EXEMPTIONS
IN
FLORIDA BANKRUPTCY PRACTICE
(INITIAL PRESENTATION IN 2001)

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I. DOMICILE.

A. General. The concept of domicile is important in the laws relating to exemptions. It is often the preliminary issue that must be analyzed. And, like similar issues, it is difficult to analyze because it relates to a state of mind, i.e. intent. It is the place that a person intends to claim as their permanent home. *Minick v. Minick,* 149 So. 483 (Fla. 1933). Everyone has one, but only one. *In re Lordy,* 214 B.R. 650 (Bankr. S.D. Fla. 1997). It is often used (or misused) interchangeably with the term "residence". However, a person can have more than one residence, but can only have one domicile. *Id.* In the case of *Smith v. Croom,* 7 Fla. 81 (1857) the Florida Supreme Court noted that a domicile once established continues until a new domicile is acquired. See also *Wade v. Wade,* 113 So. 374 (Fla. 1927).

B. Significance in applying Florida exemptions.

1. Homestead issues. The Florida Constitution of 1885 accorded the homestead protection to the head of the family "residing in this state." Accordingly, the Florida Supreme Court held that the character of the property as homestead required an actual intent to permanently reside upon the property as a permanent residence. *Hillsborough Investment Co. v. Wilcox,* 13 So. 2d 448 (Fla. 1943). However, the Constitution of 1968 omitted this phrase. Nonetheless, the requirement for an

intent to permanently reside in the home has continued. But it should be noted that the owner of the home inside a municipality might not have to be domiciled in Florida. The Constitution protects the residence of "the owner or his family." Accordingly, it is sufficient if the family intends to permanently reside in the home. *Barnett Bank of Cocoa v. Osborne*, 349 So. 2d 223 (4th DCA, Fla. 1977).

2. The wage exemption is limited to persons domiciled in Florida. *In re Szuets,* 22 B.R. 805 (Bankr. M.D. Fla. 1982).

3. The exemption of life insurance policies is expressly limited to a "person residing in the state." *Section 222.13, Florida Statutes.*

4. Both exemptions for cash surrender value of life insurance as well as annuity contracts are limited to "citizens and residents of the state." *Section 222.14, Florida Statutes.*

5. And in general, courts have held that a person must be domiciled in Florida in order to claim the benefits of Florida's exemptions. *In re Schulz,* 101 B.R. 301 (Bankr. N.D. Fla. 1989).

C. Significance in bankruptcy cases.

Domicile is one of the choices for venue of a bankruptcy case. But of greater significance, it determines whether or not Florida's laws relating to exemptions will apply. The law of the state of debtor's

domicile for the greater part of the 180 days preceding the filing of the petition determines applicable exemptions. *11 USC 522(b)(2)(A).*

In our highly mobile society this can create a number of issues including determining the applicable domicile, as well as applying the law of that domicile when people move. For example, if a person moves to Florida and files a petition seeking relief under the Bankruptcy Code before the expiration of 90 days, the law of the state from which that person came will determine applicable exemptions. *In re Lordy*, 214 B.R. 650 (Bankr. S.D. Fla. 1997). But the converse is not true. If a person moves from Florida but files a petition seeking relief under the Bankruptcy Code in Florida within 90 days from the move, Florida exemptions will not apply. *In re Schulz,* 101 B.R. 301 (Bankr. N.D. Fla. 1989); *In re Butcher,* 63 B.R. 30 (Bankr. E.D. Tenn. 1986). Instead, the person is entitled to claim the federal exemptions. *Id.* This is because the person is no longer a resident of Florida and cannot, therefore, claim Florida's exemptions. *Id.*

D. Other choice of law issues relating to domicile can impact exemptions. Generally, the law of the forum will determine which state's law will apply. Accordingly, problems can arise where a judgment is entered against a Florida resident in another state and an attempt is made to enforce that judgment in the other state. Examples can be found where the person is domiciled in Florida but a garnishment is filed against the out of state corporate office of such person's employer. Other problems

can arise relating to intangibles such as stock and contract rights. While an in depth treatment of conflicts of law issues is beyond the scope of this paper, it is the author's experience that courts of other states often do not recognize or apply the exemptions of Florida. If Florida courts have jurisdiction over the judgment holder, it may be possible to obtain an injunction in Florida against the judgment holder to enjoin enforcing the judgment against exempt assets.

E. Procedure for manifesting intent to have a Florida domicile. Section 222.17 of the Florida Statutes provides a procedure for filing a sworn statement of domicile. However, it is doubtful that filing such a sworn statement has any significant effect. *In re Lordy,* 214 B.R. 650 (Bankr. S.D. Fla. 1997).

F. Cases involving multiple residences often result in disputes relating to domicile. See *In re Defelice,* 172 B.R. 130 (Bankr. S.D., Fla. 1994). See also, Trowbridge, *"Domicile Problems of Winter Residents,"* 11 Miami L. Q. 375 (1957). In order for there to be a change of domicile there must be a physical presence at the new location and an intention to remain there indefinitely or the absence of an intent to go anywhere else. *In re DeFelice,* supra. Since domicile is a question of intent, the courts must look to surrounding circumstances to determine such intent. *District of Columbia v. Murphy,* 314 U.S. 441, 62 S. Ct. 303 (1941); *In re Lordy,* supra. The following is a non-exclusive list of factors that may be relevant to determining domicile in cases involving multiple residences:

1. Where is the debtor registered to vote?
2. Where is the debtor licensed to drive?
3. Where are the debtor's cars titled?
4. Has the debtor claimed the ad valorem tax exemption on any Florida residence?
5. Has the debtor filed an affidavit of domicile anywhere?
6. Where are the professionals that debtor uses located? His or her doctor? Dentist? Lawyer? Accountant? Veterinarian?
7. Where does the debtor work?
8. How much time does the debtor spend in Florida?
9. Does the debtor's occupation, trade or profession require any licenses? If so, in what states is he or she licensed?
10. Does the debtor have family, and if so, where do they stay?
11. Does the debtor have pets, and if so, where do they stay?
12. Where does the debtor have his or her bank accounts?
13. Where does the debtor receive his or her mail? Magazine subscriptions? Bills?
14. What address did the debtor list on tax returns?
15. Has the debtor filed any tax returns required by Florida law?
16. What address has the debtor used in applications such as loan applications, credit card applications, etc.
17. What memberships does debtor have in civic, social and religious organizations in the alleged domicile?

18. Where does the debtor keep important belongings?

II. FLORIDA EXEMPTIONS. Exemptions in Florida come from Florida's Constitution, its statutes, as well as its common law (as in the case of immunities that are often treated as exemptions). The following sets forth applicable exemptions by source.

A. The Florida Constitution. Article X, Section 4, of the Florida Constitution exempts from forced sale both the homestead and $1,000 worth of personal property. It is important to note that many of the cases interpreting one may have relevance on the other, since they both derive from the same source and have many of the same qualifying provisions, exceptions and limitations. For a thorough analysis of the constitutional exemptions see the series of articles Crosby and Miller, *"Our Legal Chameleon, The Florida Homestead Exemption: Parts I-III," 2 U of Fla. L. R. 12(1949);* Crosby and Miller, "*Our Legal Chameleon, Part V,"* 2 U of Fla. L. R. 219 (1949); Maines and Maines, *"Our Legal Chameleon Revisited, Florida's Homestead Exemption,"* 30 U of Fla. L. R. 227 (1978); and Seiden, *"An Update on the Legal Chameleon: Florida's Homestead Exemption and Restrictions,"* 40 U of Fla. L.R. 919 (1988).

1. Homesteads in Florida.

a. Requirements.

(1) Natural person.

Prior to 1984 the homestead exemption was limited to the "head of the household." In 1984

the Constitution was amended to extend to property "owned by a natural person."

While the determination of a "natural person" should be relatively easy, this change has nonetheless created issues relating to the rights of both a husband and wife to claim the homestead exemption. It seems clear that both the husband and wife are natural persons. But because of the potential for abuse the courts have struggled with the right of both spouses to claim separate homesteads.

It is generally recognized that both the husband and the wife can claim the $1,000 personal property exemption in the same or separate property. See *In re Hawkins,* 51 B.R. 348 (Bankr. S.D. Fla., 1985); *In re Howe,* 241 B.R. 242 (Bankr. M.D. Fla. 1999).

In the absence of fraud, the courts have allowed both the husband and wife to claim separate homesteads. *In re Colwell,* 196 F. 3d 1225 (11th Cir. 1999); *In re Russell,* 60 B.R. 190 (Bankr. M.D. Fla. 1986).

While the author was unable to find any reported case, it would appear logical that a husband and wife that are living together can each claim a one-half acre of a one-acre parcel (or 160 acres out of a 320 acre parcel outside a municipality). In *Morgan v. Bailey*, 105 So. 143 (Fla. 1925) the Florida Supreme Court held that it is not necessary that one person have the entire estate. See also, *Milton v. Milton*, 58 So. 718 (Fla. 1912). Accordingly, each natural person can claim an undivided interest in the whole. There is no reason that this should be limited to unmarried persons.

A creditor may argue that property held by husband and wife is held as tenants by the entireties, and that such tenancy is not a natural person or is treated as one person. *See Section IIC below*. However, since the amendment to the Constitution was clearly designed to expand the eligibility for the exemption, it is doubtful that it was the intent in amending the Constitution to preclude a husband and wife who

own their home as tenants by the entireties from claiming their homestead as exempt.

Moreover, as will be seen below, all that is required is a beneficial interest in the property. See Section (3) below. See also, *Coleman v. Williams,* 200 So. 207 (Fla. 1941) where the Florida Supreme Court noted that property held as tenants by the entireties can qualify as homestead. See also *Harkins v. Holt*, 169 So. 481 (Fla. 1936); *Oates v. New York Life Ins. Co.* 152 So. 671 (Fla. 1934).

(2) Limitations on location, size and use.

(a) Within a municipality.

Within a municipality the property is limited to one-half acre and limited to a residence. A municipality has been defined as "a legally incorporated or duly authorized association of the inhabitants of a particularly designated place or limited territorial area, established for prescribed local governmental and public utility or other public purposes." *State ex rel. Atty Gen.*

v. City of Avon Park, 149 So. 409 (Fla. 1933).

The limitation to "the residence" was a change from the 1885 Constitution. Prior to 1968 the Constitution provided that the homestead "shall not extend to more improvements or buildings than the residence and business house of the owner." The reference to the business house as well as the reference to improvements or buildings was not contained in the 1968 revisions.

The Constitution currently reads, "...shall be limited to the residence...." As a result, courts have been required to interpret such provision in connection with:

(I). Improvements. Are pools, sheds and the like within the exemption? See, *Edward Leasing Corp. v. Uhlig*, 652 F. Supp. 1409 (S.D. Fla. 1987).

(II). Contiguous lots. It is relatively clear that an unimproved, contiguous lot that is not used for business purposes is within the exemption. *In re Dudeney*, 159 B.R. 1003 (Bankr. S.D. Fla. 1993). But see *In re Estate of Ritter,* 407 So. 2d 386 (3rd DCA Fla. 1981).

(III). Business use. The courts are divided on the impact of conducting business on a portion of the property. See the following cases that hold that use of a portion of the premises for business does not preclude the homestead exemption, *Edward Leasing Corp. v. Uhlig,* 652 F. Supp. 1409 (S.D. Fla. 1987); *In re Haning,* 252 B.R. 799 (Bankr. M.D. Fla. 2000); *In re Nelson,* 225 B.R. 508 (Bankr. S.D. 1998). But see the following case for a contrary result, *In re Bell*, 252 B.R. 562 (Bankr. M.D. Fla. 2000).

(IV). Rental of a portion. There was a split of authority in early cases on

whether the homestead exemption can be claimed on the portion of a property that is rented. Those cases holding that the rental did not negate the homestead exemption did so on a theory that the property could not be divided. However, the 11th Circuit opinion in *In re Englander*, 95 F. 3d 1028 (11th Cir. 1996) resolved the divisibility problem by recognizing the remedy of partition and division of the proceeds. See also *In re Blocker*, 242 B.R. 75 (Bankr. M.D. Fla. 1999); *In re Pietrunk*, 297 B.R. 18 (Bankr. M.D. 1997); *In re Nofsinger*, 221 B.R. 1018 (Bankr. S.D. Fla. 1998) and *In re Oliver*, 228 B.R. 771 (Bankr. M.D. Fla. 1998).

(V). What if a property was partially rented or used for business purposes but such activity has ceased. Contrast *Edward Leasing Corp. v. Uhlig*, 652 F. Supp. 1409 (S.D. Fla. 1987) with *In re*

Bell, 252 B.R. 562 (Bankr. M.D. Fla. 2000).

(b) Outside a municipality.

The homestead exemption outside a municipality extends to "one hundred sixty acres of contiguous land and improvements thereon...;" Apart from the greater size limitation, the provision on its face does not appear to be limited to the portion used as a residence. Nonetheless the Court in *In re Nofsinger,* 221 B.R. 1018 (Bankr. S.D. Fla. 1998), held that the limitation to the residence in the 1968 Constitution was applicable to both rural property as well as property within a municipality. This is contrary to the earlier holding in the Northern District that recognized that a portion of the rural homestead remains exempt even if it is leased or rented. *In re Israel,* 94 B.R. 729 (Bankr. N.D. Fla. 1988).

The approach of the Northern District appears to be the better reasoned approach for several reasons. First, it is more in line with a grammatically correct reading of the Constitution. To include the residential limitation in the clause dealing with rural homesteads ignores the effect of the semicolon. The semicolon was omitted by the court in *In re Nofsinger* when it quoted the constitutional provision.

Second, it is consistent with the historical interpretations of the Constitution by the Florida Supreme Court. The 1885 constitution contained a limit on homesteads within a municipality, albeit broader than the 1968 revision. However, that clause was never construed as a limitation on rural homesteads. The latter had no limitation on use. See *Buckels v. Tomer,* 78 So. 2d 861 (Fla. 1955);

Brandies v. Perry, 22 So. 268 (1897). See also, *McDougall v. Meginis*, 21 Fla. 362 (1885).

And, the *Nofsinger* court's interpretation ignores the fundamental reasons why rural and municipal homesteads have always been treated differently. A rural homestead was given a larger size limitation and was not limited in use to allow farmers to claim their farms as exempt. If the *Nofsinger* court's interpretation is correct, the portion of rural property that is used by a debtor for business purposes such as farming would not be exempt.

Assuming that there is no limitation on rural homestead to the portion used as a residence, then earlier cases that refused to recognize a limitation on use will continue to apply. For example, property can be platted and subdivided. *Shone v. Bellmore*, 78 So. 605 (Fla.

1918); *Buckels v. Tomers*, 78 So. 2d 861 (Fla. 1955).

(c) The parcels must be contiguous.

Since the 1968 revisions the Constitution expressly requires that the property claimed as exempt be contiguous. Such a requirement, although not expressed in earlier versions of the Constitution, was nonetheless required on the theory that the property had to be part of the owners residence. This is (and was) true for property inside and outside a municipality.

As a result, the parcels cannot be separated by another parcel. *Brandies v. Perry*, 22 So. 268 (Fla. 1897).

But what if the intervening parcel is leased by the debtor?

And, where a road separates the property, there may be a question whether or not the parcel across the road is exempt. Where the road is the result

of an easement, this does not destroy the contiguous nature of the property. See, *In re Jackson,* 169 B.R. 742 (Bankr. N.D. Fla. 1994) where the court distinguished between roadways resulting from fee title and roadways granted by an easement. See also, *Shone v. Bellmore,* 78 So. 605 (Fla. 1918).

(d) Effect of subsequent incorporation.

If the debtor acquired the property prior to incorporation into a municipality, it retains its exempt status when incorporated unless the owner consents.

But, consents to what? Is it sufficient if the owner requests that his or her property be included within the municipality? See *In re Boucher,* 8 B.R. 713 (Bankr. M.D. Fla. 1981) where the court said that "the type of consent meant by this constitutional provision requires either an affirmative step

positively evidencing an intent to reduce one's homestead acreage or conduct that may be construed as abandonment of the property as homestead."

(e) Designation of exempt portion.

Where the debtor owns property that exceeds the size limitations of the Constitution, he or she can normally make a reasonable designation of that portion that is exempt. *Shone v. Bellmore,* 78 So. 2d 605 (Fla.); *Frase v. Branch*, 362 So. 2d 317 (2d DCA Fla. 1978). But see *In re Kellogg*, 197 F. 3d 1116 (11th Cir. 1999); *Englander v. Mills*, 95 F. 3d 1028 (11th Cir. 1996). This is consistent with the right of the debtor to designate personal property within the $1,000 exemption.

But the exercise of that right must be reasonable. It cannot destroy the marketability of the non-exempt portion. *In re Kellogg,* supra; and *In re Englander*, supra.

If the non-exempt portion cannot be sold, the entire parcel will be sold and the proceeds apportioned.

And, the actions of the owner, such as sale of a portion, may constitute a designation. *Frase v. Branch,* 362 So. 2d 317 (2d DCA, Fla. 1978).

(3) The Constitution requires that the property be "owned." Accordingly, the debtor must have a present, possessory interest in the property to claim it as homestead. The terms of the Constitution limit the exemption to "property owned by" a natural person. Thus, the debtor must own some interest in the property. *In re McCall,* 69 B.R. 975 (M.D. Fla. 1987); *Bowers v. Mozingo,* 399 So. 2d 492 (3rd DCA Fla. 1981); *In re Estate of Melisi,* 440 So. 2d 584 (4th DCA Fla. 1983). It is sufficient if the debtor only owns an undivided interest in the property. *Milton v. Milton,* 58 So. 718 (Fla. 1912).

But can the property interest that the debtor "owns" be a leasehold interest? Clearly, in the case of mobile homes there is an exemption where

the debtor has a leasehold interest because the statute exempts a mobile home on "land not his or her own which he or she lawfully possess." But in connection with Article X, Section 4 it may be sufficient if the leasehold interest has the indicia of an ownership interest. See *In re McAtee,* 154 B.R. 346 (Bankr. N.D. Fla. 1993) involving a 99 year lease of property on Santa Rosa Island. See also *In re Dean,* 177 B.R. 727 (Bankr. S. D. Fla. 1995). Contrast these cases with *In re Tenorio,* 107 B.R. 787 (Bankr. S.D. Fla. 1989) where the debtor had a year-to-year lease.

It is clear that the ownership interest that is required to satisfy the Constitution does not have to include legal title; an equitable or beneficial interest is sufficient. *Coleman v. Williams,* 200 So. 207 (Fla. 1941); *Beall v. Pnickney,* 150 F. 2d 467 (5th Cir., 1945). However, what is sufficient is not always clear. Under some circumstances an interest in property held in a wife's name may be sufficient. *Heiman v. Capital Bank,* 438 So. 2d 932 (3rd DCA, Fla. 1983); *Coleman v.*

Williams, 200 So. 207 (Fla. 1941); and *Beall v. Pinckney*, 150 F. 2d 467 (5th Cir. 1945).

What about property owned by a corporation in which debtor owns some or all of the stock? The debtor was not allowed to claim as exempt here stock in a cooperative apartment? *In re Estate of Wartels*, 357 So. 2d 708 (Fla. 1978). See also, *In re Duque*, 33 B.R. 201 (Bankr. S.D. Fla., 1983). But some courts have allowed a debtor to claim as exempt an interest in property of a corporation or partnership that has been dissolved? *Manda v. Sinclair*, 278 F. 2d 629 (5th Cir. 1960); and *In re David*, 54 F. 2d 140 (S.D. Fla., 1931).

Since a present, possessory interest is required, a future interest or remainder interest is not exempt even if coupled with actual possession. *Aetna Ins. Co. v. LaGasse*, 223 So. 2d 727 (Fla. 1969); *In re Pettit*, 231 B.R. 101 (Bankr. M.D. Fla., 1999).

(4) Actual occupancy with an intent to permanently reside. The debtor must actually occupy the residence. An intent to occupy the residence in the

future is not sufficient. *Solary v. Hewlett,* 18 Fla. 756 (1882); *State Dep't of Revenue ex re Vickers v. Pelsey,* 779 So. 2d 629 (1st DCA Fla. 2001). For example, a person cannot claim property as his or her homestead while the home is being constructed but is unoccupied. *Id.* See also *Oliver v. Snowden,* 18 Fla. 823 (1882); *Drucker v. Rosenstein,* 19 Fla. 191 (1882); *Porter-Mallard Co. v. Dugger,* 157 So. 429 (Fla. 1934); *In re Samson,* 105 B.R. 124 (Bankr. S.D. Fla. 1989); *First Nat'l Bank of Chipley v. Peel,* 145 So. 177 (Fla. 1932). But see, *In re Brown,* 165 B.R. 512 (Bankr. M.D. Fla. 1994) and *Second Nat'l Bank v. Richter,* 148 So. 517 (Fla. 1933).

But occupancy alone is not sufficient. The debtor must be occupying the property with the intent of permanently residing there. *Hillsborough Investment Co. v. Wilcox,* 13 So. 2d 448 (Fla. 1943). Where the debtor cannot legally have such an intent, he or she cannot claim the homestead exemption. See *In re Cooke,* 1 B.R. 537 (Bankr. N.D. Fla. 1979), aff'd 683 F. 2d 130 (5th Cir. 1982) and 412 So. 2d 340 (Fla. 1982) where a

foreign national did not have a permanent visa. See also, *Kogan v, Robbins,* 594 So. 2d 355 (3rd DCA Fla. 1992) where long term occupancy was not allowed under zoning laws.

But permanent doesn't necessarily mean forever. It is sufficient if the debtor intends to reside on the property indefinitely. *Engel v. Engel,* 97 So. 2d 140 (2nd DCA Fla. 1957).

The requirements of actual occupancy and an intent to remain there "permanently" have required the courts to consider the effect of factors that seem inconsistent with them.

(a) Temporary abandonment.

There is no question that the exemption can be abandoned. *Nelson v. Hainlain,* 104 So. 589 (Fla. 1925); *Mathews v. Jeacle,* 55 So. 865 (Fla. 1911). However, occupancy does not have to be continuous. *Read v. Leitner,* 86 So. 425 (Fla. 1920). To constitute abandonment an owner (or both the owner and his family if the property is within a municipality) must relinquish

possession with the intention of discontinuing its use as a homestead. *Hillsborough Inv. Co. v. Wilcox,* 13 So. 2d 448 (Fla. 1943); *Matthews v. Jeacle*, 55 So. 865 (Fla. 1911) and *Barclay v. Robertson,* 65 So. 546 (Fla. 1914). See also, *In re Harrison,* 236 B.R. 788 (Bankr. M.D. Fla. 1999) where debtor left the marital home after a divorce but his former spouse and son continued to live there. See also, *In re Luttge*, 204 B.R. 259 (Bankr. S.D. Fla. 1997).

The key question is, "Does the debtor (or his or her family) intend to return?" This is a question of fact that requires consideration of all pertinent facts and circumstances, including the length of the absence, reasons for the absence, use of the property during the absence, and other factors evidencing intent (or lack of intent) to return. *Hillsborough Inv. Co. V. Wilcox,* 13 So. 2d 448 (Fla. 1943). For example, see *In*

re Herr, 197 B.R. 939 (Bankr. S. D. Fla. 1996) where debtor's house was destroyed by a hurricane 3 years before and the property had a for sale sign on it but the debtor testified that he intended to sell the house and use the proceeds to buy a new one. On the other hand, the court in *In re Bratty,* 202 B.R. 1008 (Bankr. S.D. Fla. 1996) denied the exemption where the debtor left the state after his business failed and rented his condo for successive terms of 6 months to a year, and when he subsequently returned to Florida he took up a new residence. See also *U.S. v. Boyette*, 413 So. 2d 1250 (1st DCA Fla. 1982) and *In re Shillinglaw,* 81 B.R. 138 (Bankr. S.D. Fla. 1987). The objecting party has the burden of proving an abandonment.

(b) Dissolutions of marriage.

It is a common occurrence for one spouse to be granted exclusive

possession of the home after dissolution of the marriage. Often the home will not be available for sale until the occurrence of some event in the future. This has raised the question whether or not the spouse no longer residing in the home can claim his or her interest in the home as exempt. For cases addressing this issue see, *Barnett Bank of Cocoa, N.A. v. Osborne*, 349 So. 2d 223 (4th DCA Fla. 1977); *In re Estate of Melisi,* 440 So. 2d 584 (4th DCA Fla. 1983); *Cain v. Cain*, 549 So. 2d 1161 (4th DCA Fla. 1989); *In re Harrison,* 236 B.R. 788 (Bankr. M.D. Fla. 1999); and *In re Luttge*, 204 B.R. 259 (Bankr. S.D. Fla. 1997). But see, *In re Sammut,* 171 B.R. 411 (Bankr. M.D. Fla. 1994); *Sackheim v. Marine Bank & Trust Co.*, 341 So. 2d 247 (2nd DCA Fla. 1976) and *In re Cooper,* 197 B.R. 698 (M.D. Fla. 1996).

The decisions of the courts that allow the exemption to the spouse that is

no longer residing in the family home are based upon one of two theories, either the right to claim the homestead of the owner's family for homes within a municipality or the intent of the debtor to reinvest the proceeds in another home upon sale.

(c) The owner intends to sell his house and move.

A contract to sell the home without more will not result in loss of the exemption where the debtor remains in possession. *In re Estate of Skuro*, 487 So. 2d 1065 (Fla. 1986); *In re Herr,* 197 B.R. 939 (Bankr. S.D. Fla. 1996).

Even if the debtor moves before the sale the exemption will not be lost if debtor intends to reinvest the proceeds in another home in Florida. *In re Beebe*, 224 B.R. 817 (Bankr. N.D. Fla. 1998). See also, *Beensen v. Burgess,* 218 So. 2d 518 (4th DCA Fla. 1969).

(d) Proceeds from the sale of the former home.

The proceeds from a sale remain exempt if, and only if, the debtor shows a good faith intention to reinvest the proceeds in another homestead within a reasonable time. *Orange Brevard Plumbing & Heating Co. v. LaCroix,* 137 So. 2d 201 (Fla. 1962); *SunTrust Bank / Miami NA v. Papadopolous,* 740 So. 2d 594 (3rd DCA Fla. 1999).

The proceeds that are exempt are limited to the portion that the debtor intends to reinvest. *Id.* See also, *In re McDonald,* 100 B.R. 598 (Bankr. S.D. Fla. 1989).

Prior use of a portion of the funds for other purposes does not preclude asserting the exemption as to the remaining funds. *In re Binko,* 258 B.R. 515 (Bankr. S.D. Fla. 2001). Such prior use, however, may reflect upon the

intent to use the remaining funds to reinvest in another homestead.

And, there must be intent to reinvest in a new homestead within a reasonable period. Accordingly, if the proceeds are in the form of a note and mortgage payable over a significant period of time, the proceeds may not be exempt. *Sun First National Bank of Orlando v. Gieger,* 402 So. 2d 428 (5th DCA, Fla. 1981).

Commingling with other funds will preclude the claim of exemption unless the proceeds are traceable. *In re Orange Brevard Plumbing & Heating Co v. LaCroix,* supra.

(e) Insurance and other proceeds.

Insurance proceeds from loss or damage to the homestead may be claimed as exempt. *Kohn v. Coats*, 138 So. 760 (Fla. 1931). Similarly, settlement proceeds relating to a claim for damage to or diminution in value of

the home are exempt. *In re Gilley,* 236 B.R. 441 (Bankr. M.D. Fla. 1999). See also, *Hill v. First Nat'l Bank of Marianna,* 84 So. 190 (Fla. 1920).

However, the claim must be analyzed to determine if it includes claims for losses other than to the homestead. In addition, it is likely that the proceeds from such claims will be subject to the same limitation on use as in the case of proceeds from a sale, i.e. does the debtor intend to use the proceeds to repair, rebuild or buy a new homestead? See *In re Gilley,* supra.

b. Application of exemption to mobile homes and other movable units.

The mobile home exemption is primarily statutory in origin and is discussed in a later section. However, it is mentioned here because there are circumstances where a mobile or modular home qualifies as exempt under the Constitution.

Section 222.01 of the Florida Statutes dealing with designation of property claimed as exempt under the

Constitution mentions mobile or modular homes, evidencing the legislatures belief that mobile or modular homes on land owned by the debtor are within the exemption of the Constitution.

Section 222.05 deals with mobile and modular homes on land that is not owned by the debtor. In such case, the exemption is statutory in origin.

While the distinction may have little practical significance in the vast majority of cases, it may have some importance in some cases. For example, an exemption under the Constitution is not affected by subsequent amendments to the statute by the legislature nor can the legislature place limitations upon the right to claim the exemption, such as the fraudulent conversion of assets that may negate a statutory exemption.

c. Exceptions to the homestead exemption.

First it should be noted that the Florida Constitution protects against the creation of a lien by judgment, decree or execution. Accordingly, a consensual lien such as a mortgage is not precluded. *Patterson, v. Taylor*, 15 Fla. 336 (1875). In addition there are exceptions:

(1) Those expressly stated in the Constitution:

(a) Taxes and assessments.

(b) Obligations contracted for purchase, improvement or repair. This exception allows enforcement of judgment liens by holders of judgments in privity with the owner. See *Arizona Marketing Co. v. Allen,* 392 So. 2d 1359 (1st DCA Fla. 1981) where debtor failed to execute a purchase money mortgage as agreed. But does this exception extend to monies lent to debtor to pay for purchase or repairs done by others? The answer appears to be no. Contrast *Wilhelm v. Locklar,* 35 So. 6 (Fla. 1903) and *Union Indemnity Co. v. Worthingstun,* 123 So. 759 (Fla. 1929) with *LaMar v. Lechlider,* 185 So. 833 (Fla. 1939) and *Sonneman v. Tuszynski,* 191 So. 18 (Fla. 1939). But see *Jones v. Carpenter,* 106 So. 127 (Fla. 1925) where a trustee in bankruptcy of a corporation was given an equitable lien for monies the corporate officer had taken from the corporation to pay for

repairs to his home. The *Jones* case may, however, be more appropriately classified as one of the judicial exceptions for a claim of restitution.

(c) Obligations contracted for house, field or other labor performed on the realty.

(2) Other exceptions.

The Florida Supreme Court has recognized other exceptions to the prohibition against forced sale for claims in the nature of restitution, such as constructive trusts, equitable liens and equitable subrogation. See *Palm Beach Sav. & Loan Ass's v. Fishbein*, 619 So. 2d 267 (Fla. 1993) where the Florida Supreme Court recognized an equitable lien even though the owner was not guilty of the fraud. See also *Sonneman v. Tuszynski,* 191 So. 18 (Fla. 1939) where the court found an equitable lien to enforce an agreement to support. See also, *Labelle v. Labelle,* 624 So. 2d 741 (5th DCA Fla. 1993). See generally, Kolcon, *"Common law equity defeats Florida's homestead exemption,"* 63 Fla. Bar J. 54 (Nov. 1994).

However, the Florida Supreme Court has refused to extend the exceptions beyond those specifically enumerated in the Constitution and equitable remedies for restitution. *See Havoco of America, Ltd v. Hill*, 26 Fla. L.W. S416 (Fla. June 2001) relating to a contention that assets were converted into a homestead with the intent to defraud creditors. *See Quigley v. Kennedy & Ely Insurance, Inc.*, 207 So. 2d 431 (Fla. 1968) relating to purchase of contiguous property to avoid creditors. See, *Heddon v. Jones*, 154 So. 891 (Fla. 1934), relating to moving onto property to assert exemption claim. And see, *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992), relating to civil forfeiture for criminal activity.

(3) Partition.

While not technically an exception, the 11th Circuit has recognized that the property can be sold and the proceeds divided where the property cannot be partitioned in kind and only a portion of the property is exempt. *Englander v. Mills*, 95 F. 3d 1028 (11th Cir. 1996); *In re Kellogg*, 197 F. 3d 1116 (11th Cir. 1999).

The question then becomes, how do you divide the proceeds? Do you divide the proceeds with consideration of the debtor's right to designate the portion with improvements? *See In re Englander*, 156 B.R. 862 (M.D. Fla. 1992). Using a ratio based upon area? Equally? The 11th Circuit in *Kellogg* approved the bankruptcy court's allocation but the opinion of the bankruptcy court is not published. *In re Kellogg*, 197 F. 3d 1116 (11th Cir. 1999). Some of the language in Kellogg relating to a debtor's inability to designate the portion that is non-exempt appears to relate to the allocation issue as well.

(4) Federal tax liens. See Section IV below.

d. Rights of surviving spouse and heirs.

The exemption inures to the benefit of the surviving spouse or heirs of the owner. *Article X, Section 4.* Accordingly, if the debtor / owner dies, the surviving spouse or heirs acquire the homestead free and clear of the claims of decedent's creditors. See *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988). See also, *Thompson v. Laney*, 766 So. 2d 1087 (3rd DCA Fla. 2000).

This is true even if the heirs are not dependants of decedent. *Public Health Trust v. Lopez,* supra. But, when is an "heir" an "heir?" The term "heir" includes devisees, not just the one who would have inherited under intestacy law so long as the devisee is within the classes of persons that can take under the intestacy statutes. *Snyder v. Davis,* 699 So. 2d 999 (Fla. 1997). But, a devise of a decedent's homestead to a friend does not qualify. See *State Dep't of Health and Rehabilitative Services v. Trammell,* 508 So. 2d 422 (1st DCA Fla. 1987). And the heir does not have to be a resident. *Scull v. Beatty,* 9 So. 4 (Fla. 1891). See generally *Monks v. Smith,* 609 So. 2d 740 (1st DCA, Fla. 1992); *Bartelt v. Bartelt,* 579 So. 2d 282 (3d DCA, Fla. 1991) and *Davis v. Snyder,* 681 So. 2d 1191 (2d DCA, Fla. 1996).

But, if the owner provides for the sale of the homestead in his or her will, this negates the exemption upon death so that the claims of creditors of decedent will have a right to the proceeds. See *Knadle v. Estate of Knadle,* 686 So. 2d 631 (1st DCA Fla. 1996); *Estate of Price v. West Florida Hospital,* 513 So. 2d 767 (1st DCA, Fla. 1987).

e. Judgment liens.

(1) If the property is not homestead when a judgment lien attaches, such lien remains on the property after it becomes homestead and can be enforce through sale. *Pasco v. Harley*, 75 So. 30 (Fla. 1917).

(2) If the property is homestead when the judgment lien is recorded it never attaches to the property. *Prieto v. Eastern Nat'l Bank,* 719 So. 2d 1264 (3d DCA Fla. 1998).

(3) And, if the debtor acquires a homestead when there is a pre-existing judgment, the lien does not attach. *Milton v. Milton,* 58 So. 718 (Fla. 1912); *Quigley v. Kennedy & Ely Ins. Inc.*, 207 So. 2d 431 (Fla. 431); *In re Krueger*, 90 B.R. 553 (Bankr. S.D. Fla. 1988). This appears to be true even if there is a slight delay before taking occupancy so long as the intent to take occupancy is clear. *Id.*

f. Asserting a claim to homestead outside of a bankruptcy case.

Chapter 222 contains procedures for asserting a claim of exemption. Before levy Section 222.01(1) provides for filing a statement of a debtor's homestead claim in the public records.

In addition Section 222.01(2) was added effective July 1, 2000 to provide for filing a notice as a method to clear title to homestead in order to effectuate a contract or mortgage. This latter provision now provides that the owner / judgment debtor can file a notice which is then served upon the creditor. In order to contest the homestead status the judgment creditor must timely file a civil action to preserve any claim to a lien on the property.

After a levy, the procedure is set forth in Sections 222.02 and 222.03. Such sections provide a procedure for giving notice of the claim of exemption and giving the creditor the right to have the property surveyed.

The effects of compliance with Sections 222.01 and 222.02 appear to be limited.

In connection with a notice pursuant to 222.01(2) the failure of a creditor to timely file a civil action is that the judgment lien is deemed by statute not to have attached. *Section 222.01(5), Florida Statutes.* However, it does not appear to apply if no sale or refinancing is contemplated. And, it will not resolve the issue long term if such sale or refinancing does not close.

After levy, a timely filed designation should stop the sheriff's sale. *Grant v. Credithrift of America, Inc.,* 402 So.

2d 486 (1st DCA Fla. 1981). Otherwise, such designation has limited benefit. Failure to designate is not a waiver of the claim of exemption. See *In re Smith,* 21 B.R. 345 (Bankr. M.D. Fla. 1982). Nor does a properly filed designation establish the validity of the exemption. *Oliver v. Snowden,* 18 Fla. 823 (1882); *Drucker v. Rosenstein,* 19 Fla. 191 (1882). And, the claim to the homestead exemption is not generally waived or otherwise barred by failure to assert it. See *Fidelity & Cas. Co. of New York v. Magwood,* 145 So 67 (Fla. 1932) where failure to raise the defense in a lawsuit did not preclude raising it later. And see *Albritton v. Scott,* 74 So 975 (Fla. 1917) where the Florida Supreme Court held that a sheriff's sale of homestead property was void. But see *Barclay v. Robertson,* 65 So. 546 (Fla. 1914).

g. How can a debtor obtain clear title?

In the past, the remedy under state law was to file an action for declaratory judgment or to quiet title in state court. *Prieto v. Eastern Nat'l Bank,* 719 So. 2d 1264 (3rd DCA Fla. 1998). However, a final judgment quieting title does not extinguish the judgment and it may, therefore, continue to create problems.

One year after a discharge in bankruptcy, a debtor may be entitled to cancellation of the judgment. *Section 55.145, Florida Statutes.* See also, *Barnett Bank of Jacksonville, v. Harris,* 421 So. 2d 822 (1st DCA Fla. 1982).

And, as noted above, Section 222.01(2) of the Florida Statutes provides a mechanism through notice to clear this issue in order to effectuate a sale or mortgage. See also Pierce, *"Florida's New Notice of Homestead Procedure,"* 32 The Fund Concept 162 (Oct. 2000). But, this too is only a temporary fix if the sale or financing does not close. Moreover, the Fund is willing to rely upon this procedure subject to the following guidelines: "(1) the principal amount of the judgment is $50,000 or less; (2) the judgment is not among those excluded from the statute's coverage; (3) the recorded notice of homestead properly identifies the judgment and otherwise complies with the requirements of the Sec. 222.01(2), F.S. as to form and content; (4) the clerk has mailed (certified, return receipt) a copy of the notice of any homestead to the judgment lienor and to any other designated person, and certified to such service on the face of the notice, in compliance with 222.01(3), F.S.; (5) if the closing occurs within 45 days of service of the notice of homestead, the amount of the

judgment plus interest and costs, must be escrowed; (6) if the transaction is a sale, the deed to the buyer identified in the notice of homestead, or if the transaction is a refinance, the mortgage in favor of the lender identified in the notice of homestead, must be recorded within 180 days after the filing of the notice of homestead in the public records; and (7) the owner should execute an affidavit ... which details factual information evidencing the status of the property as exempt homestead, attests as to the continued homestead status, and states that no actions or enforcement proceedings have been filed by any judgment creditor ....” Pierce, at page 163.

In a bankruptcy case simply listing it as exempt in Schedule C is not sufficient. The impact of scheduling it without an objection is that the property is no longer property of the estate, but it remains subject to all valid liens and encumbrances.

A debtor may be able to file a motion to avoid a judicial lien pursuant to 11 USC 522(f)? *Owen v. Owen,* 500 U.S. 305, 111 S. Ct. 1833 (1991). However, this section will not allow avoidance of liens that attached before the property became homestead. *Owen v. Owen,* 961 F. 2d 170 (11th Cir. 1992). See also Cheek and Freeman,

Judgment Liens on Homestead Which Are Not Avoidable in Bankruptcy, Fla. Bar J. 30 (April 1994).

As to liens that did not attach before the bankruptcy case was commenced, the 5th Circuit has allowed the use of 11 USC 522(f) to clear title. *In re Henderson,* 18 F. 3d 1305 (5th Cir. 1994). However, this approach was rejected by the Southern District in the case of *Cannon v. Cannon,* 254 B.R. 773 (S. D. Fla. 2000).

An adversary proceeding pursuant to Part 7 of the Federal Bankruptcy Rules will result in a judgment that will resolve the issue. Note that once such issue is resolved, 11USC 522(c) and the injunction of a discharge will preclude the lien from attaching in the future.

According to the Fund Title Notes (rev. 12/00) the Fund will rely upon any of the following: (1) proceedings under 522(f); (2) proceedings under Section 55.145 of the Florida Statutes; or (3) "a judicial determination that the property in question was the homestead of the debtor from the time the lien would have attached to the time the property was conveyed by the debtor." The author believes that an adversary proceeding to quiet title in a bankruptcy case will also be sufficient. However, regardless of the judicial proceeding used to clear title it must be established

that the proceedings were had in a court of competent jurisdiction, the judgment creditors were properly served, and all relevant appeal times have run.

One additional caveat may be necessary. What if the debtor does not receive a discharge? Or, what if the debt to the judgment lien creditor is excepted from discharge? Section 522(c) of the Bankruptcy Code appears to preclude post petition enforcement of such judicial lien except in certain limited circumstances.

As to after acquired property, the Fund Title Notes (rev 12/00) provides, "Before issuing a Fund policy without an exception for a prebankruptcy lien as to property acquired after a discharge in bankruptcy, it should be determined that the judgment or federal tax lien is not a debt which is excepted from discharge by 11 U.S.C. Sec. 523 and that the property was not purchased with assets of the estate.

h. Marshalling of assets. At least one court has held that if a secured creditor has a lien on the debtor's homestead as well as other collateral neither the trustee nor another creditor can require the secured creditor to look first to the homestead to collect its debt. *Gibson v. Farmers and Merchants Bank*, 81 B.R. 84 (N.D. Fla. 1986).

2. Personal property. In addition to the homestead exemption, the Florida Constitution provides an exemption for personal property.

a. Types of property that can be exempted. Virtually any personal property can be claimed as exempt. *In re Rutter*, 247 B.R. 334 (Bankr. M.D. Fla. 2000). This includes general intangibles and choses in action - *In re Kelsey,* 224 B.R. 495 (Bankr. M.D. Fla. 1998). Corporate stock - *Williams v. Wirt,* 423 F. 2d 761 (5th Cir. 1970). Cash - *Schlosser v. State,* 602 So. 2d 628 (2nd DCA Fla. 1992). Bank credits - *Tracy v. Lucik,* 189 So. 430 (Fla. 1939).

b. The amount that can be claimed is $1,000.

The appropriate standard of value is fair market value. *Section 222.061(1), Florida Statutes.* However, it is often difficult to apply this standard where there is no market for the property. An example of this is stock in a closely held corporation, especially a professional association. *In re Allen,* 254 B.R. 497 (Bankr. M.D. Fla. 2000).

In calculating the $1,000 the amount of any liens is taken into consideration. See *1953-54 Op. Atty. Gen. 316.*

c. A husband and wife are each entitled to claim such exemption. *In re Howe,* 241 B.R. 242 (Bankr. M.D.

Fla.1999); *In re Moody,* 241 B.R. 238 (Bankr. M.D. Fla. 1999).

d. Sections 222.061 and 222.07, Florida Statutes, provide a method for asserting the claim of exemption. Such provisions allow the debtor to select property "in kind." See also *Johns v. May,* 402 So. 2d 1166 (Fla. 1981).

e. Waiver.

Normally, the constitutional exemption cannot be waived. *Carter's Adminstrators v. Carter,* 20 Fla. 558 (1884); *Lowe v. Keith,* 190 So. 67 (Fla. 1939). Waiver in promissory note or mortgage is not effective. *Carter's Adm'rs v. Carter,* 20 Fla. 558 (1884).

Some cases have held that concealment and transfers result in a pro tanto selection thus precluding the use of the exemption to claim other property. See, *Florida Loan & Trust Co. v. Crabb,* 33 So. 523 (Fla. 1903) and *In re Wallace,* 191 B.R. 929 (Bankr. M.D. Fla. 1996). See also, *Libby v. Beverly,* 263 F. 63 (5th Cir. 1920).

For cases addressing the failure to timely assert exemption claim as a waiver, see *Jones v. Equitable Life Assurance Society,* 171 So. 317 (Fla. 1936); *Barclay v. Robertson,* 65 So. 546 (Fla. 1914). But see *Johns v. May,*

402 So. 2d 1166 (Fla. 1981) and *McMichael v. Grady*, 15 So. 765 (Fla. 1894).

B. STATUTORY EXEMPTIONS.

1. Mobile homes and other mobile living units.

As noted above, where the land upon which the unit is located is owned by the debtor, the mobile home comes within the exemption of Article X, Section 4. However, where the land is not owned by the debtor, Section 222.05 establishes an exemption for a "dwelling house, including a mobile home used as a residence, or modular home...."

There are certain requirements that must be met. First, the debtor must own and occupy the dwelling house.

Second, the debtor must have a right to be upon the land by lease or otherwise. Accordingly, a debtor may lose a claim of exemption to the mobile home upon eviction. See *Meadow Groves Management, Inc. v. McKnight,* 689 So. 2d 315 (5th DCA Fla. 1997).

Beyond these two requirements, the courts have struggled with the question, what is a dwelling house? For cases holding a boat is exempt, see *Miami Country Day School v. Bakst,* 641 So. 2d 467 (3rd DCA Fla. 1994); *In re Mead,* 255 B.R. 80 (Bankr. S.D. Fla. 2000). For cases holding that a boat is not exempt, see *In re Major,* 166 B.R. 457 (Bankr. M.D.

Fla. 1994); *In re Walter,* 230 B.R. 200 (Bankr. S.D. Fla. 1999); and *In re Brissont,* 250 B.R. 413 (Bankr. M.D. Fla. 2000). For cases holding that a motor home is exempt, see *In re Meola,* 158 B.R. 881 (Bankr. S.D. Fla., 1993); *In re Bubnak,* 176 B.R. 601 (Bankr. M.D. Fla. 1994); *In re Mangano,* 158 B.R. 532 (Bankr. S.D. Fla. 1993). For a case holding a motor home is not exempt see *In re Kirby,* 223 B.R. 825 (Bankr. M.D. Fla. 1998) and *In re Andiorio,* 237 B.R. 851 (Bankr. M.D. 1999).

2. Wages. Section 222.11, Florida Statutes provides an exemption for "disposable earnings." There are several points that should be noted regarding this exemption, including:

   a. Assuming no waiver, the "head of family" is entitled to "all" disposable earnings. If there is a waiver, the amount of the exemption is limited to $500 per week. "Head of family" is defined to "include" any natural person who is providing more than one-half of the support for a child or other dependent. By its nature, such definition does not exclude other instances. In defining "head of family" the courts may look to the "head of family" cases that interpreted the homestead provision of the Florida Constitution prior to 1984.

b. The person who is not a head of a family is entitled to exempt wages in the amount allowed by the Consumer Protection Act, 15 USC 1673. Such Act provides that the "maximum part of the aggregate disposable earnings of an individual for any work week which is subjected to garnishment may not exceed (1) 25 per centum of his disposable earnings for that week, or (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage..., whichever is less."

c. Is the exemption limited to a sum certain of money due?

Prior to 1993 the exemption wasn't limited to money due. It covered "...money or other thing due ...."

In 1993 the statute was amended and "disposable earnings" are now exempt. "Earnings" is defined to "include compensation paid or payable, in money of a certain sum...." But, by using the word "include" does the statute limit it to "money of a certain sum?" And, if so, when is the sum "certain?" The court in *In re Stroup*, 221 B.R. 537 (Bankr. M.D. Fla. 1997) held that the use of a formula to calculate deferred compensation did not necessarily make the sum "uncertain." However, the court denied the exemption where the formula was based in part

upon accounts and payable upon termination of employment.

d. Does the use of the word "disposable" result in a limitation on the definition of earnings? The phrase "disposable earnings" is defined to mean "that part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required to be withheld."

e. The exemption is applicable not only to wages that are due, but also wages that will be due in the future.

f. Must be for labor or services. It is clear that this term does not limit the exemption to manual labor. *Wolf v. Commander,* 188 So. 83 (Fla. 1939); *White v. Johnson,* 59 So. 2d 532 (Fla. 1952). However, this requirement has generated a great deal of controversy and has resulted in a number of decisions that interpret the limits of the exemption.

(1) Independent contractors.

The Florida Supreme Court was asked to decide the applicability of a predecessor statute in the case of *Patten Packing Co. v. Houser,* 136 So. 353 (Fla. 1931). In that case the debtor operated a business that made deliveries for a third party as an independent contractor. He was paid a fee for

those deliveries from which he had to pay expenses of his business. The Florida Supreme Court held that he was an independent contractor and not entitled to claim the monies due to his business as exempt. It was unclear whether the reason for the decision was his status as an independent contractor or because the monies due to him included compensation for use of his equipment, recovery of expenses and labor of employees.

In *In re Schlein,* 8 F.3d 745 (11th Cir. 1993), the 11th Circuit was faced with a much closer question. In *Schlein,* monies in his bank account were traceable to compensation that he had received from his professional association. The professional association provided his services to a hospital and the hospital paid the professional association. From the monies that were received by the professional association, the expenses of the business were paid. The debtor received most of what was left as compensation. It does not appear that he was required to pay any business expenses from his compensation. For reasons that

are not entirely clear, the parties agreed that the debtor was an independent contractor. The 11th Circuit chose form over substance in its determination that the label of independent contractor was determinative of the debtor's right to claim the monies as exempt. Because the debtor was labeled an "independent contractor" he was not entitled to the wage exemption.

More recently, the Florida legislature amended Section 222.11. However, the changes that were made have apparently made little difference in the analysis of most courts that continue to look to whether or not the debtor is an independent contractor. For examples see, *In re Lee,* 204 B.R. 78 (Bankr. M.D. Fla. 1996); *In re Branscum,* 229 B.R. 32 (Bankr. M.D. Fla. 1999); and *In re Porter,* 182 B.R. 53 (Bankr. M.D. Fla. 1994).

On the other hand, the court in *In re Pettit,* 224 B.R. 834 (Bankr. M.D. Fla. 1998) held that the amendment to the statute required a "totality of circumstances" approach holding that compensation solely attributable to labor or

services of an independent contractor was exempt. In *In re Braddy*, 226 B.R. 479 (Bankr. N.D. Fla. 1998) Judge Killian analyzed all of the circumstances and then held that the debtor was an independent contractor.

Perhaps the most significant case since *Schlein* is the decision in *Vining v. Segal*, 731 So. 2d 826) (3rd DCA, Fla. 1999) where the state court ignored the *Schlein* decision and looked to substance rather than form to conclude that the compensation included recovery of business expenses and was not, therefore, exempt.

(2) Compensation to owners of a business. Where the court is called upon to apply Section 222.11 to compensation due or paid to an owner of a business some courts have expressed reservations because a portion of the compensation may result in a return on investment and is not solely the result of labor or services. The sole shareholders control over the business has caused some courts to deny the exemption. *In re Zamora*, 187 B.R. 783 (Bankr. S.D. Fla. 1995). For a business owner to claim the exemption he or she must (1) perform

services for the business, and (2) receive compensation on a regular basis that is determined by an arm's length employment agreement. *In re Harrison,* 216 B.R. 451 (Bankr. S.D. Fla. 1997); *In re Manning,* 163 B.R. 390 (Bankr. S.D. 1994).

(3) Passive investments. *Cadle Co. v. G & G Associates,* 757 So. 2d 1278 (4th DCA, Fla. 2000).

(4) Job related expense reimbursements. *In re Parker,* 147 B.R. 810 (Bankr. M.D. Fla. 1992).

(5) Severance pay. *In re Dennison,* 84 B.R. 846 (Bankr. S.D. Fla. 1988); *In re Powers,* 98 B.R. 577 (Bankr. M.D. Fla. 1989).

(6) Proceeds from sales of an asset that was enhanced by a debtor's labor and services. *In re Locke,* 99 B.R. 473 (Bankr. M.D. Fla. 1989).

(7) Alimony. *Waters v. Albanese,* 547 So. 2d 197 (4th DCA, Fla. 1989).

(8) Prepaid services and advances. *In re Easter,* 106 B.R. 748 (Bankr. S.D. Fla. 1989).

(9) Settlements of claims even if the claim includes loss of earnings but the amount is not specifically traceable to lost wages. *In re Passi,* 101 B.R. 360 (Bankr. S.D. Fla. 1989). See also, *In re Powers,*

98 B.R. 577 (Bankr. M.D. Fla. 1989). But see *Sunshine Resources, Inc. V. Simpson,* 763 So. 2d 1078 (4th DCA Fla. 1999).

(10) Income tax refunds. *In re Alden,* 73 B. R. 215 (Bankr. N.D. Fla. 1986). See also, *In re Lancaster,* 161 B.R. 308 (Bankr. S.D. Fla. 1993); *In matter of Truax,* 104 B.R. 471 (Bankr. M.D. Fla. 1989).

(11) Renewals, residuals and royalties. *In re Lee,* 204 B.R. 78 (Bankr. M.D. Fla, 1996); *In re Braddy,* 226 B.R. 479 (Bankr. N.D. Fla. 1998).

(12) Covenants not to compete. *In re Alstad,* 14 FLW(Fed) B336 (Bankr. M.D. Fla. 2001).

(13) Deferred compensation plans. *In re Harrison,* 216 B.R. 451 (Bankr. S.D. Fla. 1997); *In re Wheat,* 149 B.R. 1003 (Bankr. S.D. Fla. 1992); *In re Stroup,* 221 B.R. 537 (Bankr. M.D. Fla. 1997).

g. Waiver of exemption. A waiver must be clear and express and will not be implied. *Williams v. Espirito Santo Bank of Florida,* 656 So. 2d 212 (3rd DCA, Fla. 1995). And, 11 USC 522(e) may limit the effectiveness of such a waiver in a bankruptcy case.

h. Proceeds in bank accounts. Under the current statute disposable earnings traceable into a bank account retain their exempt status for 6 months. The second sentence leaves it unclear whether this is limited to the head of the family. As to the head of the family, commingling does not necessarily defeat the exemption if a portion of the wages is traceable. *In re Welch,* 115 B.R. 374 (Bankr. M.D. Fla. 1990); *In re Pettit,* 224 B.R. 834 (Bankr. M.D. Fla. 1998). And, they must be in a "bank" account, not a cash management account at a brokerage firm. *In re Rutenberg,* 164 B.R. 683 (Bankr. M.D. Fla. 1994).

i. Procedure to establish exemption outside of bankruptcy. Section 222.12 of the Florida Statutes provides a summary method for establishing the exemption after a garnishment. See also, *Gerlick v. Chandler,* 758 So. 2d 1221 (4th DCA, Fla. 2000); *Rudd v. First Union National Bank,* 761 So. 2d 1189 (4th DCA, Fla. 2000).

j. Which state law applies if the employer is out of state and the wages are garnished in a forum outside the state?

3. Motor vehicles.

Section 222.25(1), Florida Statutes, provides an exemption of "a debtor's interest, not to exceed $1,000 in value, in a single motor vehicle as defined in s. 320.01."

Motor vehicle is defined in Section 320.01 to include an automobile, a motorcycle, a truck, a trailer, a semi-trailer, a truck tractor and semi-trailer combination "or any other vehicle operated on the road of this state, used to transport persons or property, and propelled by power other than muscular power...." The term also includes a variety of "recreational vehicle-type units."

Can a debtor claim more than one vehicle using his or her statutory and Constitutional exemptions? While the statute limits the exemption to a "single" motor vehicle, debtors in this area are typically allowed to claim a vehicle under the statute and one under the Constitution. A statute cannot limit a Constitutional exemption. *Havoco of America, Ltd. v. Hill*, 26 Fla. L. W. S416 (Fla. June, 2001). And, there is nothing in the statute inconsistent with such a dual claim.

But, can a debtor combine his or her statutory and Constitutional exemption to claim more than $1,000 equity in a one motor vehicle? One court has said yes. *In re Rutter*, 247 B.R. 334 (Bankr. M.D. Fla. 2000). But such a claim is inconsistent with the express wording of the statute limiting the debtor's interest in the vehicle to $1,000.

4. Life insurance and cash surrender value of life insurance.

Sections 222.13 and 222.14 of the Florida Statutes exempt life insurance benefits and the cash surrender value of the policies. By their terms, these sections preclude creditors of the insured from realizing upon the cash surrender value of the insured's policies as well as the proceeds payable upon the death of the insured unless their is a valid assignment of the policy.

It should also be noted that these sections, by their terms, are only applicable to an insured that is a citizen or resident of Florida. The appropriate time to determine the domicile of the insured is at the time of levy, not when the policy was issued. See *Marshall v. Bacon,* 97 So. 2d 252 (Fla. 1957); and *Milam v. Davis,* 123 So. 668 (Fla. 1929).

Regardless, it is clear that the proceeds are only exempt from the claims of creditors of the insured; they are not exempt from the claims of creditors of the beneficiary. *In re Zesbaugh,* 190 B.R. 951 (Bankr. M.D. Fla. 1995). And, if a debtor in bankruptcy becomes entitled to the benefits of an insurance policy on the life of another as a result of the death of such other person within 6 months after filing bankruptcy, such benefits are property of the estate. *11 USC 541(a)(5).*

5. Annuities.

Section 222.14, Florida Statutes, also exempts "the proceeds of annuity contracts issued to citizens or residents of the state...." The first question is, What is an annuity? On a certified question from the 11th Circuit, the Florida Supreme Court answered by quoting various definitions of an annuity found in other statutes and cases as "a yearly payment of a certain sum of money granted to another in fee for life or for years.... In its broader sense it designates a fixed sum ... payable periodically, at least aliquot parts of a year, at stated intervals, and not necessarily annually." *In re McCollam*, 612 So. 2d 572 (Fla. 1993).

Since the *McCollam* decision the courts have struggled with its broad definition and have distinguished several types of contracts that provide for installment payments. For example, deferred payments under normal settlements are not annuities. *In re Dillon*, 166 B.R. 766 (Bankr. S.D. Fla. 1994). Lottery installments. *In re Bruce*, 224 B.R. 505 (Bankr. M.D. Fla. 1998). Equitable distributions pursuant to dissolution of marriage. *In re Conner*, 172 B.R. 119 (Bankr. M.D. Fla. 1994).

Given the limited guidance of the *McCollam* opinion, it should not have been a surprise that the 11th Circuit would be

called upon again to revisit the issue. In *In re Soloman*, 95 F. 3d 1076 (11th Cir. 1996), the 11th Circuit was faced with a situation where the debtor had reached a settlement with Union Mutual. Such agreement provided for payments in installments. Union Mutual was required to obtain an annuity to ensure the payments. Under the annuity it obtained, Union Mutual was the payee. The 11th Circuit held, "We read *McCollam* to require the existence of an actual annuity *contract* before a series of payments may be exempt under section 222.14. *** To qualify for the exemption, the parties to the agreement must have intended to create an annuity contract." See also Shore, *"Annuities: Suggested Objective Criteria for Reaching Safe Harbor of F.S. 222.14",* 67 Fla. B. J. 60 (Dec. 1993).

After the decision in *McCollam* the focus shifted to the financial products being offered in the market that have some of the characteristics of an annuity, but allow withdrawal of the monies for a defined period of time, often up to several years. Again the 11th Circuit certified the question to the Florida Supreme Court, and again the Florida Supreme Court determined that such contracts qualified as an annuity that is exempt under F.S. 222.14. *Goldenberg v. Sawczak,* 26 Fla. L. W. S277 (Fla. May, 2001).

Other issues addressed by the courts include, must the beneficiary of the annuity also be the owner of the policy? *In re Zeitz*, 171 B.R. 903 (Bankr. S.D. Fla. 1994). And, are the proceeds exempt? *In re Lazin*, 217 B.R. 332 (Bankr. M.D. Fla. 1998) and *In re Belue*, 238 B.R. 218 (Bankr. S.D. Fla. 1999).

6. Retirement plans.

The analysis of retirement plans begins (at least in a bankruptcy case) with the question, is the plan a qualified plan under ERISA, *Chapter 18 of Title 29 of the United States Code*? If so, then most qualified plans are not property of the bankruptcy estate in the first instance so the exemption provisions of 11 U.S.C. 522 are not relevant. *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242 (1992).

However, just because a plan in form appears to be an ERISA qualified plan does not mean it is so qualified. Courts will look to the operation of the plan to determine if there have been any disqualifying events. *In re Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995); *In re Fernandez*, 236 B.R. 483 (Bankr. M.D. Fla. 1999).

If the plan is not a qualified plan under ERISA, or in the case of a single employee / sole shareholder plan, may not have

qualified participants, the inquiry becomes, is the plan exempt under any provision of the Florida Statutes?

a. Relevant Florida Statutes.

There are several provisions relevant to retirement plans. Section 222.21 protects pension benefits from the U.S. as well as any interest in a plan that is qualified under Sections 401(a), 403(a), 403(b), 408 and 409 of the Internal Revenue Code.

In addition Section 222.201(b), Florida Statutes, protects plans that are protected under 11 U.S.C. 522(d)(10). Such plans include social security benefits and veteran's benefits. Also included is a "payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service" but such protection is limited to "the extent reasonably necessary for the support of the debtor and any dependent of the debtor." Excluded from such plans are certain insider plans.

And, plans under the Florida Retirement System are exempt under Sections 121.131 and 122.15 of the Florida Statutes. This includes social security replacements pursuant to Chapter 630 of the Florida Statutes for governmental entities not participating in social security.

In addition, firefighter's pensions are exempt. *Section 175.241, Florida Statutes.* And, pensions, annuities and other benefits for school teachers are exempt. *Section 238.15, Florida Statutes.* Similarly, retirement benefits for municipal policemen are exempt. *Section 185.25, Florida Statutes.*

b. The 11th Circuit has held that the Florida statute exempting retirement plans was not preempted by ERISA. *In re Schlein,* 8 F. 3d 745 (11th Cir. 1993).

c. To be exempt under Section 222.21 the plan must be "qualified" under the appropriate section of the Internal Revenue Code. See generally, Woodruff, *"Are Interests in Retirement Plans Really Safe from Creditors,"* 63 Fla. B. J. 44 (July / August 1994). Like the analysis of an ERISA plan, this requires an analysis of not only the form of the plan, but its operation as well. *Cornell-Young Co. v. U.S.,* 469 F. 2d 1318 (5th Cir. 1972); *In re Groff,* 234 B.R. 153 (Bankr. M.D. Fla. 1999). The analysis relating to the form of the plan looks to whether or not the plan, including its amendments, contain all required provisions and whether or not there are any prohibited provisions. The analysis relating to the operation of the plan looks to whether or not the plan has been conducted

according to the requirements and whether or not there have been any prohibited transactions that will result in disqualification of the plan. For plans that have significant amounts involved a debtor should retain the services of a qualified accountant or tax attorney to evaluate the issues. For cases analyzing the qualifications of various plans, see *In re Banderas,* 236 B.R. 837 (Bankr. M.D. Fla. 1998); *In re Groff,* 234 B.R. 153 (Bankr. M.D. Fla. 1999); *In re Pettit,* 224 B.R. 834 (Bankr. M.D. Fla. 1998); *In re Blais,* 220 B.R. 485 (S.D. Fla. 1997); *In re Fernandez,* 236 B.R. 483 (Bankr. M.D. Fla. 1999); *In re Brackett,* 259 B.R. 768 (Bankr. M.D. Fla. 2001). The party objecting to the exemption has the burden of proving the plan is not qualified. *In re Banderas,* supra.

d. The next inquiry relates to the status of proceeds from retirement plans. Certain statutes specifically relate to or mention proceeds. For example, "monies" paid to U.S. pensioners are exempt for up to 3 months. On the other hand other sections are less clear in their language. For example, 11 U.S.C 522(d)(10) exempts the "right to receive payment." Similarly, Section 222.21(2)(b) includes "any money or other assets payable..." leaving open the question of what happens after they are paid. In

In re Ladd, 258 B.R. 824 (Bankr. N.D. Fla. 2001) Judge Killian held that proceeds remain exempt.

e. Who is entitled to claim the exemption? Section 222.21(2)(b) exempts monies or other assets payable to "a participant or beneficiary." On the other hand, 11 U.S.C. 522(d)(10) exempts the "debtor's right to receive...." However, a debtor's right to a former spouses plan may not be exempt. *In re Cason*, 211 B.R. 72 (Bankr. N.D. Fla. 1997). See also *In re Brackett*, 259 B.R. 768 (Bankr. M.D. Fla. 2001) holding that the requirement for a QDRO to exempt benefits under an ERISA qualified plan does not apply to a plan not qualified under ERISA. See also *DeSantis v. DeSantis*, 714 So. 2d 637 (4th DCA Fla. 1998).

f. Can Florida partially "opt in?" Florida elected to opt out of the Federal exemptions contained in 11 U.S.C. 522(d). *Section 222.20, Florida Statutes*. However, Florida exempted property of a kind specified in 11 U.S.C. 522(d)(10). *Section 222.201(1), Florida Statutes.* This was permissible. *In re Bryan*, 106 B.R. 749 (Bankr. S.D. Fla. 1989); *In re Green*, 178 B.R. 533 (Bankr. M.D. Fla. 1995).

7. Alimony and Support. Section 222.201(1), incorporating by reference 11 U.S.C. 522 (d)(10), also includes as exempt alimony and support reasonably necessary for the support of debtor and a dependant. Once again, the burden is on the objecting party to prove that the payment does not qualify. *In re Haning*, 252 B.R. 799 (Bankr. M.D. Fla. 2000). One of the first question goes to the qualification as alimony. Thus the distinction between an award for alimony and a property settlement that was (and to a more limited extent, still is) a battle ground under 11 USC 523 has relevance in this context as well. See *In re Brackett*, 259 B.R. 768 (Bankr. M.D. Fla. 2001) listing the factors the courts look to in making such determination. Once the payments or the right to payments are classified as "alimony" the inquiry is whether or not such payments are reasonably necessary for the support of debtor or debtor's dependants. For cases in other states analyzing this limitation see *In re Taff*, 10 B.R. 101 (Bankr. D. Conn. 1981); *In re Kochell*, 31 B.R. 139 (W.D. Wisc. 1983) aff'd 732 F. 2d 564 (7th Cir. 1994).

8. Workmen's compensation benefits. These are exempted pursuant to Section 440.22 of the Florida Statutes. To some extent they are included in Section 222.201(1) as well. No distinction is made between payments for medical expenses

and lost wages. *In re Mix*, 244 B.R. 877 (Bankr. M.D. Fla. 2000). Proceeds are exempt. *Broward v. Jacksonville Medical Center,* 690 So. 589 (Fla. 1997); *In re King,* 208 B.R. 570 (Bankr. M.D. Fla. 1997).

9. Disability benefits. Such benefits are exempt pursuant to Sections 222.18 and 222.201(1) of the Florida Statutes. The statute exempts payments "in whatever form...." Accordingly, it doesn't make any difference if such benefits are paid in lump sum or installments. *Zuckerman v. Hofrichter & Quiat P.A.,* 646 So. 2d 187 (Fla. 1994). And the proceeds are exempt. *Bank of Greenwood v. Rawls,* 158 So. 173 (Fla. 1934); and *In re Ryzner*, 208 B.R. 568 (Bankr. M.D. Fla. 1997).

10. Unemployment compensation. *Sections 222.201(1) and 443.051, Florida Statutes.*

11. Deferred compensation plans for public employees. *Section 112.215, Florida Statutes.* This exemption is provided pursuant to the "Government Employees' Deferred Compensation Act" and includes employees "whether appointed, elected, or under contract, providing services for the state; any state agency or county or other political subdivision of the state; or any municipality for which

compensation or other statutory fees are paid." The plan must be approved as provided in the act.

12. Other public assistance. *Section 222.201(1), Florida Statutes.*

13. Health aids. A debtor's interest in any medically prescribed health aids are exempt pursuant to Section 222.25 of the Florida Statutes. However, a debtor's interest in a motor home may not qualify even if medically proscribed where the motor coach was not "uniquely suited and principally used for the diagnosis, cure, mitigation, treatment or prevention of disease or for the purpose of affecting any structure or function of the body." *In re Kirby,* 223 B.R. 825 (Bankr. M.D. Fla. 1998).

14. Tax refund. Generally, income tax refunds are not exempt. *In re Alden,* 73 B.R. 215 (Bankr. N.D. Fla. 1986). However, the legislature recently adopted an exemption for that portion of a tax refund resulting for earned income credit. Section 222.25, Florida Statutes.

15. Prepaid college plans. Section 222.22 of the Florida Statutes exempt prepaid college plans entered into pursuant to Section 240.551 of the Florida Statutes.

16. Crime victim's compensation. *Section 960.14, Florida Statutes.*

17. Fraternal Benefit Society benefits. *Section 632.619, Florida Statutes.*

18. Damages for injuries from certain hazardous occupations. *Section 769.05, Florida Statutes.* Chapter 679 provides for damages for death and injuries incurred while employed in certain hazardous occupations. These are railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, and boating when the boat is propelled by steam, gas or electricity. These recoveries are exempt pursuant to Section 769.05.

19. A partner's interest in specific partnership property. *Section 620.68(c), Florida Statutes.* Such section provides " A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners ... cannot claim any right under the homestead or exemption laws."

20. Certain veteran's benefits. *Section 744.626, Florida Statutes.*

21. Proceeds of proceeds. While proceeds may be exempt under the relevant exemption, there may be a question about proceeds of proceeds. Typically payment of a benefit comes

in the form of a check, the check representing proceeds. When the check is but into a bank account the account is proceeds of the proceeds. Nonetheless, the account is generally considered exempt as can be seen from cases cited throughout this outline. Similarly, proceeds traceable to a certificate of deposit may remain exempt. *In re Green,* 178 B.R. 533 (Bankr. M.D. Fla. 1995). On the other hand, the interest earned from such proceeds is not exempt. *Id.* While wages in a bank account are exempt by statute, when they are paid to an attorney they lose their exempt status even if the attorney is required to disgorge his fees because the fees were excessive. *In re Easter,* 106 B.R. 748 (Bankr. S.D. Fla. 1989). And, if otherwise non-exempt assets are acquired with exempt proceeds, the acquired assets do not generally become exempt. *In re Blum,* 39 B.R. 897 (Bankr. S.D. Fla. 1984).

22. Commingling proceeds. See *Beardsley, v. Admiral Ins. Co.,* 647 So. 2d 327 (3rd DCA Fla. 1994).

23. Exception to exemptions for collection of child support and alimony. *Section 61.12, Florida Statutes.*

C. COMMON LAW IMMUNITY – TENANCY BY THE ENTIRETIES. While not technically an exemption, the Bankruptcy Code entitles a debtor to exempt it as such. Specifically, 11 U.S.C. 522(b)(2)(B) provides that a debtor may claim an exemption in "any interest in

property in which the debtor had ... an interest as a tenant by the entirety ... to the extent such interest ... is exempt from process under applicable nonbankruptcy law." The determination of whether or not a particular property is exempt requires an analysis of several issues.

1. Is the property owned as tenants by the entireties? At common law the married couple was considered one. *Junk v. Junk 65 So. 2d 728 (Fla. 1953); Andrews v. Andrews,* 21 So. 2d 205 (Fla. 1945); *Gerson v. Broward County Title Co.,* 116 So. 2d 455 (2nd DCA Fla. 1959). As a result, the essential distinction between this tenancy and others is that each spouse is seized of the whole and not a share or part. *Ashwood v. Patterson,* 49 So. 2d 848 (Fla. 1951); *Andrews v. Andrews,* 21 So. 205 (Fla. 1845); *Wilson v. Florida Nat'l Bank & Trust Co.,* 64 So. 309 (Fla. 1953). Five unities developed from this legal fiction that are requirements for ownership of property as tenants by the entireties. These are set forth in the 11th Circuit opinion in *U.S. v. One Single Family Residence With Out Buildings* , 894 F. 2d 1511 (11th Cir. 1990). See also *In re Hill,* 163 B.R. 598 (Bankr. N.D. Fla. 1994) aff'd 197 F. 3d 1135 (11th Cir. 1999).

   a. The unity of person or marriage, i.e. the couple must be married. The marriage must be valid to qualify. *Nottingham v. Denison,* 63 So. 2d 269 (Fla. 1953);

Jablonski v. Caputo, 297 So. 2d 310 (2d DCA Fla. 1974). But see *American Central Ins. Co. of St. Louis v. Whitlock,* 165 So. 380 (Fla. 1936) where the couple was not married at the time of the conveyance of the property but married later. Once the marriage is dissolved, the ownership as tenants by the entireties is likewise dissolved and the parties become tenants in common. *Quick v. Leatherman,* 96 So. 2d 136 (Fla. 1957).

b. The unity of title, i.e. both the husband and wife must have title to the property.

c. The unity of time, i.e. both the husband and wife must acquire title to the property at the same time. *See Dixon v. Becker,* 184 So. 114 (Fla. 1938).

d. The unity of interest; i.e. they must have the same interest in the property.

e. Possession or control; i.e. both must have the right to possession of or control over the property.

2. What type of property can be owned as tenants by the entireties? Both personal and real property can be owned as tenants by the entireties. *Winters v. Parks,* 91 So. 2d 649 (Fla. 1957); *Merrill v. Adkins,* 180 So. 41 (Fla. 1938). A leasehold interest can be held as tenants by the entireties. *Matthews v. McCain,* 170 So. 323 (Fla. 1936). A bank

account. *In re Wincorp,* 185 B.R. 914 (Bankr. S.D. Fla. 1995). Partnership interest. *Lacker v. Zuern,* 109 So. 2d 180 (2nd DCA Fla. 1959). Escrow account – *Snyder v. Dinardo,* 700 So. 2d 726 (2nd DCA Fla. 1997).

3. Is all property that is jointly owned by husband and wife tenancy by the entireties property? Married persons can hold property individually or under some other form on tenancy. *AmSouth Bank of Florida v. Hepner,* 647 So. 2d 907 (1st DCA Fla. 1994).

4. What determines whether or not the property is owned as tenants by the entireties?

The critical factor is the intent of the parties. Real property that is owned as husband and wife is presumed to be owned as tenants by the entireties. *Knapp v. Fredricksen,* 4 So. 2d 251 (Fla. 1941); *Dixon v. Davis,* 155 So. 2d 189 (2d DCA Fla. 1963); *Bello v. Union Trust Co.,* 267 F. 2d 190 (5th Cir. 1959). And, the ownership interests in the proceeds from the sale of real property are owned the same way as the property. *Sunshine Resources, Inc. v. Simpson,* 763 So. 2d 1078 (4th DCA Fla. 1999); *Sheldon v. Waters,* 168 F. 2d 483 (5th Cir. 1948). However, this presumption can be overcome by evidence of a contrary intent. *Hargett v. Hargett,* 24 So.

2d 305 (Fla. 1946). But see, *Kollar v. Kollar,* 21 So. 2d 356 (Fla. 1945).

In the case of personal property there is not normally a presumption; the intent must be shown. *In re Lyons' Estate,* 90 So. 2d 39 (Fla. 1957); *Hurlbert v. Shackleton,* 560 So. 2d 1276 (1st DCA Fla. 1990); *In re Howe,* 241 B.R. 242 (Bankr M.D. Fla. 1999); and *In re Campbell,* 214 B.R. 411 (Bankr. M.D. Fla. 1997). But see *Leone v. Putnam,* 466 F. 2d 512 (5th Cir. 1972).

To determine intent the courts must look at all of the facts and circumstances. *Dickey v. Kaiser Aluminum & Chemical Sales, Inc.* 286 F. 2d 137 (5th Cir. 1960). However, for some types of personal property such as house hold goods there appears to be a presumption similar to real estate.

The fact that property is owned by husband "or" wife is not generally determinative. *Smith v. Hindery,* 454 So. 2d 663 (1st DCA Fla. 1984); *Roger Dean Chevrolet, Inc. V. Fischer,* 217 So. 2d 355 (4th DCA Fla. 1969). Conversely, the fact that the property is owned by husband "and" wife is not determinative. *Norman v. Bank of Hawthorne,* 321 So. 2d 112 (1st DCA Fla. 1975). But the use of a conjunctive or a disjunctive is often a factor that the courts consider. *In re Lyons' Estate,* 90 So. 2d 39 (Fla. 1956); *In re Brown,* 162

B.R. 616 (Bankr. M.D. Fla. 1993). And, in the case of motor vehicles the use of the disjunctive "or" negates a tenancy by the entireties based upon the motor vehicle statutes. *Amsouth Bank of Florida v. Hepner,* 647 So. 2d 907 (1st DCA Fla. 1994). But in the case of bank accounts an account titled in the disjunctive that allows one spouse to withdraw money without the other signing does not preclude ownership of the account as tenants by the entireties. *First Nat'l Bank of Leesburg v. Hector Supply Co.* 254 So. 2d 777 (Fla. 1971). See also, *Winters v. Parks,* 91 So. 2d 649 (Fla. 1957) and *Hagerty v. Hagerty,* 52 So. 2d 432 (Fla. 1951).

Where the husband and wife have clearly established their intent to establish ownership of the property as tenants by the entireties by designating it as such, the courts will give effect to such statement of intent. *Morse v. Kohl, Metzger, Spotts P.A.,* 725 So. 2d 436 (4th DCA Fla. 1999).

5. What if a person moves to Florida from out of state and brings with them property that they acquired in the other state? In *In re Koesling,* 210 B.R. 487 (Bankr. N.D. Fla. 1997) Judge Killian held that the interest of the debtor was determined by the law of Florida rather than the law of the state where debtor resided and in which the property was acquired by the debtor.

6. When and under what circumstances does property cease being owned as tenants by the entireties?

Since the five unities are required it is logical that if one of the unities no longer exists then the property will no longer be owned as tenants by the entireties. Certainly this is true if the marriage is dissolved. *Giachetti v. Giachetti,* 25 So. 2d 658 (Fla. 1946); *Quick v. Leatherman,* 96 So. 2d 136 (Fla. 1957).

And, the parties can terminate such tenancy by agreement. *Sheldon v. Waters,* 168 F.2d 483 (5th Cir. 1948). Accordingly, a separation agreement that divides the marital assets and provides for a sale of the home and a division of the proceeds terminated the ownership as tenants by the entireties. *Snow v. Mathews,* 190 So 2d 50 (4th DCA Fla. 1966). But see *Jonas v. Logan,* 478 So. 2d 410 (3rd DCA Fla. 1985) that held that the agreement did not convert the property to a tenancy in common until the conveyance was executed.

In light of the requirement for unity of possession and control a separation where the husband and wife agree to a division of their property should be sufficient to terminate the estate by the entireties.

It is clear that neither spouse alone can terminate the tenancy. *Sheldon v. Waters,* 168 F. 2d 483 (5th Cir. 1948); *Matter of Koehler,* 19 B.R. 308 (Bankr. M.D. Fla. 1982). But, a mutual agreement should be sufficient. *Sheldon v. Waters,* 168 F. 2d 483 (5th Cir. 1948).

And, when a tenancy by the entireties is terminated the presumption is that there was to be an equal division of the property. *Id.* This is true except in the case of the death of a spouse, in which case the surviving spouse owns the entire interest. *Lopez v. Lopez,* 90 So. 2d 456 (Fla. 1956).

7. When and under what circumstances is property that is owned as tenants by the entireties exempt?

Properties owned as tenants by the entireties cannot be alienated or severed or partitioned by one spouse without the consent of the other. *Nauirson v. Naurison,* 132 So. 2d 623 (3rd DCA Fla. 1961); *Rader v. First Nat's Bank,* 42 So. 2d 1 (Fla. 1949); *Richart v. Roper,* 25 So. 2d 80 (Fla. 1946); *Stanley v. Powers,* 166 So. 843 (Fla. 1936). But see, *Mesa Petroleum Co. v. Coniglio Petroleum Co.,* 787 F. 2d 1484 (11th Cir. 1986). Accordingly, a creditor with a judgment against only one spouse cannot levy upon property owned as tenants by the entireties. *Winters v. Parks,* 91 So. 2d 649 (Fla. 1957); *U.S. v. Gurley,* 415 F. 2d 144 (5th Cir. 1969). See

Bruce v. McClure, 220 F. 2d 330 (5th Cir. 1955). But a creditor with a judgment against both can pursue collection from assets held as tenants by the entireties. *Stanley v. Powers,* 166 So 843 (Fla. 1936). This includes a judgment against a husband and wife as joint tort-feasors. *Id.*

The Bankruptcy Code includes a debtor's interest in property owned as tenants by the entireties in the bankruptcy estate. *11 USC 541.* A debtor can then exempt such property under 11 USC 522, but such provision only allows the exemption of property held as tenants by the entireties to the extent allowed by Florida law. The question that the bankruptcy courts in Florida have been required to address is the extent to which the debtor's interest in property owned as tenants by the entireties can be exempted where there is only a limited amount of joint debt. Some courts have held that the existence of a single joint creditor results in a loss of the exemption of the debtor's interest in all property held as tenants by the entireties. See *In re Amici,* 99 B.R. 100 (Bankr. M.D. Fla. 1989). Others have held that the debtor is entitle to an exemption to the extent of the excess over joint debt. *In re Boyd,* 121 B.R. 622 (Bankr. N.D. Fla. 1989). See Castro, *"Florida's Treatment of Entirety Property: Do Unsecured Joint Creditors Lose the Benefit of Their Bargain or Achieve*

a Higher Status Than Specifically Provided By the Bankruptcy Code," 45 Fla. L. R. 275 (1993).

In calculating the joint debt, is fully secured debt included? See *In re Monzon*, 214 B.R. 38 (Bankr. S.D. Fla. 1997); *In re Colston*, 87 B.R. 193 (Bankr. M.D. Fla. 1988).

8. Both the husband and wife must be joined in any proceeding challenging the status of property as tenants by the entireties. *Havoco of America, Ltd v. Hill,* 197 F 3d 1135 (11th Cir. 1999).

9. In a bankruptcy case who gets the money recovered by the trustee from the sale of the debtor's interest in tenancy by the entireties property? Again there is a split of authority, some courts holding that the money should be distributed only to joint creditors. Others have held that the priority scheme of the Bankruptcy Code does not permit such separate classification and that the monies must be distributed to all unsecured creditors alike after payment of priority claims. See Castro, *"Florida's Treatment of Entirety Property: Do Unsecured Joint Creditors Lose the Benefit of Their Bargain or Achieve a Higher Status Than Specifically Provided By the Bankruptcy Code,"* 45 Fla. L. R. 275 (1993).

III. FEDERAL EXEMPTIONS.

A. SOCIAL SECURITY PAYMENTS. *42 U.S.C.407.* The provisions for Social Security may be found in Chapter 7 of Title 42 of the United States Code. Subchapter II provides for "Federal Old-Age, Survivors and Disability Benefits." Section 407 says "The right of any person to any future payment under this subchapter shall not be transferable or assignable ... and none of the monies paid or payable or rights existing under this chapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency laws." Proceeds are exempt. *Phillpot v. Essex County Welfare Bd.,* 409 U.S. 413 (1973); *In re Treadwell*, 699 F. 2d 1050 (11th Cir. 1983); *In re Pomar,* 234 B.R. 135 (Bankr. M.D. Fla. 1993).

B. CIVIL SERVICE RETIREMENT BENEFITS. *5 U.S.C. 8346 and 8437(e).* The provisions relating to Civil Service Retirement can be found in Subchapter III of Chapter 83 of Subpart G of Part III of Title 5. They provide for an annuity upon retirement as well as participation in the Thrift Savings plan. Section 8346 provides "The money mentioned by this subchapter is not ... subject to execution, levy, attachment, or garnishment, or other legal process, except as otherwise may be provided by Federal laws."

C. VETERAN'S BENEFITS. *Title 38 of the United States Code.* Title 38 of the United States Code contains several provisions relating to benefits of veterans. The general provision exempting benefits is found in Section

5301 of Chapter 53. It provides "(a) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments." In addition Title 38 exempts the special pension paid to holders of the Congressional Medal of Honor, *38 USC 1562*, and service members' group life insurance benefits and veterans' group life insurance benefits. *38 USC 1970.*

D. FISHERMAN, SEAMEN, AND APPRENTICES. *Title 46 of the United States Code.* Title 46 contains several provisions protecting seamen's wages and clothing. See *11 USC Sections 11109, 11110 and 11111.*

E. INJURY OR DEATH COMPENSATION PAYMENTS FROM WAR RISK HAZARDS. *42 USC 1701, et seq.* Subchapter I of Chapter 12 of Title 42 provides compensation for injuries or death to certain persons employed by a contractor with the U.S. injured from a war-risk hazard. Section 1717 exempts such benefits from legal process.

F. LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT DEATH AND DISABILITY BENEFITS. *33 U.S.C. 916.*

G. COMPENSATION FOR DEATH OR DISABILITY OF GOVERNMENT EMPLOYEE. See *5 USC 8130.* Such provision is part of Chapter 81 of Subpart G of Part III of Title 5. Chapter 81 relates to compensation for work injuries.

H. SERVICEMEN. *Title 10 of the United States Code.* Savings deposits made by members of the armed services while outside the U.S. are exempt. *10 USC 1035(d).* In addition, annuities payable under the Retired Serviceman's Family Protection Plan *(10 USC 1440)* and Survivor Benefit Plan (*10 USC 1450)* are exempt.

I. FOREIGN SERVICE RETIREMENT AND DISABILITY. *22 USC 4060(c).*

J. ANNUITY FOR SURVIVORS OF CERTAIN JUSTICES AND JUDGES OF U.S. COURTS. *28 USC 376(h).*

K. BENEFITS FOR SURVIVING SPOUSE OF LIGHTHOUSE SERVICE EMPLOYEES. *33 USC 775.*

L. ANNUITIES PAYABLE UNDER THE RAILROAD RETIREMENT ACT OF 1974. *45 USC 231m.*

M. RAILROAD UNEMPLOYMENT INSURANCE BENEFITS. *45 USC 352.*

N. CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY BENEFITS. *50 USC 2094.*

IV. FEDERAL TAX LIENS.

A. PROPERTY TO WHICH IT ATTACHES.

1. A federal tax lien attaches to "all property and rights to property, whether real or personal, belonging to the taxpayer." *26 U.S.C. 6321*. See *Weitzner v. U.S.*, 309 F. 2d 45 (5th Cir. 1962).

2. State law defines what property belongs to a taxpayer. *Aquilino v. U.S*, 363 U.S. 509, 80 S.Ct. 1277 (1960).

3. "All" really means all. Examples include:

   a. It attaches to contract rights including pension plan benefits. *In re Evans,* 155 B.R. 234 (Bankr. N.D. Okla. 1993).

   b. FCC licenses. *IRS v. Subranni*, 994 F. 2d 1069 (3rd Cir. 1993).

   c. Future interests. *In re Rosenberg*, N.Y.S. 2d 51 (1970); *U.S. v. Scholfeld*, 179 F. Supp. 332 (E.D. Pa. 1959).

4. Does a federal tax lien attach to property owned as tenants by the entireties? See *Talbot v. U.S.*, 850 F. Supp. 969 (D. Wyo. 1994) in which the court looked to the law of Wyoming to conclude that a federal tax lien against one spouse did not attach to property owned as tenants by the entireties. But see *In re Pletz*, 225 B.R. 206, aff'd 221 F. 3d 1114 (9th Cir. 2000) construing Oregon law to allow a federal tax lien to attach to

the interest of one spouse in tenants by the entireties. See also *U.S. v. Rogers*, 461 U.S. 677, 103 S.Ct. 2132 (1983). Florida law is similar to Wyoming law and distinguishable from Oregon law on this issue. But even under Florida law a spouse has the potential of acquiring the entire interest in the property upon the death of the other spouse. Does a federal tax lien attach to such future, contingent interest?

B. WHEN DOES IT ATTACH? A federal tax lien attaches when the following have occurred: (1) assessment; (2) notice and demand for payment; and (3) neglect or refusal to pay. *26 U.S.C. 6322.* See also, *Central Bank of Tampa v. U.S.*, 833 F. Supp. 892 (M.D. Fla. 1993).

C. WHAT PROPERTY IS "EXEMPT" FROM FEDERAL TAX LIENS? The IRS takes the position that there is no property that is exempt from a federal tax lien. However, by statute the IRS is precluded from levying upon (1) necessary wearing apparel, (2) certain school books, (3) fuel, provisions, furniture and personal effects in the household and for personal use, as well as livestock and poultry, not to exceed $6,250, (4) certain books and tools of the trade not to exceed $3,125 in value, (5) certain unemployment benefits, (6) undelivered mail, (7) certain annuity and pension benefits that are exempt under some of the federal non-bankruptcy exemptions, (8) certain workmen's compensation benefits, (9) judgments for support of minor children, (10) a limited amount of wages, salaries and other income in an amount calculated in accordance with the

statute, (11) certain service-connected disability payments, (11) certain public assistance benefits, (12) assistance under job training partnership act, (13) residences (primary of taxpayer as well as rented to another who uses it as primary residence) in small deficiency cases (not exceeding $5,000), and it should be noted that even in larger deficiency cases special approvals must be obtained to levy upon a primary residence as well as certain business assets of taxpayer. *26 U.S.C. 6334.*

V. REMEDIES FOR ABUSE.

A. CRIMINAL LAWS.

1. Prior to October of 1994 there were a number of laws whose applicability to pre-bankruptcy planning was unclear, including:

a. Bankruptcy crimes. *18 USC 152(7).*

b. Conspiracy to defraud the U.S. *18 USC 371.*

c. Mail, wire and bank fraud. *18 USC 1341 et seq.*

d. Money laundering. *18 USC 7201 et seq.*

e. RICO Act. *96 USC 1961 and 1962.*

2. Bankruptcy Reform Act of 1994 and 18 USC 157. This section provides "A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so – (1) files a petition under title 11; (2) files a document in a proceeding under title 11; or (3) makes a

false or fraudulent representation, claim or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title, imprisoned not more than 5 years, or both." NOTE: Webster's defines "artifice" as an artful devise or stratagem" and it defines "scheme" as a "plan."

3. Apart from federal law, is it a crime in Florida to convert non-exempt assets to exempt assets to avoid creditors? The author is not aware of any criminal statute in Florida that applies to conversion or transfers to exempt assets.

B. OBJECTIONS TO DISCHARGE. Section 727(a)(2) of Title 11 provides "The court shall grant a discharge unless – the debtor, with the intent to hinder, delay, defraud a creditor ... has transferred, removed ... or concealed, or has permitted to be transferred, removed ... or concealed ... property of the debtor, within one year before the date of filing of the petition ...." Various courts have denied a discharge to a debtor who has converted non-exempt property to exempt property with intent of avoid claims of his or her creditors. See *In re Collins*, 19 B.R. 874 (Bankr. M.D. Fla. 1982); *In re Reed*, 700 F.2d 986 (5th Cir. 1983); *In re Levine*, 166 B.R. 967 (Bankr. M.D. Fla. 1994). And attorneys should also be

aware that a year might not really mean a year. See *In re Oliver*, 819 F. 2d 550 (5th Cir. 1987).

C. FRAUDULENT TRANSFER STATUTES. *Chapter 726, Florida Statutes.* But, is a conversion from non-exempt to exempt assets within the scope of this statute? The answer is, yes. Section 222.29 provides "An exemption from attachment, garnishment, or legal process provided by [Chapter 222] is not effective if it results from a fraudulent transfer or conveyance as provided in Chapter 726." See also *In re Levine*, 134 F. 3d 1046 (11th Cir. 1998); *In re Davidson*, 178 B.R. 544 (Bankr. S.D. Fla. 1995). For cases addressing the issue of a transfer from one spouse to both husband and wife, as tenants by the entireties see, *Foster v. Thornton*, 179 So. 882 (Fla. 1938); *Ellis Sarasota Bank & Trust Co. v. Nevins*, 409 So. 2d 178 (2d DCA Fla. 1982); *Richardson v. Grill*, 190 So. 255 (Fla. 1939); *Sample v. Natalby*, 162 So. 493 (Fla. 1935); *In re Blitstein*, 105 B.R. 133 (Bankr. S. D. Fla. 1989). But note, it is not a fraudulent transfer to transfer from an exempt asset into another exempt asset. *Dean v. Heimbach*, 409 So. 2d 157 (1st DCA Fla. 1982); *Sneed v. Davis*, 184 So. 865 (Fla. 1938) and *In re Kimmel*, 131 B.R. 223 (Bankr. S.D. Fla. 1991). See also, *Sections 726.102(2)(b) &(c), Florida Statutes*, which exclude exempt assets and assets owned as tenancy by entireties from the definition of assets. It should also be noted that this remedy is not available to challenge an exemption under the Florida Constitution. *Havoco of America, Ltd. v. Hill*, 26 Fla. L. W. S416 (June 2001).

D. FRAUDULENT CONVERSION STATUTE. *F. S. 222.30.* This section provides another remedy for challenging assets that might otherwise be exempt based upon the conversion of non-exempt assets into exempt assets. The elements of this provision by its terms require proof of: (1) a change or disposition of an asset by the debtor; (2) made by the debtor with intent to hinder, delay or defraud a creditor; (3) resulting in product or proceeds; (4) which product or proceeds are immune or exempt from claims of creditors of the debtor; and the product or proceeds remain property of the debtor. Accordingly, this statute should not be applicable to a number of situations where the debtor ends up with exempt or immune assets:

1. Spending non-exempt assets for ordinary and reasonable living expenses and saving exempt assets.
2. Asking relatives to change their will to leave assets going to a debtor to them in a spendthrift trust.
3. Transferring an exempt asset into another exempt asset, for example, transferring a paycheck of the head of the family into an account held as tenants by the entireties. See *Sneed v. Davis,* 184 So. 865 (Fla. 1939).

For cases construing Section 222.30 see, *In re Wilbur,* 206 B.R. 1002 (Bankr. M.D. Fla. 1997); *In re Miller,* 188 B.R. 302 (Bankr. M.D. Fla. 1995). As in the remedies under the fraudulent transfer statute noted

above, the remedies of this section are not available for challenges to exemptions under the Florida Constitution.

E. ATTORNEY (AND OTHERS) AS DEFENDANTS. "Fraud" under Florida law includes "the intention by the debtor to prevent his creditors from recovering their just debts by withdrawing his property from the just reach of his creditors." *Bayview Estates Corp. v. Southerland,* 154 So. 894 (1934). If an attorney (or others) assists in the commission of fraud is he or she liable for civil conspiracy to commit fraud? It is clear that a cause of action exists under Florida law for civil conspiracy to commit a tort. See *Snipes v. West Flagler Kennel Club, Inc.,* 105 So. 2d 164 (Fla. 1958); *Wilcox v. Stout,* 637 So. 2d 335 (2d DCA Fla. 1994). However, the author is not aware of any Florida cases holding that a participant in a plan to convert non-exempt assets into exempt assets is liable to a debtor's creditors. The Fourth District Court of Appeals has ducked this issue on at least two occasions. *Volpitta, v. Fields,* 369 So. 2d 367 (4th DCA Fla. 1979) and *Broxmeyer v. Elie,* 647 So. 2d 893 (4th DCA Fla. 1889). See generally, Engel and Garland, *"Ethical and civil liability considerations for the asset protection planner,"* Off Shore Investment pg. 8 (June 1995). Also, the attorney should be aware that the U.S. Justice Department takes the position that an attorney commits a crime if he or she aids and abets or conspires with a debtor to violate the criminal laws. And if these problems aren't enough, the attorney should be aware

that the attorney – client privilege does not apply to matters that involve fraud. *In re Campbell,* 248 B.R. 435 (Bankr. M.D. Fla. 2000).

VI. BANKRUPTCY PRACTICE AND PROCEDURE.

A. PROCEDURE FOR DETERMINING EXEMPTIONS.

1. General. The commencement of a case creates an estate comprised of all of a debtor's property, including exempt property. *11 USC 541.* Section 522 of the Bankruptcy Code provides "Notwithstanding section 541 of this title, an individual debtor may exempt ...." States were allowed to decide whether or not to allow persons domiciled in the state to choose between certain federal bankruptcy exemption specified in subsection (d) or to limit debtors to state and federal non-bankruptcy exemptions. Florida decided to limit persons domiciled in Florida to state and federal non-bankruptcy exemptions. *F.S. 222.20.* Accordingly, the exemptions set forth in this outline are most, if not all, of the exemptions allowed to a debtor domiciled in Florida.

2. Which state law applies? Pursuant to 11 USC 522 the debtor's exempt property consists of property that is exempt under federal non-bankruptcy or "State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the

petition, or for the longer portion of such 180 day period than any other place ...." *See Section I above.*

3. Claiming or asserting right by debtor. Rule 4003(a) requires a debtor to list the property he or she claims as exempt on the schedules that are required to be filed pursuant to Rule 1007. These are required to be filed in a form substantially similar to the Official Forms. *Rule 9009.* Schedule C of those forms requires a debtor to list (a) a description of each item of property claimed as exempt, (b) the law providing each such exemption, (c) the value of the claimed exemption, and (d) current market value of the property without deducting exemptions. The debtor is allowed to amend his or her claim of exemptions at any time so long as there has been no bad faith or prejudice to any party in interest. *Matter of Doan,* 672 F. 2d 831 (11th Cir. 1982); *In re Talmo,* 185 B.R. 637 (Bankr. S.D. Fla. 1995).

4. Objections to debtor's claim of exemption.

   a. Who may object? Any "party in interest" may object to the list of property claimed as exempt by a debtor. *Rule 4003(b).* Thus, the trustee, a creditor or the office of the United States Trustee may object. The definitions of a "creditor" and "claim" in Section 101 of the Bankruptcy Code allow anyone who has a claim, even if the claim is

disputed, contingent or unliquidated, to object to a debtor's exemptions.

b. Time within which an objection must be made.

(1) Rule 4003(b) requires that an objection be made within 30 days after the conclusion of the 341 meeting unless the time has been extended. Thus the time for objecting does not begin to run if a meeting is continued. In the event of an amendment to the list of exemptions, the objection must be filed within 30 days after the amendment is filed. Objections filed to an amendment can only address the exemptions added by the amendment. *In re Kazi*, 985 F. 2d 318 (7th Cir. 1993).

(2) Extensions. Rule 4003(b) provides that "The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension." The current wording of this Rule is the result of the 2000 amendments that resolved a problem with cases that had held that the order granting the extension must be entered within the 30 day period. But after the 30 days has run, it is too late.

Rule 9006(b)(3). See also *Taylor v. Freeland,* 503 U.S. 638 (1992).

(3) What type of showing is required to obtain an extension? Rule 9006(b)(3) provides that "the court may enlarge the time for taking action under Rules ... 4003(b) ... only to the extent and under the circumstances stated in those rules." Rule 4003 by its terms requires a showing of "cause." The author could not find any cases addressing this requirement. By analogy, one can look to the requirement of "cause" for an extension of time to object to discharge in Rule 4004. Under 4004 the courts require a showing of diligence by the creditor. *In re Woods,* 14 Fla. L W.(Fed) B238 (Bankr. N.D. Fla. March 16, 2001); *In re Mendelsohn,* 202 B.R. 831 (Bankr. S.D.N.Y 1996) and *In re Davis,* 195 B.R. 422 (Bankr. W.D. Mo. 1996). Courts look to whether or not the creditor attended the first meeting of creditors, whether there was a timely attempt to schedule a Rule 2004 and other things that the creditor has done to investigate the issues before requesting an extension. However, because of the much shorter

time frames for objections under Rule 4003 it is likely that less diligence will be required for an extension than is required for Rule 4004 extensions.

(4) In the event of an extension by one party in interest, do other parties in interest get the benefit of the extension? Again using cases under Rule 4004 by analogy courts have held that "cause" is peculiar to the circumstances of each party in interest. Accordingly, where the request for the extension or the order is ambiguous as to who gets the benefit of the extension, the extension is generally limited to the moving party. See *Burger King Corp. v. B-K of Kansas, Inc.*, 73 B.R. 671 (D. Kan. 1987); *Matter of Ichinose*, 946 F. 2d 1169 (5th Cir. 1991).

(5) Converted cases. When a case is converted from one chapter to another, does this give parties in interest an additional period within which to object? There is a split of authority on this issue. See *In re Wolf*, 244 B.R. 754 (Bankr. E.D. Mich. 2000) and *In re Mims*, 249 B.R. 378 (Bankr. D.N.J. 2000) holding that a new thirty day period

begins with the conclusion of the first meeting in the converted case. But see *In re Ferritti,* 230 B.R. 883 (Bankr. S.D. Fla. 1999) where the court reached an opposite conclusion.

c. Who must be joined in the objection? The court must look to state law to determine necessary parties to an objection to exemptions. *Havoco of America, Ltd v. Hill,* 197 F. 3d 1135 (11th Cir. 1999). In *Havoco of America, Ltd. v. Hill,* the 11th Circuit held that Florida law required joinder of a spouse in an adversary proceeding challenging a debtor's claim of exemption to property based upon ownership as tenants by the entireties. Procedurally, a person can also be joined in a contested matter. Rule 9014 of the Bankruptcy Rules allows the court to apply any of the rules in Part VII relating to adversary proceedings. Rule 7019 incorporates Rule 19 of the Federal Rules of Civil Procedure allowing joinder of parties. However, in light of the 11th Circuit decision in *Hill* it may be prudent to file it as an adversary, at least where the challenge is to property held as tenants by the entireties.

5. The problem with ambiguous claims of exemption. In *In re Green,* 31 F.3d 1098 (11th Cir. 1994) a debtor who claimed as exempt a lawsuit which the debtor valued at $1 was entitled to

keep all of the proceeds of the lawsuit in excess of the $1 because no one objected to the exemption claim.

6. Whose property is it during the gap period? Absent a timely objection, once the time to object has expired it is clear that the property claimed as exempt is no longer property of the estate. *In re Gamble,* 168 F. 3d 442 (11th Cir. 1999). Whose property it is during the time from the order for relief until either the thirty day period has expired without objection, or until a determination of any objection, is less clear. In *In re Kasishke,* 40 B.R. 712 (Bankr. N.D. Tex. 1984) the court held that the property belonged to the estate during the gap period. However, such an approach creates a number of practical problems. For example, what if the debtor has an accident in an automobile that is claimed as exempt during the thirty day period? And is the debtor required to pay rent for use of his or her homestead during such period. The custom and practice appears to recognize (by silence and inaction) that the property claimed as exempt belongs to the debtor during such period subject to the debtor being divested of it in the event of a successful objection. The exact wording of Section 522(a) arguably supports this conclusion. It says, "Notwithstanding section 541 ..."

7. Burden of proof. Rule 4003(c) provides that the objecting party has the burden of proving that the objections are not properly claimed. Whether or not, and when, such burden may shift is an additional issue. *In re Carter*, 182 F. 3d 1027 (9th Cir. 1999); *In re Moody*, 241 B.R. 238 (Bankr. M.D. Fla. 1999).

B. DEBTOR'S AVOIDANCE POWERS.

1. Avoidance of judicial liens. *11 USC 522(f)(1)(A).*

Florida's homestead exemption has resulted in a number of decisions interpreting avoiding power provided by this subsection. The fundamental questions have been, when did the lien attach, can the debtor avoid a judicial lien that has attached to the property before it became homestead, and can this section be used to clear title for liens that arguably have not attached? In *Owen v. Owen,* 500 U.S. 305, 111 S. Ct. 1833 (1991) the U.S. Supreme Court was called upon to address the use of this subsection in connection with Florida's homestead exemption. See also *Farrey v. Sandlefoot,* 500 U.S. 291, 111 S. Ct. 1825 (1991). On remand in *Owen* the 11th Circuit held that since the judicial lien attached, the lien could not be avoided because it did not attach to a debtor's preexisting interest in the property. *Owen v. Owen,* 961 F. 2d 170 (11th Cir. 1992). See also, *In re Wrenn,* 40 F. 3d 1162

(11th Cir. 1994 interpreting application to Alabama's homestead exemption). Accordingly, if the judicial lien attached before the property became the debtor's homestead, Section 522(f) cannot be used to avoid that lien. But where the debtor's interest in the homestead preceded the judicial lien, the lien does not attach under Florida law. Can this section nonetheless be used to clear title? The Fifth Circuit has answered this question in the affirmative. *In re Henderson*, 18 F. 3d 1805 (5th Cir. 1994). But the issue is still in doubt in the 11th Circuit. See, *Cannon v. Cannon*, 254 B.R. 773 (S. D. Fla. 2000).

As to personalty, this issue rarely is an issue in Florida because of the nature of Florida's exemptions in personalty. It no doubt comes up with much greater frequency in the states that have not "opted out" of the federal exemptions set forth in Section 522(d).

For an in depth discussion and analysis of this section, see *Collier on Bankruptcy*, para. 522.11, pages 522-76 to 522-88 (15th Ed.).

2. Avoidance of non-purchase money security interests in certain property. *11 USC 522(f)(1)(B).*

A "security interest" is defined in Section 101(51) as "a lien created by an agreement." To qualify for avoidance under

this provision such security interest must be "nonpossessory" and "non-purchase money." "Nonpossessory" refers to those cases where a creditor has not perfected by possession under Article 9 of the UCC. It does not refer to repossessions upon default. *In re Schultz,* 101 B.R. 68 (Bankr. N.D. Iowa 1989); *In re Challinor,* 79 B.R. 19 (Bankr. D. Mont. 1987). But see *In re Shepler,* 78 B.R. 217 (Bankr. W.D. Wisc. 1987); *In re Sanders,* 61 B.R. 381 (Bankr. D. Kan. 1986). "A purchase Money security interest" is defined in Section 679.107 of the Florida Statutes. Under this definition it does not make any difference whether the seller / creditor retains a security interest in connection with the sale or the creditor loans money to enable debtor to acquire the collateral. Both are considered purchase money. There is a question, however, when a debtor refinances a purchase money debt. See *Matter of Manuel,* 507 F.2d 990 (5th Cir. 1975); *In re Matthews,* 724 F. 2d 798 (9th Cir. 1984); *In re Clark,* 156 B.R. 693 (Bankr. S.D. Fla. 1993). And, the agreements are purchase money only to the extent they secure the purchase price, not to the extent that other debt is included within a dragnet clause. *Southtrust Bank v. Borg-Warner Acceptance Corp.,* 760 F. 2d 1240 (11th Cir. 1985).

As with judicial liens, avoidance must be predicated upon an impairment of an exemption. Thus the property must be

within one of the exemptions set forth in this outline, the primary one being the exemption in the Constitution for $1,000 worth of personal property.

In addition, Section 522 (f)(2) lists the types of property that may be the object of avoidance.

3. Exemption of property recovered by trustee. *11 USC 522(g).* Exempt property that the trustee recovers pursuant to the avoiding powers can be claimed as exempt. This applies to recoveries by a trustee of preferences, a fraudulent transfer or the like. However, the transfer must have been an involuntary one and not concealed by the debtor. For example, if debtor's car is seized before the petition by the sheriff on a writ obtained by a judgment creditor and the rights of the creditor are avoidable, the trustee is required to give the debtor $1,000 from the proceeds of the sale of the car if the car qualifies as exempt.

4. Recovery of exempt property by debtor. *11 USC 522(h).* If the trustee is unwilling to recover avoidable transfers, the debtor is given the power to do so to the extent of exempt property. However, the limits of and defenses to the avoiding provisions are equally applicable to the debtor. For example, the exception for recoveries of preferences under $600 is

applicable to the debtor's ability to recover exempt property as a preference.

C. POST BANKRUPTCY EFFECT OF EXEMPTION CLAIM. *11 USC 522(c).* Subject to certain exceptions, property exempted under Section 522 is "not liable during or after the case for any debt of the debtor that arose ... before the commencement of the case ...."

D. PROPOSED CHANGES TO THE BANKRUPTCY CODE. The title of the House bill (H.R. 333) gives a good indication of its purpose. Section 1 says, "This Act may be cited as the 'Bankruptcy Abuse Prevention ... Act of 2001.'" The perceived abuses relating to exemptions that both the House and Senate sought to change related to two (2) areas:

1. Moving to a state with better exemption laws. Both the House and Senate versions represent a change in the choice of law provision in Section 522. As noted above, the present provision looks to the debtor's domicile for the greater part of the 180 days preceding the filing. Both the House and Senate versions would dramatically change this. They provide "any property that is exempt under ... State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition, or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the

debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place; ...." The problems if this is adopted are obvious. First, it is difficult enough to determine domicile the 180 days before the petition in the case of multiple residences or people who have recently moved. One cannot even contemplate the scope of the problem if we have to look back over 2 ½ years. But of greater significance, trustees and creditors will be required to apply the laws of other states with which they have no familiarity.

2. Too much or improperly acquired equity in the homestead. In this area there was a marked difference between the House and the Senate versions. While considerable simpler in its approach, the Senate version set a cap on the amount of equity that a debtor could claim as exempt in his or her homestead. It said "a debtor may not exempt any amount of interest that exceeds in the aggregate, $125,000 in value in (A) real or personal property that the debtor or a dependant of the debtor uses as a residence; (B) a cooperative that owns property that the debtor or a dependant of the debtor uses as a residence; or (C) a burial plot for the debtor or a dependant of the debtor. The House took a different approach. Section 309 of the

> House bill reduces the homestead exemption "to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 7-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of." Can you imagine the problems trying to figure that out much less proving the amount of the reduction?

While the proposed legislation seeks to limit such abuses, both the House and Senate versions also added an exemption for "retirement funds to the extent those funds are in a fund or account that is exempt from taxation under Section 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code of 1986."