2015 CUMMULATIVE SUPPLEMENT TO EXEMPTIONS IN FLORIDA BANKRUPTCY PRACTICE

2015 Presented by
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This outline supplements the outline prepared for the 2001 seminar. It is a cumulative supplement, with current year changes in ***italics. This supplement covers the period July 1, 2014 through July 31, 2015.***

I. DOMICILE

A. GENERAL

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

B. SIGNIFICANCE OF DOMICILE IN FLORIDA

See Wolf, "The Importance of Domicile in Asset Preservation Planning," 79 Fla. B. Journal 30 (Nov. 2005). See also, Blay "The Extraterritorial Effect of Bankruptcy Exemption Schemes," ABI J. (Nov. 2012).

C. SIGNIFICANCE IN BANKRUPTCY CASES

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

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

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

D. IMPACT ON CHOICE OF LAW

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

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

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

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

E. PROCEDURE FOR ASSERTING DOMICILE

F. MULTIPLE RESIDENCES

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

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

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

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

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

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

intended to permanently reside in his Florida home, it could have as easily been decided upon the closely related issue of domicile. Judge Killian's decision was affirmed on appeal. Middleton v. Phillips, 2012 WL 764196 (N.D. Fla. 2012). The District Court's decision to affirm was based, in part, upon the theory that there cannot be two homesteads for a spouse where the marriage is "intact."

II. FLORIDA EXEMPTIONS

During the past two years the Florida Bar has published two (2) treatises that contain significant information relating to exemptions in Florida. One is called Creditors' and Debtors' Practice in Florida and the other is called Asset Protection in Florida.

A. CONSTITUTIONAL EXEMPTIONS

1. HOMESTEAD

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

conflicts that can arise between the attorney, CPA, and financial planner when providing advice on homestead exemption planning.

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

a. Limitations and requirements

(1) Natural person

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

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

In Cutler v. Cutler, 2007 WL 601866 (Fla. 3rd DCA 2007) the mother owned the property where she lived. Eight months before she died she deeded the property to an irrevocable trust for the benefit of her children retaining a life estate. She continued to live on the property until her death. One of the questions that the Third District was called upon to decide was the question, was the home her "homestead" at the time of her death notwithstanding the fact that the home was owned by an irrevocable trust, which is not a "natural person." The Third District held that her interest was sufficient to qualify as homestead.

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

(2) Limitations on size, location and use

In In re McLachlan, 266 B.R. 220 (Bankr. M.D. Fla. 2001) Judge Baynes granted summary judgment in favor of the debtor on the following facts. The Debtor, in December 1995, owned a parcel of land outside a municipality which was his and his wife's homestead. In December 1996, the Debtor acquired an adjacent and contiguous parcel of land. This parcel had a palm grove from which the Debtor sold palm trees from time to time. Both parcels of land were outside a municipality, and they met the Florida Constitution's geographic limits to qualify as a homestead outside a municipality. He distinguished the Nofsinger case, "It should be noted the facts in this case do not concern the circumstance whereby the debtor/owner of the homestead leases a portion of that property to another party, thus destroying the residency aspect of the homestead required by the Florida Constitution…. [T]he mere allowance of a license, lease, profit, or granting of an incorporeal hereditament, which allows for a consistent

occupation of the homestead property without negating the residency, should not be a basis for denying a homestead exemption. Within this context, the use of the land for citrus groves, the grazing of cattle, the growing of animal feed, the digging of burrow pits, should not be a per se basis for eliminating the homestead exemption, unless it can be shown the debtor has abandoned or waived its homestead by such acts."

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

A contrary decision was reached in In re Yonkin, 2013 WL 100416 (Bankr. M.D. Fla. 2013). The Davis decision was not mentioned. It is also inconsistent with the Florida Supreme Court decision in Buckels v Tomer, 78 So. 2d 861 (Fla. 1955) where the Florida Supreme Court cited the language in its opinion in Fort v Rigdon, 129 So.

847, 848 (Fla. 1930) "We have no authority, if the person who claims the land for a homestead resides thereon, is a resident of the State, the head of a family, and there is no more than 160 acres in the tract, to add any other conditions than those expressed in the Constitution. To say how the homesteader should use his land, whether as a 'farm,' or for a 'saw-mill,' or a 'grist-mill,' or a 'carding and fulling mill,' would be to impose a judicial condition not found in the Constitution of the State. The Constitution does not prescribe the manner in which the tract shall be used beyond residing thereon."

In the case of In re Aliu, 16 Fla. L. Weekly (Fed) B262 (Bankr. S. D. Fla. 2003) a judgment was entered in state court granting specific performance of a contract to sell a residence. The debtor then filed bankruptcy claiming the property as homestead. The bankruptcy court held that the transfer of title effectively occurred when the judgment granting specific performance was

entered. Accordingly, the debtor did not have an interest in the property that was exempt.

How do you calculate the size for purposes of the ½ acre limitation for a condominium unit? Do you include the debtor's interest in the common areas. The Third District Court of Appeals held, No. Braswell v. Braswell, 890 So 2d 379 (Fla. 3rd DCA 2004).

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

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

with a home, such as using the employees shower, but the Bankruptcy Court limited his exemption to the apartment.

In In re Ensenat, 2007 WL 2029332 (Bankr. S.D. Fla. 2007) the bankruptcy court held that a detached dwelling unit occupied by a relative did not preclude the debtor from claiming the entire property as homestead even though it was within the city where the relative did not pay any rent.

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

In In re Williams, 2013 WL 3353633 (Bankr. S.D. Fla. 2013) Judge Cristol held that the portion of a multifamily dwelling that was used by a debtor was exempt but since it couldn't be apportioned the Eleventh Circuit decision in In re Englander, 95 F. 3d 1028 (1th Cir. 1996). Accordingly, the Trustee was authorized to sell the property and divide the proceeds. This was true even though the debtor testified that he was the only

one residing in the building. Presumably the property was within the city limits.

Similar is the case decided by Judge Specie in "In re Kain, case no. 12-31492-KKS (February 14, 2014)" at docket no. 165. Judge Specie does a detailed analysis of the portions of the property that are exempt and those that are not.

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

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

A different conclusion was reached by Judge Funk in In re Oullette, 2009 WL 1936896 (Bankr. M.D. Fla. 2009) where the debtors leased a portion of their property to another and also used a portion of their property to operate their business through a closely held entity.

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

In re Callejo, 2015 WL 779002 (Bankr. S. D. Fla.) Judge Cristol found a debtor was entitled to homestead exemption even though debtor ran a home school/tutoring business out of the residence. The home was a single family residence and met acreage requirement. The debtor occupied the entire dwelling. Judge Cristol indicated Art. X, §4 "does not limit what the owner or his family can do within the four walls of that residence." This was different than those cases where a separate structure or unit was located on the property and used for rental or business purposes.

(3) Present, possessory interest.

In In re Plaster, 271 B.R. 202 (Bankr. M.D. Fla. 2001) Judge Proctor followed existing precedent in holding that a remainder interest was not an interest entitled to protection as homestead.

What is interesting in this case is the debtor's argument for an exception to that rule where the debtor lives on the premises and is "head of the family," citing opinions of the Florida Supreme Court. Judge Proctor did not reject such an exception, but instead held that debtor failed to prove that she was head of the family.

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

In a similar vein, Judge Killian recognized an exception to the general rule and allowed a debtor with a remainder interest to claim it as exempt. In re Hildebrandt, 432 B.R. 852, 2010 WL 2718044 (Bankr. N.D. Fla. 2010).

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

Co-Ownership on Florida Homestead", Fla. Bar J. 32 (May, 2012).

The 5th District Court of Appeals distinguished the 1978 decision of the Florida Supreme Court in In re Estate of Wartels, holding instead that a cooperative apartment qualified for homestead protection from forced sale. Southern Walls, Inc. v. Stilwell Corporation, 810 So.2d 566 (Fla. 5th DCA 2002). The 5th DCA held that "in order to constitute a residence for purposes of claiming the exemption, a co-op must be a dwelling that an individual has an ownership interest in that gives him or her the right to use and occupy it as his or her place of abode." It then went on to analyze the Florida statutes relating to co-op apartments to conclude that the fact that the debtor acquired shares of stock in the cooperation and a long term lease as evidence of title instead of a deed is a "distinction without difference."

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

Law v. Law, 163 So.3d 553 (Fla. 3d DCA 2015) The 3d District Court of Appeal held a non-titled spouse could still claim homestead exemption in proceeds from the sale of the former marital home. The court reasoned the property had been the marital home, the funds had been segregated, and she had a good faith intent to reinvest in homestead. The case involved the ex-husband's counsel attempt to be paid from the proceeds of the sale of the former marital home.

The ex-husband had signed a retainer agreement allowing the law firm to be paid for foreclosure defense from the sale proceeds. The 3d District held 1) could not waive homestead protection in a retainer agreement – an unsecured agreement (relied on Chames v. DeMayo, 972 So.2d 850 (Fla. 2007) and 2) wife had not signed. The Court awarded ex-wife section 57.105 fees for having to defend the law firm's claim to the sale proceeds.

In the context of the tax exemption for homesteads, the 4th District Court of Appeals held that property occupied by a person who had conveyed the property to a qualified personal residence trust (OPRT) remained exempt. Nolte v. White, 784 So.2d 493 (Fla. 4th DCA 2001). In that case the Property Appraiser of Indian River County and the Director of the State of Florida Department of Revenue appealed a lower court decision allowing the exemption, arguing that Mrs. White did not have sufficient equitable title to claim homestead exemption because she did not hold a life estate in the property. The 4th DCA affirmed the

summary judgment, adopting the rationale in Robbins v. Welbaum, 664 So.2d 1 (Fla. 3d DCA 1995) (taxpayers were entitled to homestead exemption even though the qualified personal residence trust limited taxpayers' use of their residence to earlier of ten years from trust's creation or one of taxpayer's death).

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

Kelly v. Spain, 160 So.3d 78 (4th DCA 2015). The property appraiser from Martin County appealed a lower court decision requiring a refund of approx. $283,000 in taxes and penalties it assessed against Ms. Spain after the death of her husband. Ms. Spain was in title with her late husband as TBE, she resided in the property and continued to reside in the property after his death. However, she had not filed a homestead exemption application so property appraiser assessed taxes and penalties over a four

year period. The Court held there was no change of ownership upon husband's death and that a homestead application filed by one spouse inures to the other spouse provided they both permanently reside in the homestead.

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

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

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

decide was the question, was the home her "homestead" at the time of her death notwithstanding the fact that the home was owned by an irrevocable trust, which is not a "natural person." The Third District held that her interest was sufficient to qualify as homestead. 997 So.2d 341 (Fla. 3d DCA 2008)

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

Citing Judge Killian's case In re McAtee, 154 B.R. 346, (Bankr. N.D. Fla. 1993) the Second DCA held that a long term leasehold interest qualified as homestead. Geraci v Sunstar EMS, 93 So. 3d 384 (Fla. 2d DCA 2012).

A debtor who lived in a portion of her office located within the city limits was allowed to claim only that portion of the office in which she resided as her homestead. She was allowed to do so even though the office was zoned commercial and she

was being fined $10 per day for living there. "In re Kain, case no. 12-31492-KKS (February 14, 2014)" at docket no. 165.

(4) Occupancy with intent to reside

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

In In re McClain, 281 B.R. 769 (Bankr. M.D. Fla. 2002) the debtor lived in a motor home that she did **not** claim as exempt on real property that she owned and did claim as exempt. The question was, "whether real property, upon which there is a non-exempt motor home, can qualify for the homestead exemption." Judge Funk held that there must be a sufficient nexus "between a residence being claimed as exempt and a fixed property interest in Florida

(the 'physical permanency requirement') in order for the residence to qualify for the homestead exemption. [Cites omitted]. Additionally, a debtor must intend to make the property … his permanent residence." Judge Funk went on to hold that "so long as a debtor actually lived on real property being claimed as exempt, a non-exempt tree-house or tent would establish the requisite degree of permanency."

In a divorce one of the spouses is often required to move from the homestead. The judgment or agreement often provides that upon occurrence of a future event, the spouse that has moved is entitled to money from the sale or refinancing of the home. Even though no longer living there, Judge Proctor in the Middle District held that such spouse is entitled to retain a claim to the proceeds if such spouse intends to invest those proceeds in a new homestead in Florida. In re Kalynych, 284 B.R. 149 (Bankr. M.D. Fla. 2002). Pursuant to the divorce, the ex-spouse was required to refinance and pay debtor $15,000 within 4 years.

Two (2) years remained before the refinancing was required. Judge Proctor held that the period of time within which a debtor must reinvest the proceeds in a new homestead is a reasonable period. Under the facts of this case, he held that the remaining period of two years was reasonable.

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

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

In In re Vick, 2008 WL 2444526 (Bankr. S.D. Fla. 2008) Judge Cristol stated in dicta that it is not

necessary to have an intent to reinvest the proceeds from a sale of the homestead into a new homestead where the sale of the homestead had not closed as of the date of the petition.

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

In In re Isham, 19 Fla. L. Weekly Fed. B221 (Bankr. S.D. Fla 2006) the court addressed the relatively novel question, if a debtor's income and expenses show that the debtor cannot afford the homestead, how can the debtor have the requisite intent to reside there in the future?

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

This case was distinguished by the Third DCA in Grisolia v Pfeffer, 77 So.3d 732 (Fla. 3d DCA 2011) where the decedent had a visa that allowed

him to stay in the United States and prior to his death he was pursuing permanent residency status. His son, who resided with him, was a U.S. citizen.

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

In In re Castro, 2006 WL 4005571 (Bankr. S. D. Fla. 2006) Judge Cristol crafted a solution to the issue, does a debtor really intend to reinvest the proceeds in a new home within a reasonable period of time? Judge Cristol gave the debtor a period of time to buy the new home, absent which the exemption would be denied and the money would have to be turned over to the trustee. Also in that case the debtor had spent some of the money post-petition and Judge Cristol held that the debtor did not have the requisite intent as to the "dissipated proceeds" so they would have to be paid over to the trustee.

In In re Furey, 2014 WL 2119697 (Bankr. M.D. Fla. 2014) a judgment creditor with recorded judgment filed a civil action to declare that debtor's condo was not exempt. During the pendency of the civil action debtor obtained authority to sell her condo and the monies were placed in escrow. Debtor acquired a new home for less than the amount in escrow but the new home required improvements according to the debtor. Judge Funk held that debtor was entitled to the funds in escrow since the Petition Date was the relevant date to determine her exemption. In addition she was not limited to the money necessary to purchase the home where there was an intent to make subsequent improvements.

As an additional issue in Furey the creditor argued that debtor's contingency fee agreement with her attorney indicated she did not have the intent to reinvest all of the proceeds in a new home. Judge Funk held that she was not legally obligated to pay her attorney's from the proceeds citing Chames v DeMayo.

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

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

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

For an article on abandonment of a homestead, see Cuello, "The Long-Standing Concept of 'Abandoment' of the Homestead Did Not Survive the 1985 Amendments to the Florida Constitution," 86 Fla. B. J. 37 (December, 2012).

JBK Associates, Inc. v. Sill Bros, Inc., 160 So.3d 94 (4th DCA 2015) The 4th District Court of

Appeal held that homestead proceeds from the sale of a homestead held in a brokerage account were exempt. The account was labeled as FL homestead account and did not involve risky trading. The court found there was no constitutional provision or statute that limits how the proceeds of a sale must be held. Of interest, the Court did indicate in conclusion that it did not reach the issue of whether any profits realized would be exempt or general assets not entitled to homestead protection.

Ezem v. Federal National Mortgage, 153 So.3d 341 (Fla. 1st DCA 2014) First District Court of Appeal found a husband who was not in title was entitled to intervene in a foreclosure action. The first district recognized record title is not a prerequisite to finding that the property is homestead. He was allowed to intervene in foreclosure proceedings.

In re Charania, 2015 WL 1208616 (Bankr. S.D. Fla. 2015) In this case a debtor executed a deed in 2003 conveying homestead to son and

daughter-in-law. Deed was never recorded and debtor and his son filed 2 different bankruptcy cases in 2007. Debtor did not disclose the property. Son did and got an order avoiding the lien of a judgment creditor (judgment creditor of debtor and son). Seven years later debtor re-opens case and seeks to exempt homestead. Judgment creditor objects. Judge Mark found a Debtor could not intend to permanently reside in a home that he believed he did not own at the time of filing bankruptcy. Quoting Cooke v. Uransky, 412 So.2d at 341-343 (Fla. 1982) "Whether a person can legally formulate the intent to permanently reside in a home is based on whether that person has the "legal power to rightfully and in good faith make the subject property their 'permanent home'".

b. Mobile homes.

The 4th DCA held that a mobile home permanently affixed to real estate resided in and owned by the head of household qualified as homestead under the Florida Constitution, despite fact that residence was not on leased premises nor was it a traditional house. Gold v. Schwartz,

774 So.2d 879 (Fla. 4th DCA 2001). The court noted that Section 222.05 of the Florida Statutes was not applicable because the person owned the real property, he didn't lease it.

c. Exceptions to the exemption.

(1) Equitable liens and constructive trusts.

Several cases over the past year have addressed the right to an equitable lien or constructive trust on homestead property. In In re Thiel, 270 B.R. 785 (Bankr. M.D. Fla. 2001) Judge Corcoran addressed the language in the Florida Supreme Courts opinion in Havoco of America, Ltd. v. Hill, which said "When an equitable lien is sought against homestead real property, some fraudulent or otherwise egregious act by the beneficiary of the homestead protection must be proven." He went on to hold that debtor was collaterally estopped from contesting a finding of fraud even though no punitive damages were awarded in the state court action and that the Florida Supreme Court's decision in Palm Beach Savings & Loan v. Fishbein controlled on the issue of the innocent spouse.

However, in Williams v. Aloisi, 271 B.R. 676 (M.D. Fla. 2002) the U.S. District Court remanded a

decision in favor of a debtor for a determination of whether or not the debtor "knowingly benefited" from her ex-husband's fraud. The bankruptcy court found that she did not know of the condominium so she could not have known that her former husband used funds obtained by fraud to pay off the mortgage on the condo. The District Court determined that such a finding alone did not answer the question.

In In re Abrass, 268 B.R. 665 (Bankr. M.D. Fla. 2001) Judge Jennemann analyzed when and under what circumstances a creditor is entitled to an equitable lien on homestead property. She concluded that not all circumstances that would normally result in an equitable lien on property will result in an equitable lien on homestead property, citing in part the language of the Florida Supreme Court in Hill. However, under the facts before her she found that the creditor was entitled to an equitable lien.

On the other hand, the Third District Court of Appeals reversed a decision of the trial court imposing an equitable lien upon a debtor's homestead for past due alimony payments. The Court held that fraud was required

to impose such a lien. Robles v. Robles, 860 So. 2d 1014 (Fla. 3rd DCA 2003). However, in Sell v. Sell, 949 So. 2d 1108 (Fla. 3rd DCA 2007) the Third District Court of Appeals expanded this to allow imposition of an equitable lien for costs incurred as a result of the ex-spouse's reprehensible and contemptuous conduct.

For an article relating to equitable liens on homestead where a debtor has failed to pay alimony or child support, see Harry M. Hipler, Florida's Homestead Realty: Is It Exempt from Imposition of an Equitable Lien for Nonpayment of Alimony and Child Support, 82 Fla. B. J. (Aug. 2008)

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

Tracing issues (at least on the issues related to the "fraud") as well as standing issues were largely ignored in In re Financial Federated Title and Trust, Inc., 347 F. 3d 880 (11th Cir. 2003) where a trustee of the corporate debtor successfully asserted an equitable lien against the

homestead of principals of the debtor who were involved in a ponzi scheme utilizing the corporate debtor upon evidence that "most" of the money used to purchase the homestead came from such scheme. The opinion is not entirely clear on whether it is premised upon the fact that most of the money to purchase the homestead came from the debtor corporation or upon the fact that most of the money came from the ponzi scheme in which the debtor corporation participated.

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

In re Quraeshi, 289 B.R. 240 (S.D. Fla. 2002) deals with the difficult issue of apportionment where the property exceeds the permitted acreage. In Quraeshi the District Court addressed the problem of how to divide the net proceeds after the sale where the debtor's homestead only comprised 19% of the total acreage that was sold and there was a mortgage on the property. The court held that the

debtor's share amounted to 19% of the net proceeds after deducting the expenses of sale and the mortgage on the property. Not discussed was whether or not a debtor has a right to carve out the most valuable part of the property in determining his or her percentage.

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

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

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

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

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

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

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

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

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

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

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

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

In Randazzo v. Randazzo, 980 So. 2d 1210 (Fla. 3rd DCA, 2008) the Third District Court of Appeals affirmed a trial court judgment that the ex-wife's use of proceeds from sale of the former marital residence to buy a new home without paying the ex-husband his share of the proceeds was sufficiently "egregious conduct" to entitle the ex-husband to an equitable lien on the ex-wife's new home. This raises the question, what about other breaches of promises? Conversion of collateral? Use of loan proceeds for other than use represented to lender?

Spikes v OneWest Bank FSB, 106 So.3d 475 (Fla. 4th DCA 2012 held that an equitable vendor's lien could be imposed upon homestead property in favor of a mortgagee, and the property could be foreclosed, where the wife did not sign the mortgage thus precluding the creditor from enforcing its mortgage against the homestead.

In re Hawkins, 377 B.R. 761 (Bankr. S.D. Fla. 2007). This case is particularly interesting because the creditor's attorney decided to bring the civil action in state

court to declare an equitable lien or constructive trust after the bankruptcy case, much to his chagrin.

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

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

In re Court, 2014 WL 3400521 (Bankr. M.D. Fla. 2014) Judge Glenn held to impose an equitable lien on the homestead there had to be a clear showing of misrepresentation and egregious conduct and funds used to improve or obtain homestead. In this case, a trustee of a trust had exceeded the loan authorized by the trustee by $233,054.88 to construct a home. The successor trustee sued to impose an equitable lien or construction trust. Both were denied. The original trustee and the settlor were both deceased and there was no evidence the settlor did not know about the additional distributions or authorize them. Exceeding the initial authorized amount alone was not sufficient to allow a lien upon the homestead.

In In re Bifani, 493 B.R. 866 (Bankr. M.D. Fla. 2013) Judge Williamson found sufficient badges of fraud to

grant summary judgment on the Trustee's complaint alleging actual fraud in connection with transfers by the debtor to his girlfriend and went on to grant an equitable lien on the girlfriend's homestead that was acquired with proceeds from the sale of property she had received from the debtor. ***This case was upheld the finding of fraud, but found the equitable lien unconstitutional. The 11th Circuit then ruled and reversed the equitable lien ruling..***

In re Bifani, 580 Fed.Appx. 740 (11th Cir 2014)

The 11th circuit held it was well settled Florida law to allow an equitable lien where the property owner sought a homestead exemption for property obtained with funds of fraud. In Bifani, a non-filing friend had purchased a home in Florida with sales proceeds from a Colorado property debtor had fraudulently transferred to her. The court found the fact that the fraud occurred in the bankruptcy and not in a criminal case was irrelevant. Further, in upholding the transfer of Colorado property was fraudulent, the court held the badges of fraud enumerated in the statute were not exhaustive. Cohabitation with debtor's friend was a relevant

consideration. Further, control of the property lack of consideration and the time of the transfers was relevant.

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

In Dowling v. Davis, 2007 WL 1839555 (M.D. Fla. 2007) the District Court held that a plaintiff cannot rely upon proceeds of a fraud committed by the debtor upon a third party to impose an equitable lien on debtor's homestead. The fraud must have been committed upon the person or entity claiming the equitable lien.

In In re Marcum, 508 B.R. 499 (Bankr. M.D. Fla. 2014) Judge Williamson imposed an equitable lien upon a debtor's homestead where the creditor loaned money to the debtor for the debtor to pay real estate taxes and the debtor signed a promissory note evidencing an intent to mortgage the property to secure the lien even though a mortgage was never executed.

In Quiroga v Citizens Property Ins. Corp, 34 So. 3d 101 (3rd DCA, Fla. 2010) attorneys who sued the insurance

company to collect damages to a homestead were denied a charging lien on the proceeds recovered.

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

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

In In re Champalanne, 425 B.R. 707 (Bankr. S.D. Fla. 2010) the Debtor and his spouse engaged in a series of transfers that resulted in them acquiring title to a Florida home within 1,215 days of the Debtor's bankruptcy. However, the Trustee did not file an objection to exemption. After the time for filing such an objection had passed, the Trustee filed an adversary proceeding seeking to assert an equitable lien on the homestead as well as a

money judgment based upon the allegedly fraudulent transfers. The Trustee argued that §§522(o) and (p) superseded the Florida law limiting circumstances for imposing an equitable lien. The Bankruptcy Court disagreed, but did allow those counts seeking a money judgment (at least as to the non-debtor wife) to proceed.

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

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

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

Each of these arguments was considered and rejected. Chames v. DeMayo, 972 So. 2d 850 (Fla. 2007).

Felice v. Sutherland Pullen Law, PLLC, 161 So.3d 559 (Fla. 2d DCA 2014) – The Second District Court of

Appeal disallowed the circuit court decision to the extent it granted a charging lien against Mr. Felice's homestead. A charging lien for fees incurred in representation in a divorce was not allowed against a homestead

Law v. Law, 163 So.3d 553 (Fla. 3d DCA 2015) A husband could not waive homestead exemption in retainer agreement for foreclosure defense.

Stone v. Stone, 157 So.3d 295 (Fla. 4th DCA 2014) The 4th District Court of Appeal held a spouse could waive all homestead rights by executing a deed splitting the property into two one-half tenancy in common interests and then transferring her interest into her QPRT.

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

Friscia v. Friscia, 161 So.3d 513 (Fla. 2d DCA 2014) Another marital settlement agreement where waiver of the right to occupy the homestead was found. The surviving second wife was not entitled to possession of the former homestead of debtor when exclusive use, possession had been awarded to the ex-wife in the MSA incorporated into the divorce decree. The court found that

a martial settlement agreement waiving a parties' homestead rights was the equivalent of a written waiver of homestead under Fla. Stat. §732.702 once incorporated into a final judgment. The man's interest passed as life estate to current wife with remainder to children, but they could not interfere with ex-wife's right to exclusive possession under the MSA.

d. Rights of surviving spouse and heirs.

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

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

will left an undivided interest in the decease's former homestead to a person who is within the intestate distribution provisions of Florida Statutes even though there are surviving heirs that have a higher priority under such statutes.

Estate Planning: Death Soon after Divorce, Fla. Bar Journal (January 2015). Addresses the statutory frame work that is in place currently to address estate planning documents, 401K plans, and other assets that may not be changed following divorce to prevent an ex-spouse from receiving the deceased's assets. Article points out that irrevocable trusts are not included in these statutory provisions and should be addressed.

e. Judgment liens

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

In In re Ledzey, 2007 WL 295213 (Bankr. M.D. Fla. 2007) a home was conveyed by mistake to a judgment

debtor. The court held that the lien of the judgment creditor did not attach.

f. Asserting exemption under Florida law

In Callava v. Feinberg, 864 So. 2d 429 (Fla. 3rd DCA, 2003) the Third District Court of Appeals allowed a party to assert her homestead exemption in an appeal from a judgment foreclosing an equitable lien even though the judgment debtor had not challenged an earlier judgment establishing the equitable lien on the homestead property. The court held that the homestead issue does not have to be raised until forced sale of the homestead.

See also, Mathieu v. City of Lauderdale, 2007 WL 2119203, 961 So.2d 363 (Fla. 4th DCA, 2007).

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

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

g. Obtaining clear title

h. Marshalling of assets.

2. PERSONAL PROPERTY

a. Types of property

In In re Checiek, 492 B.R. 918 (Bankr. M.D. Fla. 2013) Judge Williamson held that a debtor could not "reverse pierce the corporate veil" to claim personal property owned by a corporation in which debtor was sole shareholder as exempt absent a showing that the debtor had used the corporation for improper or fraudulent purposes. This was certainly a novel approach by the debtor's attorney that must go under the label "nice try."

b. Amount and valuations

In re Reinhard, 2014 WL 3891298 (N.D. Fla.) Judge Hinkle recognized a debtor was entitled to $1,000 personal property exemptions under Fla. Const. art. X, §4(a)(2). He went on to find that glass gondolas (valued at $40,000 a piece) were not household decorative items as there was a separate place for art objects or collectibles on Schedule B

and that they could not have been included in the decorative household items valued at $100.

c. Claim by both husband and wife

d. Asserting claim under Florida law

e. Conduct affecting right to assert claim.

In Dyer v. Beverly & Tittle, P.A., 777 So.2d 1055 (Fla. 4th DCA 2001) the 4th DCA rejected appellee's argument that appellant waived the homestead defense because he did not assert it until the appeal where the record did not show that he abandoned the property or alienated it in a manner provided by law. The 4th DCA relied upon Sherbill v. Miller Mfg.Co., 89 So.2d 28 (Fla.1956) where the Florida Supreme Court concluded that the issue of whether the debtor's property was homestead was not waived or barred by the doctrine of res judicata in a second suit even though it was not raised in the first suit. See In re Jordan, 335 B.R. 215 (Bankr. M.D. Fla. 2005).

B. STATUTORY EXEMPTIONS

1. MOBILE HOMES, ETC.

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

the wild card. See also, In re Lisowski, 395 B.R. 771 (Bankr. M.D. Fla. 2008).

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

2. WAGES

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

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

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

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

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

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

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

See also, In re Cook, 454 B.R. 204 (Bankr. N.D. Fla. 2011) and In re Im, 495 B.R. 46 (Bankr. M.D. Fla. 2013).

For a critical analysis of the cases relating to small business owners, see Hersch & Hill,"So This Isn't Working? – When a Wage Isn't Protected," 77 Fla. B. J. 18 (Dec., 2003).

In an unpublished opinion the Eleventh Circuit held that funds on deposit in the bank account of the real estate broker's agency were not wages that qualified for the wage exemption. Since the funds were found to belong to the agency, the opinion isn't remarkable. But the comment by the Eleventh Circuit that "Florida law does not exempt from garnishment the proceeds of a business, even a sole proprietorship, where the owner of that business does not pay himself a set wage or salary" is worthy of note. In re New River Dry Dock, 497 Fed. Appx. 882 (11th Cir. 2012).

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

Recently, the question of whether or not a debtor's claim against a third party for "lost wages" is exempt. This comes up in a number of contexts such as personal injury actions and

employment related claims. The main outline cites cases that hold that claims for "lost wages" are not exempt. However, it has been brought to the author's attention that there are cases holding to the contrary. See example, In re Coltellaro, 204 B.R. 640 (Bankr. S.D. Fla. 1997). See also, Sunshine Resources, Inc. v. Simpson, 763 So.2d 1078 (Fla. 4th DCA 1999). It is difficult to reconcile these cases with the language of the statute, which requires that the monies be paid or payable for labor or services. In these cases the money was payable because labor or services were not performed through some fault of the third party. On the other hand, where labor or services were actually performed and the damage claim is for a greater amount of wages, this argument may have some merit.

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

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

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

whether only heads of a family could claim as exempt wages in a bank account. The Court in Weinshank held that single debtors are also entitled to claim wages in a bank account as exempt.

Sections 77.041 and 222.12, Florida Statutes, address a procedure for asserting a debtor's wage exemption in a garnishment action filed by a judgment creditor. In the case of Caproc Third Avenue, LLC v. Donisi Insurance, Inc. , 2011 WL 2135563 (Fla. 4th DCA 2011) the 4th DCA held that it is not sufficient for the attorney of the creditor to simply deny under oath Debtor's affidavit. The party initiating the garnishment must sign the affidavit under oath. See also, Crop Production Services, Inc. v Baxter, 2010 WL 5621323 (N.D. Fla. 2010).

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

by its terms, requires the creditor to sign that he or she has "fully explained this document to the consumer."

Hart v. Wachovia Bank, N.A., 159 So.3d 244 (Fla. 1st DCA 2015) The First District held a guaranty which "waived and release "the right to marshalling of Borrower's assets or the benefit of any exemption claim by the Guarantor" was sufficient to waive the head of family exemption to garnishment under Fla. Stat. §222.11.

For an article on Florida's wage garnishment exemption, see Mitchell, "Recent Changes to Florida's Wage Garnishment Exemption," Fla. B. J. (Nov. 2012).

Section 222.11(2)(c) has generated little attention. It is available to people who are not the head of household and provides, "disposable earnings of a person other than head of family may not be attached or garnished in excess of the amount allowed under the Consumer Protection Act, 15 U.S.C. §1673." In Brandt v Magnificent Quality Florals Corp., 2013 WL 1289259 (S.D. Fla. 2013) the judgment creditor garnished a bank account of the judgment debtor. The U.S. District Court addressed several issues, including (1) whether 222.11(2)(c) only applies to continuing garnishments, and (2) whether proceeds in a bank account of a person not the head of household remain exempt once

deposited in the bank account. The Court held in the affirmative on both issues. On the latter issue, the significance of this opinion relates to the expansion of Section 222.11(3), which by its terms only appears to relate to wages of the head of the household in a financial institution.

On a different issue under Fla. Stat. §222.11(3), Fla. Stat. 222.11(3) provides that exempt earnings of the head of a family that are deposited in a financial institution remain exempt for 6 months. Judge Delano, bankruptcy judge in the Middle District of Florida, was called upon to decide the question whether or not monies exempt earnings remain exempt when held in the trust account of the Debtor's attorney, which the attorney had deposited in a financial institution. In reviewing changes made by the 1993 amendment to the statute Judge Delano concluded that the legislative intent of the 1993 amendment was to permit debtors to claim the wage exemption for funds on deposit in accounts that they themselves do not maintain. Applying similar reasoning it can be argued that any deposit can be claimed as exempt so long as the monies on deposit can be traced to exempt earnings and the holder of the monies holds them in a financial institution. In re Shaw, 2013 WL 1283403 (Bankr. M.D. Fla. 2013).

Ulisano v. Ulisano, 154 So.3d 507 (Fla. 4th DCA 2015) In a garnishment action brought in Florida, the Fourth District Court of Appeal held the wage exemption of Fla. Stat. §222.11 applied to non-resident judgment debtor. The statute applies to non-residents and residents. Judgement debtor could still claim head of family exemption even though he had lived in South Carolina for seven (7) years.

3. MOTOR VEHICLES - **Fla. Stat. §222.25(1)**

4. LIFE INSURANCE – **Fla. Stat. §222.13**
Fla. Stat. § 222.14

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

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

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

The 1st DCA Case of Morey v Everebank and Air Craun, Inc., 93 So.3d 482 (Fla. 1st DCA, 2012) held that life insurance

proceeds paid to an insured's revocable trust which contained a clause directing payment of the insured's creditors negated the statutory protection from creditors of the insured. While not remarkable in the sense that the insured was deceased and the terms of the trust were clear that the insured's creditors were to be paid, the language in the Court's opinion regarding the provision in the trust as a waiver of the statutory protection may raise the question, if the beneficiary is a trust with a provision for payment of creditors, does this constitute a waiver of the statutory protection afforded to an insured during his or her lifetime? For an article discussing the decision and suggesting drafting tips, see Karibjanian, "Morey v Everbank: Three Drafting Tips to Avoid a Troubling Decision," Fla. B. J (July / August 2013).

In re Nolan, Case No. 10-10090 (Bankr. N.D. Fla. 2015). Judge Specie held life insurance proceeds received by a chapter 13 debtor over 180 days from filing were property of the estate under 11 U.S.C. §1306(a). This was a joint case, the wife died in year 4 of the plan. The husband received $100,000 in insurance proceeds. The court held the proceeds were property of the estate and were not exempt from the claims of the surviving husband's creditors.

5. ANNUITIES – **Fla. Stat. §222.14**

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

In re Swarup, 521 B.R. 382 (Bankr. M.D. Fla. 2014)

Judge Jennemann held a debtor could exempt retirement accounts she was awarded an interest in post-petition. The court looked to Indiana law to determine debtor's rights at the time of filing. The Court found that debtor's interest in the accounts vested at the time divorce proceeding was filed. Therefore, she had a contingent interest in the accounts at the time she filed bankruptcy. The Court held that her contingent interest in retirement accounts/annuities received in a dissolution proceeding were exempt under Fla. Stat. §222.21(2). The statute was broad enough to include any interest.

In Connor v Seaside National Bank, 135 So.3d 508 (Fla. 5th DCA, 2014) the Fifth District Court of Appeals a percentage of an annuity awarded to a former wife pursuant to a final judgment in a dissolution of marriage was exempt from the claims of the former wife's creditor. She was considered a "beneficiary" and entitled to the exemption allowed by Fla. Stat. §222.14.

For articles relating to the question, are private annuities exempt as well as other issues relating to annuities, see Jonathan E.

Gopman, Matthew N. Turko, & Howard M. Hujsa, Unraveling the Mysteries of the Florida Exemptions for Life Insurance and Annuity Contracts, Part 1, 82 FLA. B. J. 52 (Dec. 2008); Part 2, 83 FLA. B. J. 55 (Jan. 2009). See also, Alan S. Gassman, et al, "Creditors' Rights Under Private Annuity and Grantor Retained Annuity Trusts, 83 Fla. B. J. 49 (Aug. 2009).

6. RETIREMENT PLANS

The case of In re Hughes, 293 B.R. 528 (Bankr. M.D. Fla. 2003) presented the question, does a loan from an IRA to the beneficiaries' closely held corporation disqualify the plan if the loan is repaid within 60 days. Judge Paskay held, "Whether or not an account qualifies as a tax exempt IRA account is dealt with in 26 U.S.C. §408, specifically sub clause (e)(2)(A). This sub clause provides if during the taxable year, the individual holder of the account engages in any transaction which is prohibited by 26 U.S.C. §4975, such account ceases to be an individual retirement account as of the first day of such taxable year (emphasis supplied)." Based upon his analysis of these sections, Judge Paskay held that the IRA lost its exempt status. However, it should be noted that his analysis of 26 U.S.C. Section 4975 may not be correct. Such section talks in terms of transactions by "disqualified persons" and the definition of "disqualified persons"

does not appear to address transactions by a debtor with his IRA. In addition, Judge Paskay dealt with a situation where all of the money from the IRA was loaned to the closely held corporation and then repaid. What if a debtor only borrows a portion of the IRA? Wouldn't the monies left in the plan, while no longer in a qualified IRA, nonetheless be "proceeds" from a qualified IRA? Aren't proceeds exempt?

In In re Blais, 2004 WL 1067577, 17 Fla. L. Weekly (Fed) D472 (Bankr. S.D. Fla. 2004) the bankruptcy court did an analysis of the operation of a 401(k) plan and determined that the plan, as operated, did not qualify. Accordingly, the exemption was denied.

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

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

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

The Eleventh Circuit in In re Baker, 590 F. 3d 1261 (11th Cir. 2009) held that a debtor's profit sharing plan did not have to

qualify as an ERISA plan in order for the debtor to claim it as exempt under Section 222.21 of the Florida Statutes. As a practical matter the amendments to Florida 222.21 have so increased the breath of that exemption that such plans may be exempt even if not qualified under the Internal Revenue Code.

In Robertson v. Deeb, 16 So. 3d 936 (2d DCA 2009) a judgment debtor inherited an IRA from his father. A judgment creditor garnished the account. The Second District Court of Appeals affirmed the trial court judgment holding that an inherited IRA is not exempt. In its 2011 session the Florida Legislature remedied this by amending §222.21 of the Florida Statutes to provide that money or other assets or other interest in an inherited IRA are exempt from the claims of creditors of the former owner, beneficiaries and participants. This became effective May 31, 2011 and has retroactive application.

The U.S. Supreme Court addressed the question of inherited IRA's in the case of Clark v. Rameker, 134 S. Ct. 2242 (U.S. 2014) in the context of 11 U.S.C. §§522(b)(3)(C) and 522(d)(12) and decided that inherited IRA is not a "retirement plan" within the meaning of those sections of the Bankruptcy Code. The significance of this case for Florida is doubtful since in

the year 2011 the Florida legislature adopted an amendment to Fla. Stat. §222.21 making inherited IRA's exempt.

In re Baker, 2015 WL 4549212 (Bankr. M.D. Fla. 2015) Judge Delano held that payments from an inherited pension were not exempt under 11 U.S.C. §522(d)(10). The Court relied on Clark v. Rameker, 134 S.Ct. 2242, 2250 (2014) to find payments from a parent's pension were not the type set aside for when the Debtor stops working.

In re Swarup, 521 B.R. 382 (Bankr. M.D. Fla. 2014) Judge Jennemann held a debtor's contingent interest in retirement accounts/annuities received in a dissolution proceeding were exempt under Fla. Stat. §222.21(2).

In re McMillan, 2015 WL 2147044 (Bankr. M.D. Fla. 2015) Judge Funk held that funds withdrawn from an IRA and invested into an auto repair shop were not exempt. This was a chapter 13 and trustee sought to sell the debtor's interest in the auto repair shop. Debtor argued the sale funds should be turned over to them as they were exempt under Fla. Stat. §222.21(2). The Court held the funds were not exempt as Debtor has not claimed his interest in the business as exempt. In a footnote, the Court pointed out that the court was not suggesting the interest

would have been exempt if debtor claimed it…stating no ruling on that issue was being made.

In re Rivera-Cintron, 2015 WL 4749217 (Bankr. M.D. Fla. 2015) Judge Jenneman held that funds in an IRA were exempt even though they had been cashed out of retirement plan, held in checking account, and then deposited into new IRA. The transaction may not qualify for a roll over, but the exemption allows a cash deposit into an IRA.

Recent Developments in Federal Income Taxation: The year 2014, 17 Fla. Tax Rev. 97 (2015). Acknowledged the Supreme Court holding in Clark.

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

Inherited IRAS Tragedy or Planning Opportunity – Clark v. Rameker, 28-Oct Prop & Prop 20 (2014)

7. ALIMONY AND SUPPORT - **Fla. Stat. §222.201(1)**
11 USC §522(d)(10)

8. WORKMEN'S COMP. – **Fla. Stat. §440.22**

9. DISABILITY BENEFITS – **Fla. Stat. §222.18**
Fla. Stat. §222.201(1)

The fact that an automobile accident rendered the debtor disabled did not make the settlement proceeds "disability income benefits" that are exempt under Florida law. Chesley v. Woodard, Trustee , 2014 WL 1859417 (M.D. Fla. 2014). The opinion, however, seems to leave open the possibility that designation of a portion of the settlement proceeds as disability income benefits in the settlement documents may have produced a different result.

10. UNEMPLOYMENT COMPENSATION – **Fla. Stat. §222.201(1)**
Fla. Stat. §443.051

Unemployment compensation benefits do not retain their exempt status once paid and deposited in debtor's bank account according to Judge Williamson. In re Swetic, 493 B.R. 635 (Bankr. M.D. Fla. 2013).

11. DEFERRED COMPENSATION PLANS - **Fla. Stat. §112.215**

12. OTHER PUBLIC ASSISTANCE - **Fla. Stat. §222.201(1**

13. HEALTH AIDS - **Fla. Stat. §222.25**

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

In In re Kahn, 2007 WL 707376 (Bankr. M.D. 2007) Judge Briskman held that the issuance of a disabled parking sticker for debtor's van authorized by their doctor was not sufficient to come

within the exemption. The vehicle was not uniquely designed to accommodate the disability.

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

In re Oelschlager, 2015 WL 4769004 (Bankr. M.D. Fla. 2015) Judge Jenneman held an automobile that although easy for debtor to get in and out of but that had no after -market modifications or an special accommodation for the debtor was not a prescribed health aid under Fla. Stat. §222.25(2).

14. EARNED INCOME TAX CREDIT - **Fla. Stat. §222.25(3)**

In re Wharton-Price, 2015 WL 4230856 (Bankr. M.D. Fla. 2015) Judge Delano held the debtor was entitled to exempt funds in a checking account that were earned income from a tax refund. However, because both the exempt EIC portion and the tax refund and the other non-exempt portion of the tax refund went into the same account and were not segregated, the Court held a percentage of the remaining funds were exempt and a percentage were not based on the percentage the EIC was to the overall tax refund.

In re Baker, 2015 WL 4549212 (Bankr. M.D. Fla. 2015) Judge Delano said child tax credit portion of the tax refund is not exempt.

15. PREPAID COLLEGE PLANS - **Fla. Stat. §222.22**

For an article on 529 plans see McDonald, "Cracking the 529 College Savings Plan," NABTalk (Fall 2012) a copy of which is in the authorities folder accompanying the materials.

16. *CRIME VICTIM'S COMPENSATION*

Chapter 960 of the Florida Statutes was intended to protect and assist only those victims of crimes who are physically injured or become deceased as a result of a criminal act. In re Ortega, 2013 WL 1084499 (Bankr. S.D. Fla. 2013).

17. FRATERNAL BENEFIT SOCIETY BENEFITS – **Fla. Stat. §632.619**

18. DAMAGES FOR INJURIES FROM CERTAIN HAZARDOUS OCCUPATIONS

The occupation of a plastic surgeon did not qualify under Fla. Stat. §796.05. In re Ortega, 2013 WL 1084499 (Bankr. S.D. Fla. 2013).

19. PARTNER'S INTEREST IN PARTNERSHIP PROPERTY

20. CERTAIN VETERAN'S BENEFITS - **Fla. Stat. §744.626**

21. COVERDELL EDUCATION SAVINGS ACCOUNTS

22. HURRICANE SAVINGS

23. MEDICAL SAVINGS ACCOUNTS

24. PROCEEDS OF PROCEEDS

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

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

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

Do social security benefits that have "accumulated" in a bank account retain their exempt status? In Walker v Treadwell, 699 F. 2d 1050 (11th Cir. 1983), the 11th Circuit held that social security benefits did not retain their exempt status when accumulated, at least in those instances where the debtor is claiming exemptions pursuant to 11 U.S.C. §522(d). The Eleventh Circuit reasoned that the wording of 11 U.S.C. §522(d)(10) limited social security benefits to a "right to receive," which does not include benefits already received. See also, In re Crandall, 200

B.R. 243 (Bankr. M.D. Fla. 1995). Since Florida adopted Section 222.201 of the Florida Statutes incorporating 11 U.S.C. §522(d)(10), does this precedent apply to all cases where a debtor has accumulated social security benefits and seeks to claim them as exempt? What about other accumulated benefits under other provisions of 11 U.S.C. §522(10)? See, In re Schena, 2010 WL 4026807 (Bankr. D. N.M. 2010). Recently the 8th Circuit rejected the 11th Circuit's resolution of the conflict between the Social Security Act and the apparent limitation to future benefits in 11 U.S.C. §522(10).

24. COMMINGLING PROCEEDS

In re Wharton-Price, 2015 WL 4230856 (Bankr. M.D. Fla. 2015) Judge Delano applied a percentage test when determining what portion of the earned income portion of a tax refund remained in the account. The Court found 63.19% of the total tax refund was earned income credit. Therefore, 63.19% of the funds in the checking account were exempt. The court did not look to first in or out. Since the funds were commingled, a percentage applied.

25. EXCEPTION FOR CHILD SUPPORT - **Fla. Stat. §61.12**

State Dept. of Financial Services v. O'Connor, 155 So.3d 479 (Fla. 1st DCA 2015) The Court found section 61.12, Fla.

Stat. did not provide a basis for an ex-wife to recover unclaimed funds due her ex-husband to satisfy a judgment. However, the Court found other provisions of Florida law and public policy did and that the ex-wife could reach the unclaimed funds to satisfy a judgment for unclaimed child support.

27. THE $4,000 WILD CARD.

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

(1) Can a debtor stack the $4,000 on the $1,000 allowed by the Florida Constitution or the $1,000 allowed for a motor vehicle?

(2) What if a person owns a home that they intend to keep but because they do not have any equity they do not claim it as exempt in a bankruptcy proceeding?

(3) If they do not claim it as exempt can they reaffirm?

(4) Is continuing to live in a home after filing a bankruptcy "receiving benefits."

(5) If a debtor has claimed the home as exempt for ad valorem tax purposes is that "receiving the benefits."

(6) If a debtor has judgments that have been duly recorded, will failure to claim an exemption create title problems in the future?

(7) Can a debtor, who has not claimed his home as homestead, "strip off" an unsecured mortgage?

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

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

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

In re Hernadez, 2008 WL 1711528 (Bankr. S.D. Fla. 2008). Wrong cite

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

In re Martias, 2008 WL 7801998 (Bankr. S.D. Fla. 2008).

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

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

Here are more:

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

In re Archer, 416 B.R. 900 (Bankr. S.D. Fla 2009) – abrogation recognized by In re Walton, 503 BR 159 (Bankr. S.D. Fla. 2013).

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

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

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

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

In re Kent, 411 B.R. 743 (Bankr. M.D. Fla. 2009) – abrogated by In re Rodale, 452 B.R. 290 (Bankr. M.D. Fla. 2011)

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

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

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

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

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

In In re Heckman, 395 B.R. 737 (Bankr. N.D. Fla. 2008) Judge Killian held that a debtor that claims his

mobile home as exempt pursuant to Fla. Stat. §222.05 is also entitled to claim the wild card exemption. See also, In re Lisowski, 395 B.R. 771 (Bankr. M.D. Fla. 2008).

In In re Fyock, 391 B.R. 882 (Bankr. M.D. Fla. 2008) Judge Paskay held that a debtor that claimed his homestead as exempt based upon tenancy by the entireties was entitled to claim the wild card.

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

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

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

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

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

Thereafter, the 11th Circuit issued its decision affirming the lower court decisions in favor of debtor. In re Dumoulin, 2011 WL 1772160 (11th Cir. 2011). The argument that debtor initially claimed the homestead as exempt and only later amended was addressed in a footnote. In the footnote the 11th Circuit cited the cases holding that "Courts have 'no discretion to deny amendments to claims of exemption unless a showing of bad faith by the debtor or prejudice to a creditor is made by clear and convincing evidence.'" 428 Fed. Appx. 871 (11th Cir. 2011). Contrast In re Allen, 2011 WL 2493065

(Bankr. S.D. Fla. 2011) and In re Orozco, 444 B.R. 472 (Bankr. S.D. Fla. 2011) with In re Wilson, 446 B.R. 555 (Bankr. M.D. Fla. 2011).

The opinion of the Florida Supreme Court did not establish a hard and fast rule. To the contrary, the opinion suggests that it is a question of fact and there may be circumstances where a debtor in a bankruptcy case receives the benefit of the homestead exemption without claiming it. Specifically the court refers to a situation where a married debtor with joint debts claims the home as TBE while the wife is able to claim the homestead protection from forced sale for both. In In re Kehoe, 2012 WL 1077171 (Bankr. M.D. Fla. 2012) Judge Briskman addressed the argument of the trustee for an exception to Dumoulin but denied the trustee's objection. In In re Perez, 2012 WL 6027743 (Bankr. S.D. Fla. 2012) Judge Cristol held that where a home is owned by husband and wife as TBE and one spouse files bankruptcy but does not claim the house as exempt under the Florida Constitution, the debtor is not entitled to claim the wild card. It is not clear from the opinion whether the debtor claimed the home as TBE on

Schedule C. Would Judge Cristol's opinion have been different if the debtor did not claim the home as exempt on Schedule C and the non-filing spouse moved out of the house prior to the debtor's petition being filed?

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

In In re Im, 495 B.R. 46 (Bankr. M.D. Fla. 2013) title to the debtor's home was held in the name of a trust of which he was a settlor, trustee and beneficiary. The debtor testified that he and his family intended to continuing living in the home. Judge Glenn held that debtor was not entitled to use the wild card under these circumstances.

In In re Castillo, 2014 WL 843606 (Bankr S.D. Fla. 2014) Judge Isicoff held that a married debtor who did not have title to the home, the title being in the non-filing spouse, was entitled to claim the wild card.

In a case where both husband and wife filed a chapter 7 and title to the property was in the wife's name alone, the husband was entitled to claim personal property under the wild card. In re Walton, 503 B.R. 159 (Bankr. S.D. Fla 2013).

In the context of a Chapter 13, if a debtor intends to keep his home and is entitled to the protection of the automatic stay, Judge Delano held that the debtor was not entitled to the wild card. In re Valone, 500 B.R. 645 (Bankr. M.D. Fla. 2013). Judge Delano's decision was affirmed on appeal by the District Court. In re Valone, 2014 WL 970024 (M.D. Fla. 2014). ***The 11th Circuit reversed. In re Valone, 784 F.3d 1398 (11th Cir. 2015). The 11th circuit found that debtor could claim wild card exemption even if they owned a Florida home. Debtors were entitled to wildcard exemption so long as not receiving the benefit of the homestead exemption. Chapter 13 automatic stay was not the same as receiving benefit of homestead exemption. Court had to look to facts of each case to determine that.***

In re Fitzpatrick, 521 B.R. 698 (Bankr. M.D. Fla. 2014) Judge Jenneman held that a debtor who owns

real property as TBE with a non-filing spouse can claim the wild card exemption. The requirements for being allowed to do this were 1) debtor did not claim homestead exemption and 2) the non-filing spouse affirmatively waived the homestead exemption. In this case a pleading was filed with the court waiving non-filing spouses homestead exemption.

There are other practical problems that potentially result from a failure to claim the homestead as exempt. For example, as everyone knows all of debtor's property becomes property of the bankruptcy estate. 11 U.S.C. §541(a). If a debtor claims the property as exempt, §522 says it is not property of the estate. Who owns what is an open question when the home is claimed as exempt; but there is no question that it no longer belongs to debtor if the home is not claimed as exempt. As a result:

(1) Does the debtor have an insurable interest in the property if the home is damaged or destroyed?

(2) Can the debtor apply for a modification of the mortgage if it doesn't own the home?

(3) Will debtor be required to obtain court approval of a reaffirmation if it doesn't own the home? Will a creditor be willing to allow the debtor to reaffirm?

(4) Is the debtor liable to the bankruptcy estate to care and maintain the property? For rent? For damages under an unjust enrichment theory?

(5) Can the Trustee compel a "turnover?" See the surprising result in In re Iuliano, 2011 WL 1627172 (M.D. Fla. 2011)

(6) Will the debtor lose his homestead tax exemption?

28. Stacking exemptions.

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

Fla. 2007); In re Hafner, 383 B.R. 350 (Bankr. N.D. Fla. 2008); and In re Mootosammy, 387 B.R. 291 (Bankr. M.D. Fla. 2008).

C. COMMON LAW IMMUNITY – TENANTS BY ENTIRETIES

For an article discussing the historical origins of the concept of tenants by the entireties and drafting considerations in creating trusts that qualify, see Harrison, "Trusts: TBE or Not TBE," Fla. B. J. (May 2013).

In cases involving real estate, a deed conveying real property to husband and wife is conclusively presumed to be held by them as tenants by the entireties absent an express disclaimer on the face of the deed. Extrinsic evidence of a contrary intent is not sufficient to change the character of the tenancy. Roberts-Dude v J. P. Morgan Chase, 498 B.R. 348 (S.D. Fla. 2013).

U.S. v. Morales, 36 F.Supp.3d 1276 (M.D. Fla. 2014) In a criminal forfeiture case the presumption that a grantor intended to create a TBE by conveying property to her and her husband is not rebuttable absent evidence of fraud.

U.S. v. Hunter, 2015 WL 4068374 (M.D. Fla. 2015) The Middle District recognized real property acquired by a husband and wife is presumed to be held as tenants by the entirety absent a contrary intent.

In re. Dumay, 2015 WL 3505233 (Bankr. S.D. Fla. 2015) A husband had acquired title and then same day conveyed the property from himself to he and his wife. Trustee objected to the TBE exemption

claimed by debtor because the six unities from Beal Bank were missing. Judge Mark for the bankruptcy court said no, Fla. Stat. §689.11 allows a party to convey real property to he and his wife to create a tenancy by the entirety. Trustee's objection was overruled.

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

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

Thus the Florida Supreme Court has extended the "presumption" that property owned by husband and wife is owned as tenants by the

entireties to personal property, shifting the burden of proof to the creditor to prove by a preponderance of evidence that a tenancy by the entireties was not created. Absent an express disclaimer of tenancy by the entireties ownership, a rebuttable presumption now arises in favor of tenancy by the entireties if all of the unities exist.

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

If the account is held as "joint tenants with rights of survivorship" that is not an "express disclaimer" of the intent to hold property as TBE where the account application does not offer the ability to claim the account as TBE. Mathews v. Cohen, 382 B.R. 526 (M.D. Fla. 2007).

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

The Beal Bank presumption did not apply in a guardianship. In Romano v Olshen, 2014 WL 940700 (4th DCA, Fla. 2014) the husband and wife had a joint account that was listed as Joint Tenants with right of survivorship. The husband subsequently became a ward in a guardianship proceeding. When the obligations of the guardianship exceeded the separate assets of the ward, the guardian requested payment from the funds in the joint account. For practical reasons the 4th DCA held that the presumption did not apply and authorized use of the monies in the joint account to pay guardianship expenses.

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

Appellee also argued that irrespective of whether the holding of Beal Bank is limited solely to joint bank accounts, or is viewed as applicable to personalty in general, there should be no presumption of tenancy by the entireties in the stock because the words *"with right of survivorship"* were not present.

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

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

entireties to all personal property it clearly could have." (receded from by In re: Matthews, 360 BR 732 (Bankr. M.D. Fla. 2007)

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

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

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

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

In In re Peraeu, 2007 WL 907545 (Bankr. M.D. 2007) debtor and his spouse had claims arising out of an injury to debtor. The case was settled post-petition without the knowledge or consent of the trustee. A single check was issued settling the claims of the debtor and the non-filing spouse. Judge Proctor agreed with the cases that have held that there is now a presumption that property is held as TBE, but held that this presumption was rebutted because one of the unities, unity of interest, was not present.

Regions Bank v. Hyman, 2015 WL 1033915 (M.D. Fla. 2015). In a garnishment proceeding, an account was held not to be TBE. A spouse specifically disclaimed TBE account where signature card had option of TBE and spouse selected multiple-party account and had multiple opportunities to review the card. The court found the express disclaimer ended the inquiry absent evidence of fraud.

Smart v. City of Miami Beach, Florida, 51 F.Supp.3d 1299 (S.D. Fla. 2014) The District Court for the Southern District of Florida held a bank account was TBE because it lacked one of the six unities of title. The important date to determine ownership of a financial account is the date it is opened or established. In this case the wife opened account in March 1998, Married in December 1998, husband added to account in November 2009. Court found the account was not a TBE account and was subject to garnishment.

Simon v. Koplin, 159 So.3d 281 (Fla. 2d DCA 2015) Property conveyed to A & B husband and wife and to C as joint tenants with rights of survivorship. Because conveyance to A & B is presumed to create a tenancy by the entirety, the survivorship language clearly applied between A, B and C, not just between husband and wife.

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

"So You Think You Know Joint Accounts: A Primer on the Law in Florida", ActionLine Spring 2015.

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

In Bridgeview Bank Group v Callaghan, 84 So. 3d 1154 (Fla. 4th DCA 2012) the judgment creditor contended it had the right to introduce evidence to rebut the presumption of TBE in connection with real property owned by husband and wife. The Fourth DCA held that there isn't a presumption to rebut in connection with real estate where there is no indication of the deed that property was held in some form of ownership other than TBE.

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

On appeal from the decision in McRae Judge Paul agreed that the relevant time for determining exemptions was the date of the filing of the

petition. However, on the issue of distribution of proceeds, he disagreed and reversed. He held that only joint creditors are entitled to share in a distribution of jointly held property. Since the only joint creditor in McRae was paid post petition, he held that the objection to exemptions filed by the trustee should be denied. In re McRae, 308 B.R. 572 (N.D. Fla. 2003).

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

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

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

tenancy by the entireties but the car titled with an "—" was tenancy by the entireties.

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

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

Assuming there is a presumption that jointly held property is held as tenancy by the entireties, are tax refunds resulting from a joint return presumed to be TBE property? Another case holding the presumption set forth in Beal Bank applies to all personal property is In re Kossow, 325 B.R. 478 (Bankr. S.D. Fla. 2005) relating to tax refunds. For another case involving a TBE claim as it relates to a tax refund, see In re Freeman, 2008 WL 2078144 (Bankr. M.D. Fla. 2008). See also, In re Newcomb, 483 B.R. 554 (Bankr. M.D. Fla. 2012).

But according to Judge Glenn, the answer is "no." In re Kant, 2006 WL 4919043 (Bankr. M.D. Fla. 2006). See also, In re Rice, 442 B.R. 140 (Bankr. M.D. Fla. 2010) and In re Ascuntar, 487 B.R. 319 (Bankr. S.D. Fla. 2013).

Based upon findings in the Bankruptcy Court that the five (5) unities exist, the 11th Circuit affirmed the district court's decision affirming the Bankruptcy Court's decision upholding a debtor's claim that his tax refund is exempt as TBE. In re Uttermohlen, 525 Fed.Appx. 916 (11th Cir. 2013). The District Court's decision is at 506 B.R. 142 (M.D. Fla. 2012) and the Bankruptcy Court's decision is at 2011 WL 10988234.

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

In In re Ascuntar, 487 B.R. 319 (Bankr. S.D. Fla. 2013) Judge Mark in the Southern District held that a tax refund did not have the unity of interest necessary to qualify the refund as TBE. He went on to hold that the amount of the tax refund that is property of the bankruptcy estate is based upon the relative percentage withheld from each parties' wages. While this simplistic approach may be fair in the majority of cases, there are cases that simply do not fit this approach to dividing the refund. For example, what about the case where the non-filing spouse did not have anything withheld during the year but the right to the refund is based upon loss carry-forwards from the non-filing spouses' business enterprises? What if the joinder of the non-filing spouse is the reason for the tax refund where filing tax returns separately would not result in any refund or a smaller refund?

Judge Mark's opinion notes that normally state law applies to determine interests in property. However, he held, that since the nature of an interest in a tax refund is a matter of federal law, then federal law should be applied to determine if there is a unity of interest necessary to qualify as TBE. While that is all well and good, there is no reference in the opinion to any federal law dictating the percentage of interest. If state law is applied, is the tax refund a marital asset and if so, how would it be divided? Or if the interest is held as tenants in common, how would state law divide it.

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

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

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

In Branch Banking and Trust Company v Maxwell, 2012 WL 4078407 (M.D. Fla. 2012) the magistrate was faced with the issue of

whether a check that was clearly TBE lost such status when deposited in a series of bank accounts, the first of which may not have been TBE because the wife's name was added to the account sometime after the husband had opened the account. The proceeds were then deposited in an account solely in the husband's name. The report of Magistrate Judge Porcelli presents a detailed review of authorities that supported his decision that neither transfer destroyed the TBE status of the proceeds. Included in his opinion are references to the presumption now found in Section 655.79(1) of the Florida Statute as well as Judge Killian's decision in In re Koesling. The report of the Magistrate was approved and adopted by the U.S. District Court.

See also, Connell v. Connell, 93 So.3d 1140 (Fla. 2d DCA 2012).

For a detailed analysis of evidence relating to various items of personal property, see In re Caliri, 347 BR 788, 2006 WL 2382518 (Bankr. M.D. Fla. 2006**).** ***Smart v. City of Miami Beach, Fla., 51 F.Supp.3d 1299 (S.D. Fla. 2014) discusses unity of title with respect to bank account.***

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

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

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

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

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

In Cobb v Burando, 111 So. 3d 277 (Fla. 2nd DCA 2013) the 2nd DCA reversed an award of attorneys' fees to a husband and wife who sued a contractor for roofing problems and made an offer of judgment which was rejected. The reason for the reversal, as expressed by the 2nd Circuit, was that the offer of judgment could not be made jointly to be effective; it had to be apportioned between them. This, said the court, was required even though the contractor was repairing property owned as TBE.

What happens when a person moves to Florida from a state that doesn't recognize tenancy by the entireties as a form of ownership? In Republic Credit Corp. v. Upshaw, 2009 WL 763546 (4th DCA 2009) the Fourth DCA held that if it wasn't owned as tenancy by the entireties the move to Florida did not result in in becoming property owned as tenants by the entireties.

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

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

One of the required unities is the unity of time. The question is, if property is owned by one spouse and that spouse conveys it to husband

and wife, does the unity of time exist? In connection with real property, Florida Statutes allow one spouse owning the real property to create a TBE interest in the real property by deeding the property to both spouses. Fla. Stat. §689.11. However, no similar statute exists that will allow the creation of TBE status by one spouse conveying the personal property to both spouses. In In re Aranda, 2011 WL 87237 (Bankr. S.D. Fla. 2011) the TBE exemption was denied where one spouse added the name of his spouse to a bank account. In In re Shahegh, 2013 WL 364821 (Bankr. S.D. Fla. 2013) the transfer of a car title from one spouse to both spouses lacked the unity of time to be considered TBE. However, in the latter case, Judge Cristol indicated that it would have been allowed if the car was traded in and a new car was acquired in joint names. However, attorneys for debtor's need to keep in mind the potential impact of an objection to discharge or an avoidance action if the transfer is deemed fraudulent.

Judge Briskman, bankruptcy judge in the Middle District of Florida, dealt with an account established by a couple prior to their marriage. He held that the required unity of marriage was not present at the time the account was established, which in his opinion was the relevant time to determine its status. He also held that an account that offered debtor the option of TBE but the debtor chose a different form of ownership was an "express disclaimer" of intent to hold as TBE and that

express disclaimer was conclusive. On this latter point one cannot help but wonder how many people really know what the various types of account mean until they see a bankruptcy attorney. In re Stephenson, 2012 WL 4896725 (Bankr. M.D. Fla 2012).

D. PROPER STATE FORUM

Fla. Stat. §222.10 provides in part "The circuit courts have equity jurisdiction upon bill filed by a creditor or other person interested in enforcing any unsatisfied judgment or decree, to determine whether any property, real or personal, claimed to be exempt, is so exempt,…." In Sepulveda v. Westport Recovery Corp., 2014 WL 3291766 (3rd DCA Fla. 2014) the 3rd DCA held that the county court did not have jurisdiction to determine a judgment debtor's claim that the property was exempt as his homestead.

III. FEDERAL NON-BANKRUPTCY EXEMPTIONS

FEMA assistance. **22 CFR §206.110(g)**

Accumulated Social Security Beneifts. **42 USC §407**

Do social security benefits that have "accumulated" in a bank account retain their exempt status? In Walker v Treadwell, 699 F. 2d 1050 (11th Cir. 1983), the 11th Circuit held that social security benefits did not retain their exempt status when accumulated, at least in those instances where the debtor is claiming exemptions pursuant to 11 U.S.C. §522(d). The Eleventh Circuit reasoned that the wording of 11 U.S.C. §522(d)(10) limited social security benefits to a "right to receive," which does not include benefits already received. See also, In re

Crandall, 200 B.R. 243 (Bankr. M.D. Fla. 1995). Since Florida adopted Section 222.201 of the Florida Statutes incorporating 11 U.S.C. §522(d)(10), does this precedent apply to all cases where a debtor has accumulated social security benefits and seeks to claim them as exempt? What about other accumulated benefits under other provisions of 11 U.S.C. §522(10)? See, In re Schena, 2010 WL 4026807 (Bankr. D. N.M. 2010). Recently the 8th Circuit rejected the 11th Circuit's resolution of the conflict between the Social Security Act and the apparent limitation to future benefits in 11 U.S.C. §522(10).

IV. FEDERAL LIENS

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

The opinion leaves a number of unanswered questions.

Prior to the Craft decision it was generally recognized that the federal tax lien statutes do not create property rights, but rather attach consequences,

federally defined, to rights which are created under state law. *See,* United States v. Bess, 357 U.S. 51, 55, 78 S.Ct. 1054, 1057 (1958). Resort must first be made to underlying state law to determine the existence and nature of an interest to which the federal tax lien could be asserted. Aquilino v. United States, 363 U.S. 509, 512-514, 80 S.Ct. 1277, 1280-1281 (1960). If the taxpayer's interest under state law is considered "property" or a "right to property," the tax lien attaches to that interest, and "the tax consequences thenceforth are dictated by federal law." *See,* Medaris v. United States, 884 F.2d 832, 833 (5th Cir.1989), quoting U. S. v. National Bank of Commerce, 472 U.S. at 722, 105 S. Ct. at 2925.

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

Reviewing Michigan law, the Court noted that Michigan law gave the taxpayer "some of the most essential property rights: the right to use the property, to receive income produced by it, and to exclude others from it." The taxpayer also "possessed the right to alienate (or otherwise encumber) the property with the consent of … his wife…. It is true … that he lacked the right to unilaterally alienate the property, a right that is often in the bundle of property rights. [cite omitted]. There is no reason to believe, however, that this one stick, the right of unilateral alienation, is essential to the category of property."

The Court went on to hold, "that the … husband's interest in the entireties property constituted property or rights to property for the purposes of the federal tax lien statute."

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

U.S. v. Hunter, 2015 WL 4068374 (M.D. Fla. 2015)

U.S. v. Cespedes, 603 F3d.Appx. 769 (11th Cir. 2015) Federal government's power to tax and attach liens trumps state rights of tenancy by the entirety .

U.S. v. Barber, 2014 WL 5473570 (M.D. Fla. 2014) Where criminal forfeiture is involved, those statutes trump homestead and TBE protection offered by the state. See also U.S. v. Barber, 61 F.Supp.3d 1273 (M.D. Fla. 2014).

U.S. v. Kermali, 60 F. Supp.3d 1280 (M.D. Fla. 2014) Non-titled spouse's interest in property does not prevent forfeiture.

In Hatchett v. U.S., 330 F. 3d 875 (6th Cir. 2003) the Court of Appeals held, among other things, that: (1) government could levy against and seize land, and mortgage payments owed on land, that was held by taxpayer and spouse as tenancies by the entirety; (2) Supreme Court's Craft decision applied retroactively to action, which was pending before Court of Appeals when Craft was rendered; and (3) the government could sell the whole of real properties held by taxpayer and spouse as tenancies by the entirety and collect a portion of the proceeds. Like the Supreme Court decision in Craft the opinion in Hatchett gives little guidance on the issue of the value of the taxpayer's interest in the property. Is it 50% or something less?

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

In U.S. v. Wolfers, 2012 WL 5363488 (M.D. Fla. 2012) the court granted a motion for summary judgment filed by the U.S. and authorized the U.S. to foreclose its tax liens on the husband's interest in TBE property without any discussion of exactly what that interest is. Those of you who are familiar with the decision in Craft will recall the "bundle of sticks" analysis where the IRS lien only attached to those "sticks" that were the separate right of the delinquent taxpayer. The U.S. Supreme Court in Craft sent the case back to the lower courts to determine the "sticks" and their value. In Wolfers there was no discussion of the "sticks" that were to be sold. What will the buyer in that sale get?

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

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

The title of this section has been changed from "Federal Tax Liens" to "Federal Liens." This change was dictated by a review of other federal statutes

with language similar to the language in the tax code. For example, in In re Dahlman, 304 B.R. 892 (Bankr. M.D. Fla. 2003) the bankruptcy court held that the lien of federal government for a fine or restitutionary obligation that was imposed, pursuant to the Anti-Terrorism and Effective Death Penalty Act (AEDPA), in a bank fraud prosecution attached to debtor's interest in property that he owned as tenant by the entirety with his non-debtor wife, although extent of debtor's interest in this entireties property still had to be determined.

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

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

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

During the past year there have been a number of cases relating to the IRS or U.S. seeking to realize upon property owned for tax and restitution liens. Many of these cases involve issues of the right to proceed against property that is exempt or is held as tenants by the entireties. In the latter cases there is often little analysis of the limitations of the Craft decision. The following is a list of the cases:

United States v. Baxley, 2014 WL 2106837 (N.D. Fla. 2014)

United States v. Cone, 2013 WL 6401343 (M.D. Fla. 2013)

United States v. Dorman 2014 WL 4060716 (M.D. Fla. 2014)

United States v. Fussell, 2014 WL 2219044 (11th Cir. 2014)

United States v. Lazzari, 2014 WL 197739 (M.D. Fla. 2014)

United States v. McArthur, 2014 WL 1245272 (S.D. Ala., 2014)

United States v. Morales, 2014 WL 3866082 (M.D. Fla. 2014)

United States v. Barber, 2014 WL 5473570 (M.D. Fla. 2014)

United States v. Morales, 36 F.Supp.3d 1276 (M.D. Fla. 2014)

United States v. Barber, 61 F.Supp. 3d 1273 (M.D. Fla. 2014)

United States v. Kermali, 60 F.Supp.3d 1280 (M.D. Fla. 2014)

United States v. Souffrant, 601 Fed. Appx. 883 (11th Cir. 2015) The 11th Circuit found that Souffrant's interest in a police and firefighter retirement system was not exempt from garnishment to satisfy a restitution order. Souffrant claimed the funds were exempt under Fla. Stat. §175.241. The 11th Circuit said no and held that the government could reach any property they could levy in a tax deficiency.

V. REMEDIES FOR ABUSE

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

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

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

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

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

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

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

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

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

Kahama VI, LLC v. HJH, LLC, 2014 WL 4655750 (M.D. Fla. 2014) FUFTA does not refer to parties other than debtors and transferees, to allow claims to be brought against other parties – that would expand FUFTA. In this case a creditor sought to unwind a transfer from a law firm and the attorney handling the case. The judgment debtor's firm had received $100,000.00 in settlement of a title claim. At the instruction of the client, the law firm then cut the settlement proceeds to the client (who had recovered on the title claim).

The Fourth District Court of Appeals recently held that a payment to an insider within one year is recoverable under Chapter 726. Mied, Inc. v. Summit Healthcare, Inc., 849 So.2d 397 (Fla. 4th DCA 2003). What makes this case somewhat remarkable is that the insiders held a judgment that presumably was a

lien upon property and that was entered outside the one year period. This may not bode well for insiders that attempt to secure their loans. Even if the loans are secured outside the one year, payments made during the one year may nonetheless be recoverable.

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

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

In In re Mazon, 368 B.R. 906 (Bankr. M.D. 2007) the debtors dissipated non-exempt assets post-petition that they had failed to disclose. Judge Williamson held that it was proper to surcharge otherwise exempt assets for such dissipation except for assets that are exempt pursuant to the Florida Constitution. Order reversed by In re Mazon, 395 BR 742 (MD Fla. 2008). See also, In re Scrivner, 2007 WL 1783863 (10th Cir BAP, 2007) but Scrivner was reversed by 10th Cir – 535 F. 3d 1258 (10th Cir. 2008). Recently the 1st Circuit held that a debtor's exempt property can be surcharged for debtor's wrongful concealment of property. Malley v. Agin, 693 F. 3d 28 (1st Cir. 2012). The U.S. Supreme Court recently granted cert on this issue in the case of Stephen Law v. Siegel, 133 S.Ct. 1729 (U.S. 2013).

In Law v Siegel, 134 S. Ct. 1188 (U.S. 2014) the U.S. Supreme Court reversed the 9th Circuit's decision allowing a surcharge. Justice Scalia, writing for a unanimous court, held that §105 of the Bankruptcy Code could not be used to contravene the limitations on denial of the right to exemptions found in §522. The opinion makes clear that the decision was not intended to "denude bankruptcy courts of essential 'authority to respond to debtor misconduct with meaningful sanctions.'" Justice Scalia also noted that to the extent that state law exemptions allow or provide for denial of exemptions or surcharges on exemptions, those remain applicable.

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

In re Court, 2014 WL 3400521 (Bankr. M.D. Fla. 2014) Debtors conduct was not egregious and no evidence of fraud to allow equitable lien or constructive trust on homestead property.

In a case outside the 11th Circuit, Ellman v. Baker, (6th Cir. 2015) the 6th Circuit found that following Siegel, a court did not have the authority to limit a debtor's exemptions due to bad faith, failure to disclose, or other wrongful conduct.

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

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

In In re Asunmaa, 2010 WL 1379790 (Bankr. M.D. Fla. 2010) the Bankruptcy Court sustained an objection to the debtor's claim that funds in a Roth IRA were exempt pursuant to Fla. Stat. §222.30. The court found several factors indicating an intent to hinder, defraud or delay creditors, including:

(1) The transfer was made ten (10) days before the bankruptcy petition;

(2) It was made after consultation with a bankruptcy lawyer;

(3) It was made when debtors were insolvent;

(4) It was made at a time when several lawsuits were filed against debtors; and

(5) Debtors did not list the transfer in the Statement of Financial Affairs.

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

In re Roberts, 527 BR 461 (Bankr. N.D. Fla. 2015). Judge Specie found §522(o)(4) to be applicable. She found the homestead exemption could be reduced by the amount of non-exempt assets invested in the homestead within

ten (10) years of filing with the intent to hinder, delay, or defraud. Great discussion of the badges of fraud by the 11th Circuit:

1. *The transfer was to an insider*
2. *The debtor retained possession or control of the property transferred after the transfer;*
3. *The transfer was not disclosed or concealed;*
4. *Before the transfer was made the debtor had been sued o threatened with suit*
5. *The transfer was of substantially all the debtor's assets*
6. *The debtor absconded*
7. *The debtor removed or concealed assets*
8. *The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred*
9. *The debtor was insolvent or became insolvent shortly after the transfer was made*
10. *The transfer occurred shortly before or shortly after a substantial debt was incurred*
11. *The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor*

These coupled with extrinsic evidence of fraud…which can be found in conduct intentionally designed to materially mislead or conveyance of property for inadequate consideration. The court found the trustee had established badges of fraud and that the debtors' misrepresentations and half-truths made them uncredible. In this case the debtors over a period of time sold non-exempt lots and put the funds into their "dream home". They also used a non-exempt money market account to construct the home. While doing this, they applied to SunTrust to short sale their old homestead and defaulted on a BB &T loan. Never disclosed to SunTrust the new homestead. The court reduced the homestead exemption by $394,875.28.

VII. BANKRUPTCY PRACTICE AND PROCEDURE

A. PROCEDURES FOR DETERMINING EXEMPTIONS

As we all know, pursuant to §541 all of debtor's property becomes property of the bankruptcy estate. Section 522 allows a debtor to exclude exempt property from property of the bankruptcy estate. It does so with the phrase "notwithstanding section 541…." This is typically done by listing the property that a debtor claims as exempt on Schedule C. In 1992 the U.S. Supreme Court decided Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (U.S. 1992). That opinion established several things. First, it made it clear that absent a timely objection to a debtor's exemption claim, debtor's claim could not be later challenged. Second, it established a rule of interpretation. If it appears that a debtor is claiming 100% of an asset, then he or she was entitled to the entire asset even if the asset turned out to be worth more than the monetary limit for such an asset.

This was the rule until the U.S. Supreme Court decision in Schwab v Reilly, 130 S. Ct. 2652 (U.S. 2010). That decision sought to eliminate the harsh results of the Taylor decision. The U.S. Supreme Court held that if it is later determined that the asset is more than the monetary limit and the bankruptcy estate has the ability to recover the value of the asset beyond the dollar value the debtor expressly declared exempt.

Given the flexible approach of the Schwab decision, how can anyone tell who owns what until the case is finally closed?

This has led to creative ways to express an exemption on Schedule C. Some have put that the value claimed exempt is 100% or "its full market value". However, courts have mixed views as to whether such an approach is proper. See examples, Massey v Pappalardo, 465 B.R. 720 (1st Cir. BAP 2012); In re Messina, 687 F. 3d 74 (3d Cir. 2012); In re Messer, 2012 WL 762828 (9th Cir. BAP 2012). One court threatened to sanction the attorney if he took that approach again. In re Gregory, 487 B.R. 444 (Bankr. E.D. N.C. 2013).

The impact of this change is difficult to determine. For example, if a debtor lists his shares of stock in a closely held business entity, how can he or she be certain that their claim that the stock is exempt will not be challenged after the time for objecting to exemptions has lapsed?

In Schwab v. Reilly, 130 S. Ct. 2652 (U.S. 2010) the United States Supreme Court "clarified its prior decision in Taylor v. Freeland relating to the effect of a claim of exemption on schedule C equal to the value listed for the value of the property claimed as exempt by holding that when the Bankruptcy Code defines the property a debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describes the asset and declares the "value of [the] claimed exemption" in that asset to be an amount within the limits that the Code prescribes, an interested party is entitled to rely upon that value as

evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt.

A debtor may amend his or her Schedule C without leave of the Court. In re Hernandez-Abreu, 2013 WL 6157985 (Bankr. S.D. Fla. 2013).

However, in dicta the Bankruptcy Court in In re Williams, 2013 WL 3353633 (Bankr. S.D. Fla. 2013) mentioned the possible use of judicial estoppel to preclude a debtor from amending Schedule C to change his homestead.

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

The right to amend has recently come up in connection with the "wild card" exemption. Debtors, when faced with a challenge to their personal property, have sought leave to amend and delete their homestead from Schedule C with mixed results. Contrast In re Allen, 2011 WL 2493065 (Bankr. S.D. Fla. 201) and In re Orozco, 444 B.R. 472 (Bankr. S.D. Fla. 2011) with In re Wilson, 446 B.R. 555 (Bankr. M.D. Fla. 2011). See also, In re Ballou, 2011 WL 4530314 (Bankr. M.D. Fla. 2011).

In re Bodensiek, 522 BR 737 (Bankr. S.D. Fla. 2015) A debtor may amend his exemptions at any time prior to the case being closed.

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

Assuming a debtor amends Schedule C, are objections to the amended Schedule C limited to the items amended or can the trustee and creditors object to items that were not amended? In In re Woerner, 483 B.R. 106 (Bankr. W.D. Texas 2012) there is a good discussion of the cases that are split on this issue.

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

The issue of indefinite continuances as well as the issue of the effect of conversion on the time for objecting to exemptions and on whether the debtor's exemption rights are determined as of the date of the original filing or on the date of conversion were the subject of an article by Professor Scott Norberg presented at the Southeastern Bankruptcy Law Institute in 2002.

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

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

In In re Shahid, 18 Fla. L. Weekly Fed. B278 (Bankr. N.D. Fla. 2005) Judge Mahoney held that an extension of time to object to

exemptions granted upon motion by the trustee does not extend the time as to any other creditor in the absence of express language to the contrary.

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

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

A.2 PROPERTY ACQUIRED POST-PETITION.

Section 541(a)(5) of the Bankruptcy Code provides that property acquired by a debtor within 180 days after the petition date is property of the estate under certain circumstances. The question is, can this property

be claimed as exempt? See In re Nofziger, 2007 WL 570006 (M.D. Fla. 2007).

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

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

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

1. Use of §522(f) to Clear Title.

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

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

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

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

2. Strip Offs.

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

Additional cases:

In re Almeida, 2013 WL 1163777 (Bankr. M.D. Fla. 2013 – strip off of lien of home owners' association.

In re Bertan, 2013 WL 216231 (Bankr. S.D. Fla. 2013).

In re Bustamante, 2013 WL 1110886 (Bankr. S.D. Fla. 2013).

In re Plummer, 484 B.R. 882 (Bankr. M.D. Fla. 2013).

A lien can be stripped off through a Chapter 20 even though the debtor is not entitled to a discharge. In re Scantling, 754 F. 3 1323 (11th Cir. 2014).

In re Gaynor, 2014 WL 4435429 (Bankr. M.D. Fla. 2014)

In re Catalano, 510 B.R. 654 (Bankr. M.D. Fla. 2014)

PNC Bank, NA v. LucMAUR, LLC, 2015 WL 3453475 (Bankr. M.D. Fla. 2015).

In re Bodensiek, 522 B.R. 737 (Bankr. S.D. Fla. 2015)

In re Hilaire, 2015 WL 3979071 (Bankr. M.D. Fla. 2015)

In re Rauseo, 2015 WL 1956230 (Bankr. S.D. Fla. 2015) cannot re-open a case to strip a lien

In re Blackburn, Case 12-31658 (Bankr. N.D. Fla. 2015) debtor could not strip IRS lien.

THE CHANGE -

Bank of America, N.A. v. Caulkett, 135 S. Ct. 1995 (2015). This was an appeal of a Judge Jennemann case that allowed a junior mortgage lien (wholly underwater to be stripped). Section 506(d) provides "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." The question was what is a "secured claim". The Supreme Court relied on Dewsnup and the definition there of a secured claim – "claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim." Ruling to lead to arbitrary results, $1 difference could result in the stripping of lien or not.

C. POST BANKRUPTCY EFFECT OF EXEMPTION CLAIM

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

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

In In re Mayhugh, 427 B.R. 549 (Bankr. S.D. Fla. 2010) Debtor moved to reopen her case to file a motion to avoid a pre-petition judgment lien on her homestead. It was undisputed that at all relevant times prior to the petition date the property in question was the debtor's homestead. However, the debt owed to the judgment creditor was excepted from discharge and the judgment creditor contended that the debtor had abandoned her homestead after the petition date. Judge Mark refused to reopen the case to allow such a motion on the theory it would be unfair to "deprive" the judgment creditor of a possible remedy. There was no discussion of the impact of 11 U.S.C. §522(c). See, In re Cunningham, 513 F.3d 318 (1st Cir. 2008). By refusing to reopen the case to allow a lien to be avoided pursuant to §522(f), the effect is to negate the benefit of §522(c) since §522(c) by its terms doesn't apply to "a debt secured by a lien that is (A)(i) not avoided under subsection (f)…." For debtor's attorneys this emphasizes the importance of filing §522(f) motions during the case to avoid potential post-bankruptcy problems.

The new flexibility in challenging exemptions resulting from the U.S. Supreme Court's decision in Schwab v Reilly, 130 S. Ct. 2652 (U.S. 2010) may also have an impact on the application of §522(c) after the case is closed.

In re Failla, 529 B.R. 786 (Bankr. S.D. Fla. 2014) Judge Hyman found that when debtor does not claim property as exempt and indicates an intent to surrender the property, they cannot then contest the foreclosure after the case is closed. Judge Hyman indicated that to continue to do that, debtor's discharge could be in jeopardy as revocation may be appropriate.

In re Metzler, 2015 WL 2330131 (Bankr. M.D. Fla. 2015) Judge Williamson found that surrender the property did not require turnover of physical possession, but it did require the debtor to cease defenses to foreclosure action.

D. IMPACT OF CHANGES TO THE BANKRUPTCY CODE

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

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

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

b. Note that the test is "domicile." Domicile is not necessarily the same as a physical address. Accordingly if a debtor has left the state with the intent to return or is in the military service, he or she may still have a single domicile for the 730 days before the petition. See the section in this outline relating to domicile issues.

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

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

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

"Accordingly, if the language of a state's homestead statute restricts its application to property located within the state, the

statute cannot be given extraterritorial effect by this Court. If the plain language of a state's homestead statute is silent as to its extraterritorial effect, the Court will look to that state's case law precedent to determine if the state's homestead statute can be applied to property outside of the state. If the state's homestead statute is silent as to its extraterritorial effect and there is no case law precedent determining the propriety of its extraterritorial application, the Court believes it is appropriate to interpret the state's homestead law to apply extraterritorially*305 based upon the strong policy of liberally construing exemptions in favor of the debtor as espoused by the Eighth and Ninth Circuit Courts of Appeal."

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

See also, McNeilly, "Exemptions and the Mobile Debtor," NABTalk 17 (Spring, 2009). See also, Blay "The Extraterritorial Effect of Bankruptcy Exemption Schemes," ABI J. (Nov. 2012).

3. The $125,000 cap for persons owning their home for less than 1215 days. 11 U.S.C. §522(p). See Gans & Lynch, supra; Nelson, "How Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Affect Homestead?" 79 Fla. B. Journal 22 (Nov. 2005); and Ahern, "Homestead and Other Exemptions

Under the Bankruptcy Abuse Prevention and Consumer Protection Act," 13 Am. Bankr. L. Inst. L. Rev. 585 (Winter 2005).

A Cautionary Tale: Transfer of Real Property from LLC to Debtor May Trigger Statutory Cap on Homestead Exemptions, ABI Journal p. 18 (March 2015)

a. Does it apply in states that have "opted out." An Arizona bankruptcy judge held it does not. In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005). However, every bankruptcy judge in Florida that has considered the issue has held that the $125,000 cap applies notwithstanding Florida's election to opt out of the federal exemptions:

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

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

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

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

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

c. What happens to a jointly owned homestead where only one spouse files? In In re Buonopane, 359 B.R. 346 (Bankr. M.D.

Fla. 2007) Judge Williamson held that the TBE exemption is separate and distinct from the exemption under state law that is limited to $125,000 by virtue of the 1215 day requirement found in 11 U.S.C. §522(p). Accordingly, a homestead that is acquired within 1215 days of the bankruptcy is not limited to $125,000 where the property is held as TBE, there are no joint creditors and only one spouse files bankruptcy. See also, In re Hinton, 378 B.R. 371 (Bankr. M.D. Fla. 2007). See also, In re Aranda, 2010 WL 5018320 (Bankr. S.D. Fla. 2010) holding that neither §522(o) nor §522(p) applied to property claimed as exempt by virtue of its ownership as TBE.

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

e. What does "any amount of interest that was acquired by the debtor" mean? What if debtor owned the property for more than 3.3 years but the property did not acquire homestead status prior to 3.3 years? The cases outside of Florida are split. In In re Greene, 346 B.R. 835 (Bankr. Nev. 2006) the Bankruptcy Court in Nevada held that the acquisition of homestead status was within the 1215 day period and rendered the homestead subject to the $125,000 cap. On the other hand, the Court in In re Rogers, 354 B.R. 792 N.D. Tex. 2006)(reversed in part In re Greene, 583 F.3d

614 (9th Cir. 2009)) held that the $125,000 limit did not apply where the debtor acquired fee title to the property prior to the 1215 days even though the property became the debtor's homestead within the 1215 days. What if the debtor has a remainder interest and the life tenant dies within the 3.3 years? What if the debtor is beneficiary of a revocable trust and has lived on the trust property for over 3.3 years and the trust becomes irrevocable as a result of death of the settler?

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

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

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

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

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

h. What if the debtors owned the property for more than 1215 days but it appreciated in value more than $125,000 during the 1215 days? In In re Sainlar, 344 B.R. 669 (Bankr. M.D. Fla. 2006) Judge Briskman held that where the property was acquired more than 1215 days before the petition the fact that it appreciated in value during the 1215 days is not sufficient to invoke the cap.

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

And, what does "in the aggregate" mean in the context of the $125,000 cap?

i. What are the respective rights of a debtor and the trustee where the $125,000 cap applies? Who has the right to possession? Who has to pay to preserve and maintain the property? Does the Trustee have an obligation to pay the mortgage to preserve the $125,000 cap for the benefit of the debtor? Must the trustee seek

authority to sell the property pursuant to §363(h)? What about the requirement of §363(h) that the benefit to the estate of a sale of the property free of the interests of co-owners outweigh the detriment to the co-owners?

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

k. What does the exception for "any amount of such interest does not include any interest transferred from a debtor's previous residence …into the debtor's current residence…" mean? Does the word 'interest transferred" really mean "proceeds?" Does the debtor have to be able to trace in order to get the benefit of this exception?

l. Note the exception in §522(p)(1) for §§544 and 548. What is the effect of this exception in Florida?

3. Fraudulent transfers or conversions within 10 years. 11 U.S.C. §522(o).

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

that portion that a debtor could not exempt" under the applicable exemption law. Accordingly the elements necessary to "reduce" a debtor's claim of exemption are:

(1) disposition of property of the debtor,

(2) that is not exempt,

(3) within the 10 years preceding the petition,

(4) with intent to hinder, delay or defraud a creditor, and

(5) use of the proceeds from such disposition

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

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

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intent to hinder, delay, or defraud. Great discussion of the badges of fraud by the 11th Circuit:

1. *The transfer was to an insider*
2. *The debtor retained possession or control of the property transferred after the transfer;*
3. *The transfer was not disclosed or concealed;*
4. *Before the transfer was made the debtor had been sued o threatened with suit*
5. *The transfer was of substantially all the debtor's assets*
6. *The debtor absconded*
7. *The debtor removed or concealed assets*
8. *The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred*
9. *The debtor was insolvent or became insolvent shortly after the transfer was made*
10. *The transfer occurred shortly before or shortly after a substantial debt was incurred*
11. *The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor*

These coupled with extrinsic evidence of fraud…which can be found in conduct intentionally designed to materially mislead or conveyance of property for inadequate consideration. The court found the trustee had established badges of fraud and that the debtors' misrepresentations and half-truths made them uncredible. In this case the debtors over a period of time sold non-exempt lots and put the funds into their "dream home". They also used a non-exempt money market account to construct the home. While doing this, they applied to SunTrust to short sale their old homestead and defaulted on a BB &T loan. Never

disclosed to SunTrust the new homestead. The court reduced the homestead exemption by $394,875.28.

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

c. Presumably the courts will use the same "badges of fraud" to determine the applicability of this provision as they use in other fraudulent transfer or conversion cases. However, the "constructive fraud", i.e. transfers for less than reasonably equivalent value when a debtor is insolvent or rendered insolvent, doesn't appear to apply. In In re Cook, 460 BR 911 (Bankr. N.D. Fla. 2011) the Trustee objected to Debtors' claim that their homestead was exempt. The Trustee presented evidence of some of the "badges of fraud." The Debtors had purchased the home using a non-exempt tax refund to make the down payment. Judge Killian held that evidence of some of the badges of fraud did not necessarily meet the Trustee's burden of proof necessary to defeat Debtors' claim that their homestead was exempt where Debtors had been looking for a home after selling their more expensive home, the Debtor's could not get credit because of their financial

condition and the down payment was in line with typical owner financing. On appeal the decision of Judge Killian was reversed. In re Cook, Case No. 5:12-cv-00008-MP-GRJ (N.D. Fla. 2012), a copy of the opinion is included in the materials.

Upon retrial of the §522(o) objection, Judge Specie denied the creditor's objection to the homestead exemption. In re Cook, Case No. 11-50287-KKS (Dec. 2, 2013) at Docket No. 320.

d. In In re Mathews, 360 B.R. 732 (Bankr. M.D. Fla. 2007) Judge Funk held that a loan secured by property that was owned as TBE, the proceeds from which were in the form of a check to the debtor alone but which were deposited into a joint account and then used to pay off a mortgage on debtor's homestead did not come with the limitation of §522(o).

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

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

bankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5)."

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

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

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