

## **18. UNDERWRITING**

### **PDF Supplement**

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- John B. Neukamm, Esq., *The Continually Evolving Chameleon: Florida's Homestead Laws*, ActionLine, Fall 2010 p. 13

## **222.01 Designation of homestead by owner before levy.—**

(1)Whenever any natural person residing in this state desires to avail himself or herself of the benefit of the provisions of the constitution and laws exempting property as a homestead from forced sale under any process of law, he or she may make a statement, in writing, containing a description of the real property, mobile home, or modular home claimed to be exempt and declaring that the real property, mobile home, or modular home is the homestead of the party in whose behalf such claim is being made. Such statement shall be signed by the person making it and shall be recorded in the circuit court.

(2)When a certified copy of a judgment has been filed in the public records of a county pursuant to chapter 55, a person who is entitled to the benefit of the provisions of the State Constitution exempting real property as homestead and who has a contract to sell or a commitment from a lender for a mortgage on the homestead may file a notice of homestead in the public records of the county in which the homestead property is located in substantially the following form:

### **NOTICE OF HOMESTEAD**

To: (Name and address of judgment creditor as shown on recorded judgment and name and address of any other person shown in the recorded judgment to receive a copy of the Notice of Homestead).

You are notified that the undersigned claims as homestead exempt from levy and execution under Section 4, Article X of the State Constitution, the following described property:

(Legal description)

The undersigned certifies, under oath, that he or she has applied for and received the homestead tax exemption as to the above-described property, that is the tax identification parcel number of this property, and that the undersigned has resided on this property continuously and uninterruptedly from (date) to the date of this Notice of Homestead. Further, the undersigned will either convey or mortgage the above-described property pursuant to the following:

(Describe the contract of sale or loan commitment by date, names of parties, date of anticipated closing, and amount. The name, address, and telephone number of the person conducting the anticipated closing must be set forth.)

The undersigned also certifies, under oath, that the judgment lien filed by you on (date) and recorded in Official Records Book , Page , of the Public Records of County, Florida, does not constitute a valid lien on the described property.

**YOU ARE FURTHER NOTIFIED, PURSUANT TO SECTION 222.01 ET SEQ., FLORIDA STATUTES, THAT WITHIN 45 DAYS AFTER THE MAILING OF THIS**

NOTICE YOU MUST FILE AN ACTION IN THE CIRCUIT COURT OF        COUNTY, FLORIDA, FOR A DECLARATORY JUDGMENT TO DETERMINE THE CONSTITUTIONAL HOMESTEAD STATUS OF THE SUBJECT PROPERTY OR TO FORECLOSE YOUR JUDGMENT LIEN ON THE PROPERTY AND RECORD A LIS PENDENS IN THE PUBLIC RECORDS OF THE COUNTY WHERE THE HOMESTEAD IS LOCATED. YOUR FAILURE TO SO ACT WILL RESULT IN ANY BUYER OR LENDER, OR HIS OR HER SUCCESSORS AND ASSIGNS, UNDER THE ABOVE-DESCRIBED CONTRACT OF SALE OR LOAN COMMITMENT TO TAKE FREE AND CLEAR OF ANY JUDGMENT LIEN YOU MAY HAVE ON THE PROPERTY.

This    day of    , 2 .

(Signature of Owner)

(Printed Name of Owner)

(Owner's Address)

Sworn to and subscribed before me by        who is personally known to me or produced as identification, this    day of    , 2 .

Notary Public

(3)The clerk shall mail a copy of the notice of homestead to the judgment lienor, by certified mail, return receipt requested, at the address shown in the most recent recorded judgment or accompanying affidavit, and to any other person designated in the most recent recorded judgment or accompanying affidavit to receive the notice of homestead, and shall certify to such service on the face of such notice and record the notice. Notwithstanding the use of certified mail, return receipt requested, service shall be deemed complete upon mailing.

(4)A lien pursuant to chapter 55 of any lienor upon whom such notice is served, who fails to institute an action for a declaratory judgment to determine the constitutional homestead status of the property described in the notice of homestead or to file an action to foreclose the judgment lien, together with the filing of a lis pendens in the public records of the county in which the homestead is located, within 45 days after service of such notice shall be deemed as not attaching to the property by virtue of its status as homestead property as to the interest of any buyer or lender, or his or her successors or assigns, who takes under the contract of sale or loan commitment

described above within 180 days after the filing in the public records of the notice of homestead. This subsection shall not act to prohibit a lien from attaching to the real property described in the notice of homestead at such time as the property loses its homestead status.

(5)As provided in s. 4, Art. X of the State Constitution, this subsection shall not apply to:

(a)Liens and judgments for the payment of taxes and assessments on real property.

(b)Liens and judgments for obligations contracted for the purchase of real property.

(c)Liens and judgments for labor, services, or materials furnished to repair or improve real property.

(d)Liens and judgments for other obligations contracted for house, field, or other labor performed on real property.

History.—s. 1, ch. 1715, 1869; RS 1998; GS 2520; RGS 3875; CGL 5782; s. 20, ch. 73-334; s. 2, ch. 77-299; s. 1, ch. 83-40; s. 1195, ch. 95-147; s. 25, ch. 2000-258; s. 17, ch. 2005-241.

#### **627.784 Casualty title insurance prohibited.—**

A title insurance policy or guarantee of title may not be issued without regard to the possible existence of adverse matters or defects of title.

#### **627.786 Transaction of title insurance and any other kind of insurance prohibited.—**

(1) An insurer may not transact title insurance and any other kind of insurance in this state.

(3) Subsection (1) does not preclude a title insurer from providing instruments to any prospective insured, in the form and content approved by the office, under which the title insurer assumes liability for loss due to the fraud of, dishonesty of, misappropriation of funds by, or failure to comply with written closing instructions by, its contract agents, agencies, or approved attorneys in connection with a real property transaction for which the title insurer is to issue a title insurance policy.

#### **627.7841 Insurance against adverse matters or defects in the title.—**

If a title insurer issuing a commitment or policy of title insurance upon an estate, lien, or interest in property located in this state through its officers, employees, agents, or agencies disburses settlement or closing funds, the title insurer shall insure against the possible existence of adverse matters or defects in the title which are recorded during the period of time between the effective date of the commitment and the date of recording of the document creating the estate or interest to be insured, except as to matters of which the insured has knowledge.

### **627.782 Adoption of rates.—**

(1) Subject to the rating provisions of this code, the commission must adopt a rule specifying the premium to be charged in this state by title insurers for the respective types of title insurance contracts and, for policies issued through agents or agencies, the percentage of such premium required to be retained by the title insurer which shall not be less than 30 percent. However, in a transaction subject to the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. ss. 2601 et seq., as amended, no portion of the premium attributable to providing a primary title service shall be paid to or retained by any person who does not actually perform or is not liable for the performance of such service.

### **627.7711 Definitions.—**

“Primary title services” means determining insurability in accordance with sound underwriting practices based upon evaluation of a reasonable title search or a search of the records of a Uniform Commercial Code filing office and such other information as may be necessary, determination and clearance of underwriting objections and requirements to eliminate risk, preparation and issuance of a title insurance commitment setting forth the requirements to insure, and preparation and issuance of the policy. Such services do not include closing services or title searches, for which a separate charge or separate charges may be made.

### **627.7842 Policy exceptions.—**

(1)(a) If a survey meeting the minimum technical standards for surveying required by the Department of Business and Professional Regulation and certified to the title insurer by a registered Florida surveyor has been completed on the property within 90 days before the date of closing, the title policy may only except from coverage the encroachments, overlays, boundary line disputes, and other matters which are actually shown on the survey.

(b) If at closing the seller signs an affidavit swearing that there is no person in possession of the property or with a claim of possession to the property except the seller, the title policy may not exclude from coverage rights or claims of parties in possession not shown by the public records.

(c) If at closing the seller signs an affidavit swearing that no improvements have been made to the property within the past 90 days for which payment has not been made in full, the title policy may not except from coverage any lien or right to a lien for services, labor, or material furnished which is imposed by law and not shown by the public record.

(2) The title insurer, agent, or agency issuing the title policy may except from coverage the items specified in subsection (1) if the title insurer, agent, or agency has knowledge of facts requiring the exceptions, notwithstanding the survey or affidavits, if the insurer, agent, or agency discloses such facts to the proposed insured.

### **159.17 Lien of service charges.—**

Any municipality issuing revenue bonds hereunder shall have a lien on all lands or premises served by any water system, sewer system or gas system for all service charges for such facilities until paid, which liens shall be prior to all other liens on such lands or premises except the lien of state, county and municipal taxes and shall be on a parity with the lien of such state, county and municipal taxes. Such liens, when delinquent for more than 30 days, may be foreclosed by such municipality in the manner provided by the laws of Florida for the foreclosure of mortgages on real property.

### **FLORIDA CONSTITUTION, ARTICLE X, 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.

### **732.4015 Devise of homestead.—**

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

- (2) For the purposes of subsection (1), the term:
- (a) “Owner” includes the grantor of a trust described in s. [733.707](#)(3) that is evidenced by a written instrument which is in existence at the time of the grantor’s death as if the interest held in trust was owned by the grantor.
- (b) “Devise” includes a 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.
- (3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse’s interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

### **732.401 Descent of homestead.—**

- (1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent’s death per stirpes.
- (2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent’s descendants in being at the time of the decedent’s death, per stirpes.
- (a) The right of election may be exercised:
1. By the surviving spouse; or
  2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse’s probable lifetime.
- (b) The election must be made within 6 months after the decedent’s death and during the surviving spouse’s lifetime. The time for making the election may not be extended except as provided in paragraph (c).
- (c) A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent’s death and during the surviving spouse’s lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election.
- (d) Once made, the election is irrevocable.
- (e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located.

# The Continually Evolving Chameleon: Florida's Homestead Laws

By John B. Neukamm, Mechanik Nuccio, P.A., Tampa, FL

Florida's homestead exemption laws have been likened by the commentators to a chameleon "which changes color to accord with the background against which it is viewed." It has been noted, however, that "there exist today definite contours that remain distinguishable amid the camouflage of varying factual situations."<sup>1</sup> In this article, I hope to provide some background which will allow you to more easily discern and distinguish Florida's legal chameleon, as well as to describe its evolution.

In fact, like the three-horned chameleon featured on the cover of this publication, there are actually three distinct aspects of Florida homestead law (each of which derive from different constitutional and statutory bases), as follows:

- Exemption from creditors' claims;
- Restrictions on alienation; and
- Tax exemptions and benefits.

The constitutional bases for the exemption of a Florida homestead from creditors' claims (both during the homestead owner's life and after their death) are set forth in Subsections 4(a) and (b) of Article X of the Florida Constitution. In addition, Chapter 222, Florida Statutes sets forth the statutory scheme to implement Florida's constitutional protections against the forced sale of homesteads. Article X, Section 4(c) of the Florida Constitution establishes restrictions on the alienation of a homestead. Restrictions with respect to the devise and descent of homestead property are clarified in Sections 732.401 and 732.4015, Florida Statutes. Finally, Article VII, Sections 4(d) and 6 of the Florida Constitution set forth the framework for Florida's homestead tax exemption laws (which are codified in Chapter 196 and in Section 193.155, Florida Statutes).

## Creditors' Claims Exemptions

The concept of a homestead exemption is unique to American law and did not exist at common law (although English canons of decency provided an exemption for a debtor's necessary clothing).<sup>2</sup> Florida was the fourth state to provide some form of homestead protection for debtors when, in 1843, certain items of personal property were exempted from creditors' claims. In 1868, Florida's first constitution provided exemptions from creditors' claims for up to 160 rural acres and up to a half acre within a city owned by a debtor.

In an early decision, the Florida Supreme Court described the purposes of laws providing for the exemption of property from forced sale as follows:

The object of exemption laws is to protect people of limited means and their families in the enjoyment of

so much property as may be necessary to prevent absolute pauperism and want, and against the consequences of ill advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasion of others.<sup>3</sup>

Initially, therefore, the two major purposes of Florida homestead exemption laws were to prevent poverty (and the consequential need for public assistance) and to protect debtors from their own poor decisions. As subsequently provided in Article X, Section 4(b) of Florida's Constitution, the creditors' exemption was extended to the surviving spouse and heirs of a deceased owner of homestead property.

With the foregoing background, let us now examine the creditors' exemption with respect to homesteads in greater depth, both in the context of the rights inuring to the benefit of the homestead owner during their lifetime, as well as the rights of the surviving spouse and heirs after the homestead owner's death.

## What is Homestead?

As set forth in Section 4(a) of Article X of the Florida Constitution, a "homestead" owned by a "natural person" is exempt from forced sale.

**"Homestead" Property:** While the extent of homestead property is described in the Florida Constitution, the term "homestead" is not explicitly defined. However, the case law provides some guidance.

In 1928, the Florida Supreme Court held that "the homestead intended by our Constitution to be exempt is the place of actual residence of the party and his family, and ... a temporary absence of the head of a family in search of health, pleasure, or for business reasons will not deprive the homestead of its character and status as such unless there was a design of permanent abandonment."<sup>4</sup> The court continued by stating "[i]t is equally as well settled, however, by the cases just cited, that a permanent abandonment of the homestead as a bona fide home and place of permanent abode strips it of its homestead character. A homestead is abandoned by taking up a permanent abode at a distant place. Whether there has been an abandonment of a homestead so as to deprive it of its status as such under the Constitution should be determined by a consideration of all the pertinent facts and circumstances of each case."<sup>5</sup> Thus, the court concluded that "[t]he character of property as a homestead depends upon an actual intention to reside thereon as a permanent place of residence, coupled

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with the fact of residence.”<sup>6</sup> As the Florida Supreme Court subsequently noted, once created, a homestead interest can only be waived by abandonment or by alienation in the manner provided by law.<sup>7</sup>

**Owned by a “Natural Person”:** Since January 8, 1985, it has no longer been necessary to be a “head of family” in order to avail oneself of the homestead exemption from creditors’ claims; it has only been necessary to be a “natural person.” A “natural person” is defined in the Florida Statutes, in the context of stock and mutual insurers, as “an individual.”<sup>8</sup> However, there is no explicit definition of a “natural person” in the homestead context under the Florida Constitution or the Florida Statutes. Nevertheless, Florida cases have generally confirmed the approach described in the foregoing statute. For example, a bankruptcy court held that a residence held in a revocable trust by a trustee who resided on the property and was also the settlor was held by a “natural person” and was, therefore, exempt from creditors’ claims.<sup>9</sup> However, it should be of no surprise that partnership property has been held not to constitute the homestead of one of the partners.<sup>10</sup>

### Extent of Homestead

Article X, Subsection 4(a)(1) of Florida’s Constitution provides that a homestead located outside a municipality consists of up to one hundred sixty acres of contiguous land and improvements thereon or of up to one-half acre of contiguous land within a municipality (upon which the exemption shall be limited to the residence of the owner or the owner’s family).

**Outside a Municipality:** Property used as a mobile home park which was contiguous to residential property located outside a municipality has been held to qualify for the homestead exemption from creditors’ claims in a case in which the total acreage was less than 160 acres.<sup>11</sup>

**Within a Municipality:** A bankruptcy court held that, when two separate structures were located upon a single lot which could not be subdivided and only one of the structures was used for residential purposes (with the other being used for rental purposes), only the structure utilized for residential purposes qualified for the homestead exemption from creditors’ claims.<sup>12</sup> In another bankruptcy case, the bankruptcy trustee was authorized to sell an entire indivisible 2.3 acre tract located within a municipality upon which the debtor’s residence was located, with an apportionment of the sales proceeds between the homestead and non-homestead portion of the property.<sup>13</sup>

**Contiguous Land:** A husband and wife who purchased their residence located upon one lot, along with four other contiguous lots (which were used for their driveway and front lawn) were found to be entitled to homestead protection with respect to all five lots regardless of the fact that

they had only claimed a homestead exemption for ad valorem tax purposes with respect to the lot upon which their residence was located.<sup>14</sup> The same result was reached in a case involving two contiguous lots which were acquired in separate transactions.<sup>15</sup>

### Types Property Interests Qualifying as Homesteads

The Florida Constitution does not distinguish between different types of ownership interests or property that qualify for the homestead exemption.<sup>16</sup>

**Life Estates:** A life estate interest “that gives the owner the right to use and possess a co-op as his or her residence may be sufficient” to establish a homestead interest which is exempt from creditors’ claim since homestead is broadly defined as “property owned by a natural person ... upon which the exemption shall be limited to the residence of the owner or the owner’s family.”<sup>17</sup> In that case, the court recognized that the Florida Constitution does not define “owned,” and stated:

“[I]t does not designate how title to the property is to be held and it does not limit the estate that must be owned, i.e., fee simple, life estate, or some lesser interest.... [T]he Florida courts have consistently held that the exemption should be liberally construed in favor of protecting the family home and those whom it was designed to protect”<sup>18</sup>

In analyzing the ownership interest necessary to claim the homestead exemption, consideration must be given to a person’s intention to make the property their homestead and the actual use of the property as the principal residence.<sup>19</sup> At least one other court has also held that a life estate is a protected homestead interest.<sup>20</sup>

**Leasehold Interests:** Florida courts have also upheld homestead exemption claims in cases in which the debtor merely leased the underlying real property.<sup>21</sup> In a Florida bankruptcy case, the debtor claimed that his residence located on a long-term leasehold was exempt under Florida law, and the court, citing the “long and well established history of liberally construing and applying” the homestead exemption, concluded that “ownership” for purposes of the homestead exemption is not limited to fee simple ownership. Rather, the court found that a lessee’s interest in a leasehold estate is, for all purposes, the equivalent of absolute ownership and is protected by Florida’s homestead exemption.<sup>22</sup>

**Trusts:** Both Florida appellate and bankruptcy courts have held that legal title does not need to be in an individual’s name in order to qualify for Florida’s homestead exemption. As noted above, a residence held in a revocable trust by a trustee who resided on the property and was also the settlor was held to be owned by a “natural person” and was, therefore, exempt from creditors’ claims.<sup>23</sup> In another case, legal title to a home was held not in the debtor’s name, but in the name of another person, as trustee. The court found

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that, even if the debtor only owned a beneficial interest in the property, she was entitled to homestead exemption.<sup>24</sup> Another recent case held that a residence held in a revocable trust was owned by a "natural person" for purposes of Florida's homestead exemption.<sup>25</sup>

**Partial Interests:** A half interest, the right of possession or any beneficial interest in property may be entitled to homestead protection from creditors' claims.<sup>26</sup>

### Types of Property Qualifying as Homesteads

Just as Florida courts liberally construe ownership interests qualifying for homestead status, the courts have broadly construed the types of property qualifying for homestead treatment for the purposes of the creditors' claims exemption. Thus, Florida courts have held that condominiums,<sup>27</sup> mobile homes,<sup>28</sup> co-operatives<sup>29</sup> and boats<sup>30</sup> all qualify as homesteads for the purposes of the creditors' claim exemption. However, a remainder interest in real property does not qualify as an exempt homestead interest since such an interest does not constitute a present possessory interest.<sup>31</sup> A very recent case recognized that insurance proceeds paid after a homestead suffers casualty damages are constitutionally exempt from creditors' claims; in that case, the court confirmed that such proceeds were not subject to a charging lien securing the debtor's attorneys' attorneys' fees.<sup>32</sup>

## Application of Homestead Exemption from Creditors' Claims

As set forth in Article X, Section 4(a) of the Florida Constitution, a homestead owned by a natural person is 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 thereon.

### Designation of Homestead Before Levy:

Pursuant to Section 222.01, Florida Statutes, a person wishing to avail themselves of Florida's homestead exemption from creditors' claims and who wishes to sell or encumber their homestead property may record a Notice of Homestead in the public records of the county in which the homestead property is located if a certified copy of a judgment is recorded in the public records. That statement should be in substantially the form set forth in the statutes.

After recordation, the Clerk is required to furnish a copy of the Notice of Homestead upon the judgment creditor reflected in the Notice, and, if the creditor fails to file an action seeking declaratory relief or foreclosure of their judgment lien within 45 days (and record a lis pendens), the sale or encumbrance described in the Notice of Sale shall be free and clear of the judgment lien. Subsection (5) of the foregoing statute provides that, in accordance with the Florida Constitution, the statute shall not apply to:

- (a) Liens and judgments for the payment of taxes and

assessments on real property,

(b) Liens and judgments for obligations contracted for the purchase of real property,

(c) Liens and judgments for labor, services, or materials furnished to repair or improve real property, or

(d) Liens and judgments for other obligations contracted for house, field, or other labor performed on real property.

**Designation of Homestead After Levy:** Pursuant to Section 222.02, Florida Statutes, whenever a levy is made upon property, a portion of which constitutes homestead property, the owner may, at any time before the sale date, notify the officer making the levy, by written notice under oath, of which portion of the property they regard as their homestead, and only the remainder shall be subject to sale under such levy.

**Effect of Bankruptcy Laws:** Federal bankruptcy law reduces the homestead exemption by the amount attributable to the debtor's disposition of non-exempt property with the intent to hinder, delay or defraud creditors within 10 years prior to the bankruptcy filing.<sup>33</sup> This provision is intended to prevent debtors from transferring the bulk of their assets into homestead property shortly before filing bankruptcy in order to eliminate debts while claiming their home as exempt property. In addition, bankruptcy law disallows homestead exemptions in excess of \$125,000 (which may be stacked with a joint debtor's exemption limitation) to the extent that additional value was added within 1,215 days of the bankruptcy filing, unless the additional value derived from another homestead within the same state or the homestead is the principal residence of a family farmer.<sup>34</sup>

**Federal Tax Liens:** The federal government may levy upon homestead property because federal law preempts the Florida Constitution. In fact, the federal government may even levy upon homestead property held as tenants by the entireties to satisfy a federal tax lien against only one of the spouses.<sup>35</sup>

## Protection of Surviving Spouse and Heirs

As noted above, the homestead exemption from creditors' claims derives from Article X, Subsection 4(b) of the Florida Constitution. The most "user friendly" and thorough analysis of Florida's homestead laws with respect to the exemption of a decedent's homestead from creditors' claims (as well as issues related to the devise or descent of homestead) is set forth in Rohan Kelley's "Homestead Paradigm," which, with his generous permission, is reproduced below.

**Protected Homestead:** For the purposes of Florida's Probate Code, "protected homestead" means the property described in Article X, Section 4(a)(1) of the Florida Constitution on which the exemption inures to the owner's surviving spouse or heirs under Article X, Section 4(b) of the Florida Constitution,<sup>36</sup> and real property owned as tenants by the entirety is not "protected homestead." Protected homestead is not considered to be an asset in the hands

of the personal representative under the Florida Probate Code;<sup>37</sup> thus, it is not subject to probate<sup>38</sup> or administrative expenses.<sup>39</sup>

**Creditors' Claims Exemption:** Only the decedent's surviving spouse and heirs are entitled to the homestead exemption from creditors' claims. If a decedent is not survived by a spouse or heirs, as defined in the Florida Probate Code,<sup>40</sup> then the decedent's homestead is not "protected homestead" and will be subject to creditors' claims. "Heirs" are defined to include those persons (including the surviving spouse), who are entitled under the statutes of intestate succession to a decedent's property. If a testate decedent was not survived by a surviving spouse or minor children but was survived by heirs, the homestead may be devised to any person described as an "heir" under the intestacy statute in order to qualify for the creditors' claims exemption.<sup>41</sup> However, if the homestead is devised to a person not qualifying as an "heir," it will not be considered to be a "protected homestead," and it will be subject to probate administration, administrative expenses and creditors' claims. Furthermore, if a decedent bequeaths proceeds from the sale of their homestead to their heirs, the homestead loses its protected status.<sup>42</sup>

**Personal Representative's Lien:** Notwithstanding the foregoing, the personal representative is entitled to a lien for funds advanced to preserve homestead property.<sup>43</sup>

(See "Kelly's Homestead Paradigm" Illustration, next page)

**Restrictions on Alienation:** The foregoing Homestead Paradigm provides an excellent segue between the issue of homestead exemptions from creditors' claims and issues arising from efforts to sell, encumber or otherwise transfer homestead realty. As noted above, in addition to the provisions set forth in Article X, Subsection 4(c) of the Florida Constitution, specific restrictions with respect to the devise and descent of homestead property are set forth in the Florida Probate Code.<sup>44</sup>

**Devise and Descent of Homesteads:** Florida law provides that, except with respect to entireties property or property devised as permitted by applicable law<sup>45</sup> and the Florida Constitution, the homestead shall descend in the same manner as other intestate property. However, if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.<sup>46</sup> The Florida Probate Code restates the constitutional mandate that the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child, except that the homestead may be devised to the owner's spouse if there is no minor child.<sup>47</sup> Notwithstanding the foregoing, homestead rights (as well as other spousal rights) may be waived in a properly executed marital agreement; provided, however, fair disclosure must be provided if the agreement is executed after marriage.<sup>48</sup>

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**Spousal Joinder Required for Inter Vivos Alienation of Homestead:** As set forth in Article X, Subsection 4(c) of the Florida Constitution, the owner of homestead realty may, if joined by their spouse if married, alienate the homestead by mortgage, sale or gift, and, if married, may transfer title to an estate by the entirety with their spouse. Obviously, if the owner is unmarried, no spousal joinder is required (but a recitation confirming the unmarried status is advisable). Married individuals must be joined by their spouse, and it is

recommended that the joinder be in the same instrument.<sup>49</sup>

### Exceptions:

**(1) Powers of Attorney:** Joinder may be accomplished through the use of a power of attorney (provided that the power of attorney was executed in the same manner as required for a deed).<sup>50</sup>

**(2) Creation of Tenancies by the Entireties:** It is not necessary for the other spouse to join in the execution of a deed which creates a tenancy by the entireties in homestead property that was previously owned by only one of the spouses.

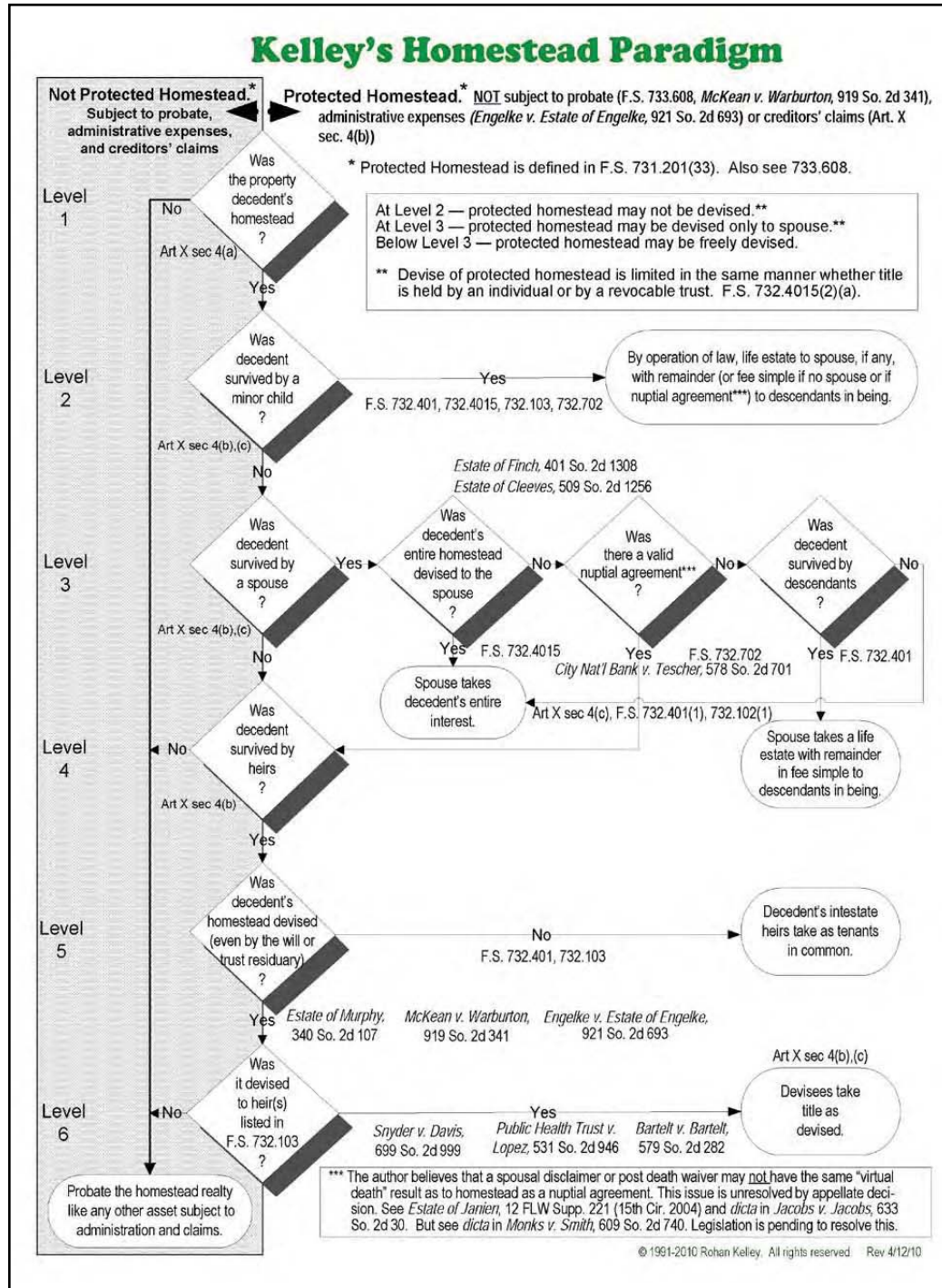
**(3) Guardianships:** If a spouse is incompetent, the guardian may, with court approval, join in the execution of the deed on behalf of the incompetent spouse.<sup>51</sup>

### Effect of a Spouse's Failure to Join:

**(1) Conveyances:** If homestead property is purportedly conveyed via deed without spousal joinder, the deed is a nullity and is void *ab initio*.<sup>52</sup>

**(2) Mortgages:** If homestead property is encumbered without spousal joinder, the mortgage is voidable.<sup>53</sup> However, a spouse who joins in the execution of a mortgage which includes a promise to pay may be liable for amounts due under the promissory note, even if the spouse did not execute the note, unless clear disclaimer language is included in the mortgage.<sup>54</sup>

**Tax Exemptions and Benefits:** One of the most confusing aspects of homestead law is the distinction between the availability of homestead exemptions from creditors' claims and various property tax benefits available with respect to homestead property. As noted above, the constitutional bases for homestead exemptions and benefits for tax purposes are set forth in Article VII of the Florida Constitution (and are further addressed in Chapter 196, Florida Statutes and in



Section 193.155, Florida Statutes), while the constitutional bases for homestead exemptions from creditors' claims and alienability restrictions are set forth in Article X of the Florida Constitution.

The most obvious distinction between the tax exemptions and other benefits described in Article VII and the creditors' rights exemptions and alienability restrictions arising under Article X is that the homestead status arising under Article X either exists or does not exist depending on the nature and ownership of the property; no action on the part of the owner or third parties is necessary. On the other hand, in order to avail oneself of the tax benefits set forth in Article VII, a taxpayer must affirmatively apply for those tax benefits within specific time frames. Thus, in a bankruptcy case referenced above, the court held that the creditors' rights exemption existed with respect to all five contiguous lots owned by the debtors despite the fact that the debtors had only claimed a homestead exemption for ad valorem tax purposes with respect to the single lot upon which their residence was located.<sup>55</sup>

## Homestead Tax Exemption

Florida's Constitution allows up to \$50,000 to be deducted from the assessed value of a primary residence (provided, however, only \$25,000 may be deducted for the purpose of calculating the assessed value for school taxes). The first \$25,000 and the third \$25,000 of the property's value (that portion of the property's value between \$50,000 and \$75,000) may be deducted from the assessed value. In order to avail oneself of the homestead tax exemption, a taxpayer must fulfill the following requirements:

The taxpayer must have legal or beneficial title to the property recorded in the appropriate public records prior to January 1<sup>st</sup> of the year of application.

A homestead application (Florida Department of Revenue Form DR-501) must be submitted to the appropriate Property Appraiser's office on or before March 1<sup>st</sup> of the year for which the exemption is sought (unless that date falls on a weekend or legal holiday, in which event the deadline is extended to the next business day).

The taxpayer must establish the appropriate Florida County as their legal domicile, reside on the subject property and be a U.S. citizen or permanent resident.

Once homestead exemption is established it is automatically renewed each year, until there is a change of ownership. Florida law requires the property owner to inform the appropriate Property Appraiser's office of any change in residency, use of the property or marital status that would affect the qualification of the homestead exemption.

If the taxpayer only uses a portion of their property for residential purposes, the Property Appraiser may allocate the homestead exemption and benefits between the homestead property and the non-homestead property. Thus, in a recent case, the court approved the apportionment of the homestead exemption between a single apartment building unit within which the taxpayer resided and the remaining four units which were rented to third parties.<sup>56</sup> In that case, the court specifically noted, in a footnote, that:

The term "homestead" is used in two other contexts in the Florida Constitution. First, it is used to define property that is protected from forced sale by creditors under article X, section 4(a)-(b) of the Florida Constitution. Second, it is used in the context of devise and descent in article X, section 4(c). The definition of "homestead" in those two contexts is distinct from that term's definition in the context of property taxation... It is well appreciated in the case law concerning homestead that the definition of homestead property for Article VII, section 6 purposes is not the same as Article X, section 4 of the Florida Constitution.<sup>57</sup> We recognize that the homestead provisions found in Article VII and Article X of our constitution are separate and distinct, and principles relating to one do not necessarily govern the other.<sup>58</sup>

For taxation and finance purposes, the court explained that the Florida Legislature had defined "real estate used and owned as a homestead" as real property to the extent provided in Article VII, Section 6(a) of the Florida Constitution, but less any portion thereof used for commercial purposes.<sup>59</sup> That statute goes on to provide that property rented for more than 6 months is presumed to be used for commercial purposes.

A similar result was reached in a recent case in which the court confirmed that the applicable statute,<sup>60</sup> which provides that the rental of an entire dwelling previously claimed as homestead for tax purposes shall constitute abandonment of the homestead, could be construed to deny a homestead exemption to a taxpayer who rented their prior dwelling, other than two locked closets, since the closets constituted a *de minimis* amount of space within the building.<sup>61</sup>

**"Save Our Homes" Amendment:** The "Save Our Homes Amendment" to Florida's Constitution (also commonly known as Amendment 10) was approved by Florida voters in 1992 and became effective as of January 1, 1995. This amendment limits any annual assessment increases on Florida homestead properties to the lesser of 3% or the increase in the CPI (consumer price index). However, except for specified statutory exceptions (which include interspousal transfers),<sup>62</sup> when homestead property is transferred, the homestead exemption is removed, and, subject to the portability rules described below, the assessed value increases to just value during the following year. There are exceptions to that limitation, including new construction or additions which are found to have escaped assessment increases in the past.

The "Save Our Homes" Amendment has been the subject of several lawsuits alleging that the Amendment is unconstitutional, three of which have been considered by the 1<sup>st</sup> DCA. In its first decision on this particular issue, the 1<sup>st</sup> DCA affirmed the trial court's order finding that the Article VII, Section 4(c) of the Florida Constitution did not violate the plaintiffs' rights under the Equal Protection Clause, the Privileges and Immunities Clause or the Commerce Clause of the United States Constitution.<sup>63</sup> Essentially, the plaintiffs argued that the "Save Our Homes" Amendment has a dis-

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criminary effect upon nonresidents. The court noted that the federal constitutional challenges had all been rejected in previous cases, including a U.S. Supreme Court case which upheld California's constitutional amendment limiting property tax increases to 2% per year in the absence of a change of ownership,<sup>64</sup> and a prior 1<sup>st</sup> DCA decision which upheld the \$25,000 homestead exemption.<sup>65</sup>

Two other cases addressing the constitutionality of the "Save Our Homes" Amendment, as well as the portability provisions described below, were considered by the 1<sup>st</sup> DCA on November 17, 2009. In the *Bruner* case, Florida residents alleged that both Amendments 10 (the "Save Our Homes" Amendment) and 1 (the Amendment giving rise to portability) violated the federal constitution,<sup>66</sup> and, in the *DeLuccio* case, nonresidents made identical arguments.<sup>67</sup> In *Bruner*, the court noted that it had already considered and rejected virtually identical challenges, so the court affirmed the trial court's dismissal of the plaintiffs' complaint. In *DeLuccio*, the court reversed the trial court's determination that it did not have subject matter jurisdiction to consider the complaint and remanded the case back to the trial court. Since the trial court had erroneously concluded that it lacked jurisdiction to consider the case, the appellate court noted that it also could not consider the merits of the case. However, it specifically noted that the case raised nearly identical challenges to those that had been raised and rejected by the court in the *Bruner* case.

**Other Exemptions:** In addition to the general homestead exemption described above, homestead property owned by certain taxpayers or used for certain purposes may be subject to other exemptions, including an additional \$50,000 homestead tax exemption for taxpayers at least 65 years old with household income of less than \$25,000 (subject to inflation adjustments) provided that the taxpayer's county or municipality has approve that additional exemption, and a discount for certain partially or totally disabled veterans who are at least 65 years old in proportion to their combat related disability.

**Portability:** Finally, on January 28, 2008, Florida voters

approved Amendment 1, which allows Florida residents who owned property qualifying as homestead property for tax purposes in 2007 or later to transfer the benefit of their "Save our Homes cap" (or a portion thereof) to subsequently acquired Florida homestead property. In order to qualify for portability benefits, the taxpayer must timely file an application on Florida Department of Revenue Form DR-501T, as provided in F.S. §193.155. Essentially, the portability benefit allows the taxpayer to transfer their entire assessment savings (not to exceed \$500,000) to their new residence if "upsizing" and a pro-rated portion of their assessment savings (again, not exceeding \$500,000) to a "downsized" new residence. The Hillsborough County Property Appraiser has provided the following explanation which more clearly illustrates the application of the portability concept to "real world" factual scenarios:

(See illustration below.)

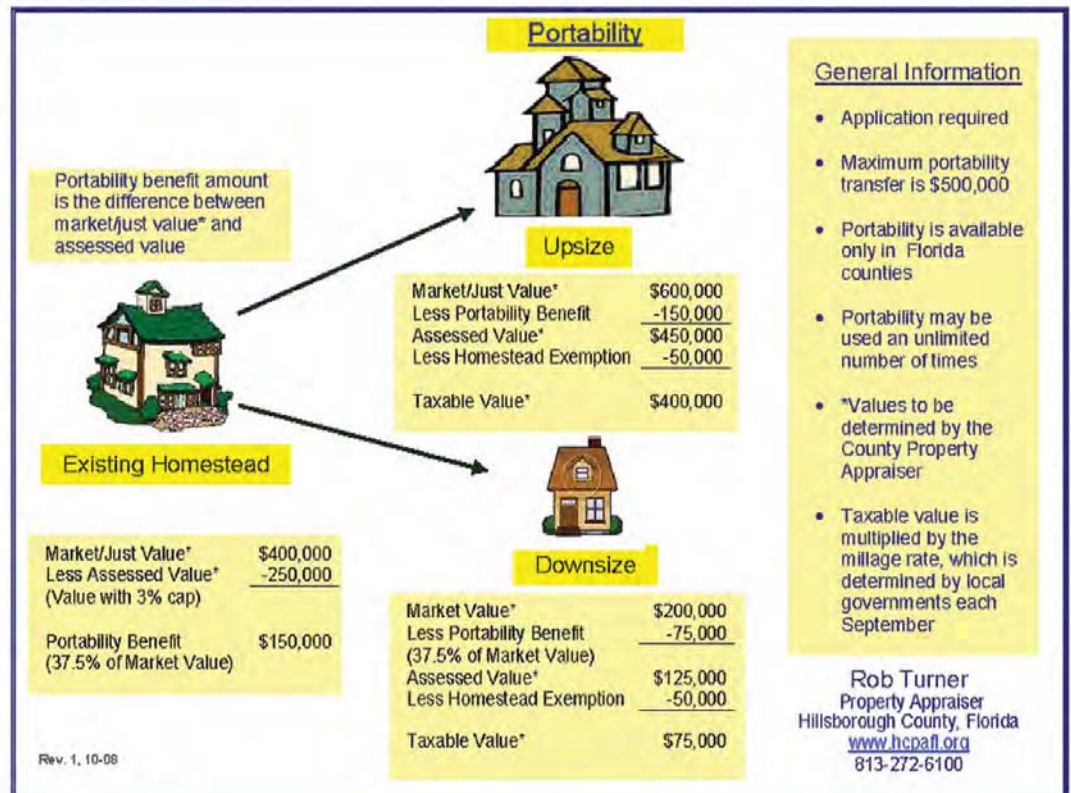
### Conclusion

While Florida's homestead laws are quite complicated and have evolved significantly over the years, through careful consideration of the foregoing analyses and continued study of future evolving developments with respect to our legal chameleon, it is possible to apply the appropriate laws in each applicable situation to arrive at the correct conclusion. ■

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### Endnotes:

- 1 Crosby and Miller, *Our Legal Chameleon: The Florida Homestead Exemption*, 2 U. Fla. L. Rev. 12 (1949).
- 2 Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. Fla. L. Rev. 227, 228 (1978).
- 3 *Carters Administrators v. Carter*, 20 Fla. 558, 569 (1875).
- 4 *Lanier v. Lanier*, 116 So. 867 (Fla. 1928), citing *Matthews v. Jeacle*, 55 So. 865 (Fla. 1911), and *Murphy v. Farquhar*, 22 So. 681 (Fla. 1897).
- 5 *Lanier* at 868 (citing *Nelson v. Hainlin*, 104 So. 589 (Fla. 1925)).
- 6 *Lanier* at 868.
- 7 *Hillsborough Investment Co., v. Wilcox*, 13 So. 2d 448 (Fla. 1943), citing *Clark v. Cox*, 85 So. 173 (Fla. 1920).
- 8 F.S. §628.4615(13).
- 9 *In re: Alexander*, 346 B.R. 546 (Bkrcty. M.D. Fla. 2006).
- 10 *Buchman v. Canard*, 926 So.2d 390 (Fla. 3<sup>rd</sup> DCA 2005), *rev. den.* 929 So.2d 1051 (Fla. 2006).
- 11 *Davis v. Davis*, 864 So.2d 458 (Fla. 1<sup>st</sup> DCA 2004).
- 12 *In re: Bell*, 252 B.R. 562 (Bkrcty. M.D. Fla. 2000).
- 13 *In re: Radtke*, 344 B.R. 690 (Bkrcty. S.D. Fla. 2006).
- 14 *In re: Coin*, 241 B.R. 258 (Bkrcty. S.D. Fla. 1999).
- 15 *In re: Mohammed*, 376 B.R. 38 (Bkrcty. S.D. Fla. 2007).
- 16 *In re Ballato*, 318 B.R. 205, 209 (Bkrcty. M.D. Fla. 2004), citing *Bessemer Properties v. Gamble*, 27 So.2d 832 (Fla. 1946); *Milton v. Milton*, 58 So. 718 (Fla. 1912); and *Southern Walls, Inc. v. Stilwell Corp.*, 810 So.2d 566 (Fla. 5<sup>th</sup> DCA 2002).
- 17 *Southern Walls* at 569.
- 18 *Southern Walls* at 569 – 570, citing *Havoco of Am., Ltd. v. Hill*, 790 So.2d 1018, 1020 (Fla. 2001).
- 19 *Southern Walls* at 572, citing *In re Dean*, 177 B.R. 727 (Bkrcty. S.D. Fla. 1995); and *Edward Leasing Corp. v. Uhlig*, 652 F.Supp. 1409, 1412 (S.D. Fla. 1987).
- 20 *Westport Recovery Corp. v. Midas*, 954 So.2d 750 (Fla. 4<sup>th</sup> DCA 2007).
- 21 *In re Dean*, 177 B.R. 727 (Bkrcty. S.D. Fla. 1995); and *In re McAtee*, 154 B.R. 346 (Bkrcty. N.D. Fla. 1993).
- 22 *McAtee* at 347-348.
- 23 *In re: Alexander*, 346 B.R. 546 (Bkrcty. M.D. Fla. 2006).
- 24 *Callava v. Feinberg*, 864 So.2d 429, 431 (Fla. 3<sup>d</sup> DCA 2004), citing *Bessemer Props., Inc. v. Gamble*, 27 So.2d 832 (Fla. 1946); and *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So.2d 774, 776 (Fla. 1<sup>st</sup> DCA 1991).
- 25 *Engelke v. Estate of Engelke*, 921 So.2d 693 (Fla. 4<sup>th</sup> DCA 2006).
- 26 *Coy v. Mango Bay Property & Investment, Inc.*, 963 So. 2d 873 (Fla. 4<sup>th</sup> DCA 2007).
- 27 *Braswell v. Braswell*, 890 So.2d 379 (Fla. 3<sup>rd</sup> DCA 2004).
- 28 *Gold v. Schwartz*, 774 So.2d 879 (Fla. 4<sup>th</sup> DCA); and *Meadow Groves Management, Inc., v. McKnight*, 689 So. 2d 315 (Fla. 5<sup>th</sup> DCA 1997).
- 29 *Southern Walls, Inc. v. Stilwell Corp.*, 810 So.2d 566 (Fla. 5<sup>th</sup> DCA 2002).
- 30 *In re: Mead*, 255 B.R. 80 (Bkrcty. S.D. Fla. 2000); and *Miami Country Day School v. Bakst*, 641 So.2d 467 (Fla. 3<sup>rd</sup> DCA 1994).
- 31 *In re: Plaster*, 271 B.R. 202 (Bkrcty. M.D. Fla. 2001).
- 32 *Quiroga v. Citizens Property Insurance Corp.*, 34 So. 3<sup>rd</sup> 101 (Fla. 3<sup>rd</sup> DCA 2010), citing *Orange Brevard Plumbing & Heating Co., v La Croix*, 137 So.2d 201 (Fla. 1962).
- 33 11 U.S.C. §522(o).
- 34 11 U.S.C. §522(p).
- 35 *Weitzner v. United States*, 309 F.2d 45 (5<sup>th</sup> Cir. 1962), *cert. den.* 372 U.S. 913.
- 36 F.S. §731.201(33).
- 37 F.S. §733.608.
- 38 *McKean v. Warburton*, 919 So.2d 341 (Fla. 2005).
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- 40 F.S. §731.201(20).
- 41 *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997).
- 42 *McKean v. Warburton*, 919 So.2d 341 (Fla. 2005).
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- 44 F.S. §§732.401 and 732.4015.
- 45 F.S. §732.4015.
- 46 F.S. §732.401.
- 47 F.S. §732.4015.
- 48 F.S. §732.702.
- 49 *Uniform Title Standard 18.1*.
- 50 F.S. §689.111.
- 51 F.S. §744.441(12).
- 52 *Jahn v. Purvis*, 199 So. 340 (Fla. 1940), and *Robbins v. Robbins*, 411 So.2d 1024 (Fla. 2<sup>d</sup> DCA 1982).
- 53 *Pitts v. Pastore*, 561 So.2d 297 (Fla. 2<sup>d</sup> DCA 1990).
- 54 *Ehrlich v. Mangicapra*, 626 So.2d 702 (Fla. 4<sup>th</sup> DCA 1993).
- 55 *In re: Coin*, 241 B.R. 258 (Bkrcty. S.D. Fla. 1999).
- 56 *Karayiannakis v. Nikolits*, 23 So.3<sup>rd</sup> 844 (Fla. 4<sup>th</sup> DCA 2009).
- 57 *Phillips v. Hirshon*, 958 So.2d 425 (Fla. 3<sup>rd</sup> DCA 2007).
- 58 *Crain v. Putnam*, 687 So.2d 1325 (Fla. 4<sup>th</sup> DCA 1997).
- 59 F.S. §196.012(13).
- 60 F.S. §196.061.
- 61 *Haddock v. Carmody*, 1 So.3<sup>rd</sup> 1133 (Fla. 1<sup>st</sup> DCA 2009).
- 62 F.S. §193.155(3).
- 63 *Lanning v. Pilcher*, 16 So.3<sup>rd</sup> 294 (Fla. 1<sup>st</sup> DCA 2009).
- 64 *Nordlinger v. Hahn*, 505 U.S. 1 (1992).
- 65 *Reinish v. Clark*, 765 So.2d 197 (Fla. 1<sup>st</sup> DCA 2000).
- 66 *Bruner v. Hartsfield*, 23 So.3<sup>rd</sup> 192 (Fla. 1<sup>st</sup> DCA 2009).
- 67 *DeLuccio v. Havill*, 25 So.3<sup>rd</sup> 31 (Fla. 1<sup>st</sup> DCA 2009).