 2002, she owned a residence that was her homestead, she was married to Pinkney W. Carter, and she had two adult sons, Ronald R. Williams (Ronald) and Robert A. Williams (Robert). In her Will, the Decedent devised a life estate in her residence to her spouse, with the remainder to Ronald in fee simple. She devised the residue of her estate to both Ronald and Robert in equal shares. The Will provides that the Decedent "carefully considered" her relatives and that she "made what [she] consider[ed] to be the wisest and most just disposition."

Robert died on February 8, 2017. Lindsay Ballard is his sole heir. Pinkney Carter, the Decedent's spouse, died on February 24, 2019.

In May 2020, Ronald filed a petition for summary administration of the Decedent's estate with the only asset being the subject property. In June 2020, Ballard filed a petition to determine homestead status. She alleged that the Decedent's residence was homestead property and that the devise of the Decedent's homestead was invalid under section 732.4015, Florida Statutes (2002). Ballard contended that the homestead descended on the Decedent's date of death pursuant to section 732.401 with a life estate to the Decedent's spouse and with the remainder to Ronald and Robert.

In his affirmative defense and memorandum in opposition to the homestead petition, Ronald asserted that a devise of a life estate to the surviving spouse was valid under section 732.4015(1). He asserted that if a life estate in homestead property is bequeathed to the surviving

spouse, then the remainder interest can be bequeathed to anyone, but he cited no case law. Ronald further asserted that because the Decedent's spouse did not raise any objections and enjoyed a life estate in the property, any objection to the validity of the Will was waived. Ronald requested the circuit court to uphold the validity of the Will.

The circuit court's Order Determining Homestead Status reflects that the court heard argument of counsel before entering the order on September 22, 2020. The court determined that the Decedent's real property constituted her homestead, which the parties do not dispute. Further, the court determined that on the Decedent's date of death the title to the property descended to her spouse, "until his date of death on February 24, 2019, and then to the Decedent's son, [Ronald], as of February 24, 2019." Ballard appealed the Order Determining Homestead Status. *See* Fla. R. App. P. 9.170(b)(13).

Soon after the circuit court entered its order, Ronald executed a quitclaim deed transferring his interest in the homestead property to his children, Kristen Pritchard and Kevin Williams. Ronald died in November 2020. This court subsequently entered an order substituting Kristen Pritchard and Kevin Williams (collectively, Pritchard) as appellees in place of Ronald.

When the relevant facts are undisputed, appellate review of an issue of law is de novo. *See Chase v. Horace Mann Ins. Co.* , 158 So. 3d 514, 517 (Fla. 2015). The Florida Constitution limits the devise of homestead property. "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except *573 the homestead may be devised to the owner's spouse if there be no minor child." Art. X, § 4(c), Fla. Const. Similarly, section 732.4015(1) states, "As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there is no minor child." In contrast, when no spouse or minor child survives a decedent, "no constitutional restriction on the devise of the homestead" exists. *Webb v. Blue* , 243 So. 3d 1054, 1057 (Fla. 1st DCA 2018).

On appeal, Pritchard does not dispute that when the decedent has a surviving spouse or minor children, the Florida Constitution and section 732.4015(1) restrict what devises can be made. *See In re Estate of Finch* , 401 So. 2d 1308, 1309 (Fla. 1981). When a devise is invalid because it violates the Florida Constitution and section 732.4015(1), the homestead descends via intestate succession under section 732.401(1). 401 So. 2d at 1309. Section 732.401(1) provides as follows:

> (1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death per stirpes.

In *In re Estate of Finch* , the petitioner argued that neither the constitution nor statutes should frustrate the decedent's expressed intent to devise a life estate in his homestead to his spouse with a vested remainder interest to one of his two adult daughters. 401 So. 2d at 1309. The Florida Supreme Court disagreed. *Id.* The court adopted the Fourth District's position and held that when "a testator dies leaving a surviving spouse and adult children, the property may not be devised by leaving less than a fee simple interest to the surviving spouse." *Id.* (quoting *In re Estate of Finch* , 383 So. 2d 755, 757 (Fla. 4th DCA 1980)). Similarly, here the Decedent was restricted to devising a fee simple interest in her homestead to her spouse, despite the intent she expressed in her Will.

Pritchard argues that the appealed order does not show if the circuit court made factual determinations regarding the defenses raised. The circuit court did not conduct an evidentiary hearing, so no factual determinations were made. The relevant facts were undisputed. On appeal, Pritchard mentions two defenses. She contends that Ronald raised in the circuit court that the Decedent provided for Robert through other methods. Pritchard also makes a vague reference to a waiver of a homestead interest. Neither of these theories are legally valid defenses under the circumstances here.

As to the waiver argument, the sons each had a vested remainder interest in the property at the time of the Decedent's death in 2002. When an owner is survived by a spouse or minor child, the homestead passes outside of probate at the time of the owner's death. *See Aronson v. Aronson* , 81 So. 3d 515, 519 (Fla. 3d DCA 2012) ("At the moment of Hillard's death, his homestead property passed outside of probate, in a twinkle of an eye, as it were, to his wife for life, and thereafter to his surviving sons, James and Jonathan per stirpes." (citations omitted)); *see also White v. Theodore Parker, P.A.* , 821 So. 2d 1276, 1279 (Fla. 2d DCA 2002) ("Florida courts have continued to hold that homestead does not become part of the probate estate unless a testamentary disposition is permitted and is made to someone other than an heir, i.e., a person to whom the benefit of homestead protection could not inure."). In 574 addition, "homestead rights exist *574 and continue even in the absence of a court order confirming the exemption." *White* , 821 So. 2d at 1280. Petitions to determine homestead property "are similar to actions for declaratory relief that explain or clarify existing rights rather than determine new rights." *Id.*

Further, equitable principles such as waiver or estoppel "cannot operate to nullify a homestead interest." *Rutherford v. Gascon* , 679 So. 2d 329, 331 (Fla. 2d DCA 1996). Rather, to find a waiver of homestead protection by a surviving spouse, "evidence must demonstrate the survivor's intent to waive the constitutional and statutory claim to homestead property." *Id.* (citing *In re Estate of Cleeves* , 509 So. 2d 1256, 1259 (Fla. 2d DCA 1987)).

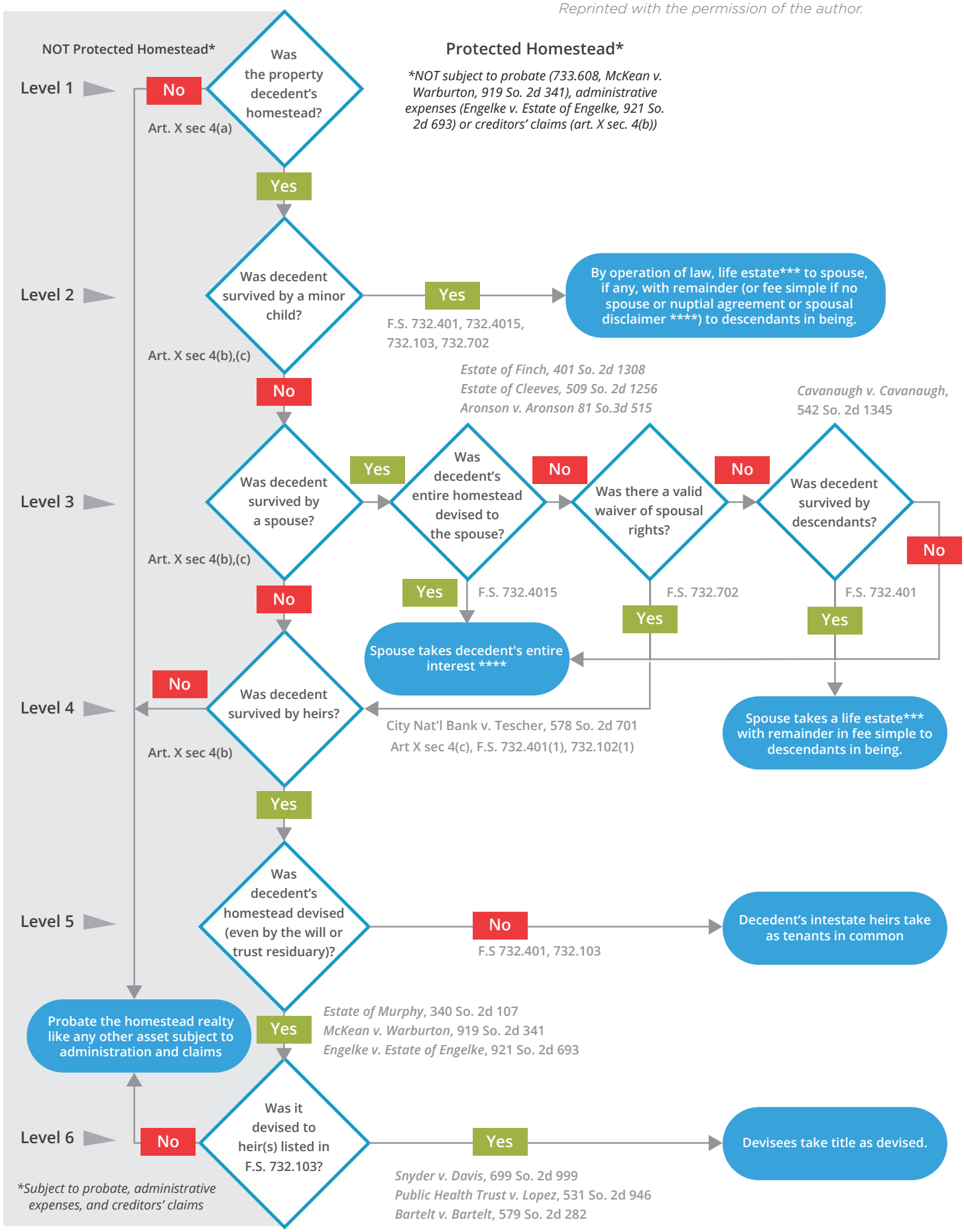
Here, Robert's vested remainder interest in the homestead came into existence at the moment of the Decedent's death, *see White* , 821 So. 2d at 1280, and waiver principles do not apply, *see Rutherford* , 679 So. 2d at 331. As to the Decedent's intent to provide for Robert in other ways, this intent does not control over the provision in article X, section 4(c), of the Florida Constitution and section 732.4015. *See In re Estate of Finch* , 401 So. 2d at 1309. Thus, the homestead did not pass via the Decedent's Will; rather, it passed via section 732.401(1) immediately upon the Decedent's death to her spouse for life with a vested remainder interest in each of her sons, Ronald and Robert, per stirpes. Therefore, we reverse the circuit court's Order Determining Homestead Status and remand for entry of an order consistent with this opinion.

Reversed and remanded.

VILLANTI and STARGEL, JJ., Concur.

Kelley's Homestead Paradigm

Includes statutory changes effective through 2014



Kelley's Homestead Paradigm

Additional Information

If the homestead was owned as tenants by the entireties or JTWROS, this Paradigm does not apply. Title passes automatically to the surviving tenant or tenants free of decedent's creditors. 732.401(5). Ostyn v. Olympic, 455 So. 2d 1137.

Protected Homestead* NOT subject to probate (F.S. 733.608, McKean v. Warburton, 919 So. 2d 341), administrative expenses (Engelke v. Estate of Engelke, 921 So. 2d 693) or creditors' claims (Art. X sec. 4(b)).

NOT Protected Homestead* is subject to probate, administrative expenses, and creditors' claims.

* Protected Homestead is defined in F.S. 731.201(33). Also see 733.608.

Level Information:
At Level 2 — protected homestead may not be devised by will or rev trust 732.4015.**

At Level 3 — protected homestead may be devised only to spouse.** Art X § 4(c)

Below Level 3 — protected homestead may be freely devised.** Art X § 4(c)

** Devise of protected homestead is limited in the same manner whether title is held by an individual or by a revocable trust. F.S. 732.4015(2)(a).

*** The spouse may elect to take a ½ interest as tenant in common rather than a life estate. F.S. 732.401(2)

**** A disclaimed intestate or validly devised spousal interest passes pursuant to 739.201. Disclaimer of a surviving spouse's life estate does not divest a descendant's vested remainder interest. 732.401(4).

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				Kara Scott
				Date of Educational Event:
City:		State (XX):		
Preferred e-mail address				Location:
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