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OUR LEGAL CHAMELEON REVISITED: FLORIDA'S HOMESTEAD EXEMPTION

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> The Florida homestead exemption is at once the great bulwark of the individual homeowner and a formidable barrier to creditors and county and municipal fiscal authorities. To the intending alienor it is frequently a pitfall, and to many a testator or trustor it is the fatal rock upon which he is lured by the sirens of full and free choice in leaving his property. To the general practitioner, however, it is more often than not a chameleon, which changes color to accord with the background against which it is viewed.[1]

With these words Harold B. Crosby and George J. Miller began their 1949 University of Florida Law Review article, *Our Legal Chameleon, the Florida Homestead Exemption.* That article described the four major provisions of Florida's then-existing homestead exemption law: the personalty and realty exemptions from forced sale and the personalty and realty exemptions from taxation. Since application of these exemptions is conditioned upon satisfaction of requirements that vary under differing circumstances, Crosby and Miller concluded that this area of the law possessed chameleon-like qualities.

Although the "chameleon" remains protected under Florida law today, it hardly resembles its ancestor. In the early 1960's it was attacked because it had been misconstrued, was antiquated, and provided unjustified protection for debtors.[2] The Homestead exemption was given new life by the 1968 constitutional revision, but was again criticized as a "sacred cow" in 1972.[3] The current exemption laws are faced with many problems which were unknown in 1949. Changing patterns of living have resulted in new forms of home ownership not contemplated by the original homestead laws. In fact, there has been a trend away from home ownership that threatens the very existence of the homestead exemption.

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1. Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption I-V*, 2 U. FLA. L. REV. 12 (1949).

2. *See* Shapo, *Restraints on Alienation and Devise of Homestead: Monsters Unfettered from Florida's Past*, 19 U. MIAMI L. REV. 72 (1964).

3. Note, *Our Legal Chameleon is a Sacred Cow: Alienation of Homestead Under the 1968 Constitution*, 24 U. FLA. L. REV. 701 (1972).

This article uses the original *Our Legal Chameleon* to illuminate the present state of homestead exemption law. Each aspect of the homestead tax and forced sale exemptions is examined in order to analyze the purposes of each constitutional or statutory requirement and its treatment by the courts. Also discussed are the kinds of exempt property, problems associated with the conditions for exemption, the situations in which each condition is applicable, and the present validity of each exemption. Finally, the article considers the statutory procedures for claiming and protecting homestead exemptions.

ORIGIN AND BACKGROUND

The homestead exemption is distinctly American,[4] and did not exist at common law,[5] although English canons of decency required the exemption of a debtor's necessary clothing.[6] The conception of a homestead developed in both a federal and state context. Early federal homestead laws were designed to attract settlers by offering land at nominal prices and exempting it from debts contracted prior to the official grant of the land.[7] State homestead laws usually applied to debts incurred after the homestead was acquired. These state laws offered further security to potential settlers by exempting limited amounts of personal property from forced sale.[8]

Florida was the fourth state to enact some type of homestead privilege for the debtor.[9] As early as 1843, certain laws exempted bedding, kitchen furniture,

4. Crosby & Miller, *supra* note 1, pt. I at 13-14.

5. Weller v. City of Phoenix, 39 Ariz. 148, 4 P.2d 665 (1931).

6. Glen, *Property Exempt from Creditors' Rights of Realization*, 26 VA. L. REV. 127, 128 (1939); Rombauer, *Debtor's Exemption Statutes—Revision Ideas*, 36 WASH. L. REV. 484, 485 (1961). Later English laws recognized exemptions of bare essentials, clothing, bedding, and tools of trade. Nevertheless, these laws preserved only minimal assets necessary to the debtor's survival.

7. Homestead Act of 1862, ch. 75, §§1, 4, 8, 12 Stat. 392, 393. *See* C. WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 230-31 (1941). This act provided for a grant of 160 acres to any head of the family who could settle, cultivate, and continuously occupy the land for five years. *See generally* HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1939).

8. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L. REV. 779, 783 (1974).

9. Shapo, *supra* note 2, at 74. State homestead statutes are by no means uniform. Northeastern exemption laws reflect the traditional pro-commerce, and hence pro-creditor, attitudes of that region. *Compare* ME. REV. STAT. ANN. tit. 14, §4552 (1964) ($1,000 homestead exemption) *with* CAL. CIV. CODE §1260 (West Supp. 1977) ($30,000 homestead exemption). Exemption laws in most southern and western states were enacted in response to the devastating effects of the economic depressions in the eighteenth and nineteenth centuries. These depressions affected borrowers in all economic classes, and the realization that any person could lose his home led to debtor protection statutes. Shapo, *supra* note 2, at 74. *See also* C. WARREN, BANKRUPTCY IN THE HISTORY OF THE UNITED STATES 87-88 (1935). For example, in response to economic hardship following the Civil War, Georgia provided very large exemptions of $2,000 for the homestead and $1,000 for personal property. GA. CONST. art. VII, §5218 (1868). Similarly, Texas enacted the country's first exemption law in reaction to the panic of 1837. 3 TEX. CONST. ANN. art. 16, §50 (Vernon 1955). Many southern states were also influenced by Spanish exemption laws which reflected a tolerance for debtors. *See generally* Rombauer, *supra* note 6. Today, all but six jurisdictions provide a homestead exemption from forced sale. Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1469 n.76 (1959). However, fewer than one-fourth of the states, including Florida, provide for a tax exemption on homestead realty.

the horse, bridle and saddle of clergymen, and the personal property of "every actual housekeeper, with a family . . . as may be necessary to the support of himself and his family, not to exceed in value $100."[10] By 1868, Florida's first constitution provided for a forced sale exemption on 160 rural acres.[11] Within a city the homestead was limited to half an acre. In either case, the constitution exempted $1000's worth of personalty. The constitution also prohibited alienation of the homestead property without the joint consent of a husband and wife[12] and provided that all of these exemptions were to accrue to the heirs of the debtors.[13] The Florida Constitution of 1885 substantially re-enacted the homestead provisions of 1868, making only two major changes.[14] In 1968, Florida's Constitution was again revised. Although the substantive provisions regarding debtor exemptions closely parallel the Constitution of 1885, the framework regulating the conveyance of homestead was changed substantially.[15]

PURPOSE

Traditionally, the policy underlying Florida exemption laws was to prevent debtors from being reduced to destitution and thereby becoming public charges.[16] But in addition to obviating the need for welfare, the exemptions

10. Acts of March 15, 1843, §§1-2, pamp. 55, reprinted in THOMPSON'S DIGEST 356 (1847). After Florida achieved statehood in 1845, an additional provision exempted $200 on 40-acre tracts of land, 10 acres of which were in cultivation. In addition, a landowner was given the power to devise this property, and if he failed to do so, it would descend to his issue or to his widow if no issue existed. *See* Shapo, *supra* note 2, at 74.

11. FLA. CONST. art. IX, §1 (1868).

12. *Id.*

13. *Id.* §3.

14. See FLA. CONST. art. X, §2 (1885). This new section stated that the homestead exemption should "inure to the widow and heirs," replacing the 1868 provision that it would merely "accrue to the heirs. . . ." The 1885 Constitution also contained a new clause which implied a restraint on the devise of a homestead when the head of the family was survived by children. *Id.* §4 (last sentence).

15. For example, it now appears that the homestead owner no longer must reside on the premises or even in the state as FLA. CONST. art. X, §4(a)(1) (1968) limits the exemption "to the residence of the owner or his family." In contrast, the Constitution of 1885 contained the restriction: "owned by the head of the family residing in the state." The homestead immunities for a debtor's business house also have been eliminated. *Compare* FLA. CONST. art. X, §1 (1885) *with* FLA. CONST. art. X, §4(a)(1) (1968). Additionally, the constitution now provides for alientation of the homestead by gift. FLA. CONST. art. X, §4(c) (1968). Finally, the presumption that the husband is the family head has apparently been abolished as FLA. CONST. art. X, §5 (1968) provides that "there shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal."

16. Slatcoff v. Dezen, 76 So. 2d 792, 794 (Fla. 1954); Patten Package Co. v. Houser, 102 Fla. 603, 606-07, 136 So. 353, 355 (1931); Maryl v. Hernandez, 254 So. 2d 47, 49 (Fla. 3d D.C.A. 1971). Only a few states emphasize this as a basic purpose of the exemption laws, probably because most homestead exemptions go far beyond merely providing minimal welfare support for the debtor and his family. It is ironic that Florida uses this justification for its debtor statutes since our exemption laws are among the most liberal in the nation. *See* Vukowich, *supra* note 8, at 783. It is doubtful that minimization of losses on forced sales was a major purpose behind enacting the Florida exemption laws, although this was a major purpose behind the Texas laws. *See* Act of May 6, 1935, TEXAS GEN. LAWS ch. 145, §2 (exemption of

from forced sale were designed to protect the unfortunate citizen from the consequences of poor judgment and to preserve for him things which were necessary to earn a livelihood.[17] There can be no doubt that laws exempting wages and occupation-related items enable a debtor to provide for himself and for his family. Two important effects of the exemption laws, then, are the rehabilitation of debtors and encouragement of the payment of debts.[18]

Exemption laws are intended not only to benefit the debtor personally but also to protect the debtor's family.[19] This two-fold objective is evidenced by the condition that a debtor taking advantage of the homestead provisions be the head of a family. These laws are also intended to relieve suffering caused a wife and children by the husband's improvidence. Consequently, a debtor's exempt property remains beyond the reach of his creditors even after passing to his descendants.[20]

Florida's liberal exemption laws probably are responsible for many debtors foregoing bankruptcy.[21] Bankruptcy permits a debtor to discharge his current obligations on a pro rata basis and thus free his remaining or after-acquired assets from his prior debts. If a debtor's property is exempt from forced sale, however, it is already "free" from his debts and filing bankruptcy would be pointless. Should the debtor continue to earn a living and yet refuse to pay his debts voluntarily, then his creditors could garnish his non-exempt earnings.[22]

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wearing apparel and other personal property because these articles would bring little money when sold), *cited* in In re Richards, 64 F. Supp. 923, 925 n.4 (S.D. Tex. 1946).

17. Crosby & Miller, *supra* note 1, at 14-16; Milton v. Milton, 63 Fla. 533, 536, 58 So. 718, 719 (1912). *See also* Carter's Adm'rs v. Carter, 20 Fla. 558, 569 (1884).

18. Patten Package Co. v. Houser, 102 Fla. 603, 606-07, 136 So. 353, 355 (1931).

19. Weitzner v. United States, 309 F.2d 45 (5th Cir.), *cert. denied*, 372 U.S. 913 (1962) (homestead laws to be liberally applied to ensure that the debtor's family shall have shelter and not be reduced to destitution); Anderson v. Anderson, 44 So. 2d 652, 655 (Fla. 1950) (homestead exemption cannot be asserted against family for intra-family debts). *See also* Olesky v. Nicholas, 82 So. 2d 510 (Fla. 1955); Bessemer Properties v. Gamble, 158 Fla. 38, 27 So. 2d 832 (1946).

20. By protecting the debtor and individual members of his family, homestead exemption laws create economic security for the family and help preserve it as a unit. The strain on family stability is said to be universally proportional to the family's level of income, a proposition supported by studies showing that separation and divorce are more common in economically distressed families. H. CARTER & P. GLICK, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY 224, 264-67, 398-99 (1970). Exemption laws reduce the economic strain and family stability by ensuring that a family will retain its home. *Id.* at 165.

21. A debtor who goes into bankruptcy may retain his exempt property and most or all of his debts are discharged. *See* Bankruptcy Act §6, 11 U.S.C. §24 (1970).

22. An earnings exemption is the most significant relief that can be granted to most debtors. In ensures that debtors have the means to provide themselves and their families with basic day-to-day necessities such as food, clothing, and shelter. It is the exemption most dedicated towards rehabilitation of the debtor.

The exempt status of earnings in Florida is uncertain because statutes place restrictions only upon their garnishment. FLA. STAT. §222.11 (1977). Thus, even though earnings in Florida are not specifically exempted, the restriction of a creditor's right to garnish wages has the same effect in most instances. There are two instances where the distinction between exempting a debtor's earnings and prohibiting their garnishment becomes apparent. First, exemption laws prohibit the execution against earnings even after they have been paid to the debtor/employee. Statutes restricting the garnishment of wages do not affect the creditor's

Moreover, if the debtor exceeds his exempt standard of living by acquiring non-exempt assets, those assets will be subject to levy by unsatisfied creditors. Thus, very liberal exemption laws may discourage gainful employment and debtor rehabilitation. Therefore a crucial question regarding every state's exemption statutes is whether they provide debtors with comfortable standards of living and thereby remove the incentive to acquire non-exempt assets. Consequently, property should be exempt only to the extent that the exemption furthers the policy underlying the exemption laws. Thus any analysis of Florida's homestead exemptions must also consider other, statutory exemptions.[23]

In recent years homestead laws have been attacked by an increasing number of commentators because of provisions that are allegedly too restrictive on creditors,[24] antiquated,[25] excessively liberal,[26] in lack of a uniform policy[27] and productive of unintended effects.[28] These criticisms are not unwarranted, especially when one realizes that exemption laws defer or prevent payment to creditors of amounts adjudged by a court of law to be owed to them.[29] These

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right to levy upon them should the debtor totally fail to dispose of all income. Second, although the new Bankruptcy Act may standardize the exemptions granted to debtors throughout the nation, the current act accords bankrupts the exemptions granted by state and federal laws. *See* Bankruptcy Act §6, 11 U.S.C. §24 (1970). The bankrupt is thus allowed to retain his earnings if they are exempt; however, if they are merely protected against garnishment, the earnings will pass to the trustee in bankruptcy for payment of creditors' claims. *See* Bankruptcy Act §6, 70(a)(5), 11 U.S.C. §§24, 110 (1970).

Florida's statute regulating garnishment is not as pervasive as the provisions set forth in the Federal Consumer Protection Act §302(a), 15 U.S.C. §1671(a) (1970). FLA. STAT. §222.11 (1977) only exempts wages from garnishment; it does not apply to commissions or bonuses. In addition, the Florida exemption is limited to heads of families while the federal law is not.

Title III of the Consumer Credit Protection Act §303, 15 U.S.C. §1673(a) (1970), limits garnishment of earnings to the lesser of 25 percent of disposable earnings per week or the amount by which weekly disposable earnings exceed 30 times the federal minimum hourly wage. Disposable earnings is "that part of the earnings . . . remaining after the deduction . . . of any amounts required by law to be withheld." *Id.* §302, 15 U.S.C. §1672(b) (1970). This statute is binding on all states, but it does give way to state statutes which restrict garnishments more tightly. *Id.* §307, 15 U.S.C. §1677 (1970).

23. Considered together, many state exemptions are exorbitant and subject to abuse. Exemption statutes are scattered, but usually encompass allowances for life insurance proceeds, public assistance, savings and loans, unemployment compensation, fraternal and mutual benefit organizations, workmen's compensation, credit unions, health insurance, public employees' retirement benefits, property tax, and relief for elderly, blind, or disabled people.

24. *See generally* S. ENZER, R. DE BRIGARD, & F. LAZAR, SOME CONSIDERATIONS CONCERNING BANKRUPTCY REFORM 55-59, 210-13 (Report R-28, Institute for the Future, Menlo Park, Cal., 1973); D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 81-82 (1971); Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 681-84 (1960).

25. Countryman, *Consumer Bankruptcy — Some Recent Changes and Some Proposals*, 19 KAN. L. REV. 165, 167 (1970); Joslin, *Debtors' Exemption Laws: Time for Modernization*, 34 IND. L.J. 355 (1959); Karlen, *Exemptions From Execution*, 22 BUS. LAW. 1167, 1169-70 (1967); Rambauer, *supra* note 6; Shapo, *supra* note 2.

26. REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES 171 (1973); Note, *supra* note 9, at 1465-69.

27. Countryman, *supra* note 24, at 681-84 (1960).

28. Vukowich, *supra* note 8.

29. Of course, creditors are aided when the exemption laws encourage a particular debtor

unpaid creditors either bear the loss themselves or pass it on to others in the form of higher costs for goods and services.

PART I. EXEMPTION OF THE HOMESTEAD REALTY FROM FORCED SALE

In determining whether specific property qualifies for the homestead realty exemption, it is important not only to recognize what property constitutes a homestead, but also to realize the circumstances under which an exemption from forced sale may be declared. Of course, this determination necessarily involves an assessment of the nature and physical extent of realty to which the debtor's exemption applies. Additionally, the obligor seeking this forced sale exemption must have been the "head of a family" and owner of the real estate continuously from the time a creditor's lien attached until the present. Finally, since certain liabilities may be asserted even against a homestead, it is also necessary to identify the nature of the debtor's underlying obligation.

Liabilities Enforceable Against the Homestead

Before a debtor may successfully assert a privilege of homestead, his underlying obligation must be one that gives rise to an exemption when his creditor attempts to procure a forced sale. If the underlying obligation does not fall within the homestead provisions, forced sale is permissible.[30] Both the new and the old constitutions set forth six exceptions to the homestead exemption, all of which are to be strictly construed.[31] Article X, section 1, of the Florida Constitution of 1868 provided that:

> . . . no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same.

The Florida Constitution of 1968 left this provision substantially unchanged, and provides in article X, section 4(a):

> [The homestead] shall be exempt from forced sale under process of any

to forego bankruptcy and eventually pay his debts in full. However, numerous abuses to exemption laws ensure a comfortable life for the debtor without bankruptcy or the necessity of paying his debts. *See, e.g.*, First Nat'l Bank of Mobile v. Pope, 274 Ala. 395, 405, 149 So. 2d 781, 790 (1963); Independence Bank v. Heller, 275 Cal. App. 2d 84, 87-89, 79 Cal. Rptr. 868, 871-72 (Dist. Ct. App. 1969); O'Brien v. Johnson, 275 Minn. 305, 309-11, 148 N.W.2d 357, 360-61 (1967).

30. *See* Beall v. Pinckney, 150 F.2d 467 (5th Cir. 1945) (homestead exempt from all debts except those named classes in the constitution).

31. *See* Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431 (Fla. 1968); Wilhelm v. Locklar, 46 Fla. 575, 35 So. 6 (1903). In contrast, the homestead exemption itself is to be interpreted in the liberal and beneficent spirit in which it was intended. *See Quigley*, 207 So. 2d at 431; *In re* Estate of Van Meter, 214 So. 2d 639 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970); Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962); Marsh v. Hartley, 109 So. 2d 34 (Fla. 2d D.C.A. 1959). But the laws should not be applied so as to make them an instrument of fraud, an imposition upon creditors, or a means to escape honest debts. Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912); Vandiver v. Vincent, 139 So. 2d at 704.

> court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty. . . .

It is noteworthy that these excepted obligations either made the acquisition of the exempt property possible (purchase money obligation), increased its value and accordingly increased the value of the exemption (improvements or repair), or were imposed by the state as a condition to the exemption status (taxes).[32]

1. Taxes and Assessments. As noted by Crosby and Miller, the term "taxes" as used in the homestead provisions "embraces any tax validly levied and does not contemplate the problem of what can be taxed and to what extent."[33] But the constitution does not specify whether the homestead may be sold to rectify the nonpayment of any tax or only those taxes levied against the homestead realty itself. Obviously, the homestead may be sold to satisfy a tax lien against it.[34] Moreover, the Fifth Circuit Court of Appeals has established that despite state exemption statutes the federal government can levy upon the homestead for *any* tax deficiency.[35] It is less clear whether the state can enforce a lien against the homestead for a state tax which was not assessed against it. Nevertheless, since the constitution only provides an exception to the homestead exemption for "payment of taxes and assessments thereon,"[36] it would appear that the homestead is subject to forced sale only for nonpayment of a tax specifically levied against the property.[37]

The taxes and assessments exception to the homestead exemption from forced sale is not to be confused with the homestead tax exemption set forth in article VII, section 6 of the constitution.[38] The latter excludes from all

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32. Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950).

33. Crosby & Miller, *supra* note 1, pt. I at 18. For the distinction between a tax and a specific assessment, see note 460 *infra*.

34. FLA. CONST. art. X, §4(a) (1968). *Cf.* Florida Indus. Comm'n v. Coleman, 154 Fla. 744, 18 So. 2d 905 (1944) (owner of automobile, on which sheriff levied under a tax warrant, entitled to assert homestead exemption as against ordinary judgment).

35. Weitzner v. United States, 309 F.2d 45 (5th Cir. 1962) (deceased taxpayer's widow and children had no rights under the Florida homestead provisions which would prevent foreclosure of a tax lien by the federal government). Note that the federal government can also garnish part of the wages of the head of a family in Florida. 15 U.S.C. §1673.

36. FLA. CONST. art. X, §4(a) (1968) (emphasis added).

37. It would seem to be more consistent with the policy behind other exceptions to the homestead exemption if the state were only able to procure forced sale of the homestead to satisfy a tax assessment against the homestead itself. This is especially true in light of the fact that exceptions to the homestead exemption are to be strictly construed. But because the state is the grantor as well as the guardian of the exemption, imposing the condition upon the debtor that he must pay all of his obligations to the state prior to availing himself of homestead relief would not seem unreasonable. In such a case, the debtor would only be paying taxes on property that he is using or some service that he is enjoying. In addition, welfare payments, workmen's compensation, and unemployment benefits should provide even a destitute person with enough money to pay his minimal share of taxes.

38. This provision formerly appeared in FLA. CONST. art. X, §7 (1885).

taxation[39] 1) a certain amount of the assessed valuation of the realty owned and used as a home by any Florida resident, whether or not the head of a family, and 2) at least $1,000 of household goods and effects from the taxable base of the head of a family residing in Florida.[40] Whenever these limits are exceeded the excess is subject to taxation. If the assessed tax is not paid, the homestead provisions will not apply to prevent a forced sale.[41]

2. Purchase and Construction-Related Obligations. Homestead property is also not exempt from forced sale when the claim asserted against it is for the payment of an obligation contracted for in the purchase of such property.[42] But since this exemption is construed most strongly against the creditor,[43] "purchase money" is limited to money loaned by the seller which is directly used to purchase the homestead. Thus, "purchase money" does not include money used in refinancings. It is "a debt contracted to be paid, or a duty to be performed by the purchaser as a consideration of the purchase of the premises."[44]

Obligations for labor or materials used to build, repair or improve the homestead real estate are not subject to the forced sale exemption.[45] But this

39. The term "all taxation" does not include assessments for special benefits. Note also that assessments for special benefits may be levied against both homestead property and non-homestead property. Forced sale of the homestead can always be used to collect these assessments because they directly increased the value of the property and therefore the value of the exemption.

40. FLA. CONST. art. VII, §3 (1968). This provision should not be confused with FLA. CONST. art. X, §4(a)(2) (1968) which provides that a *maximum* of $1,000 is exempt from forced sale as homestead personalty. The forerunner of Article VII excluded only $500 of personalty from the taxable base of a family head. FLA. CONST. art. IX, §11 (1885). FLA. STAT. §196.181 (1977) presently specifies that all personal effects and household goods of a family head are excluded from taxation.

41. If a tax or special assessment levied by a governmental unit of Florida is not paid, the tax collector may advertise and hold a tax certificate sale. *See* FLA. STAT. §197.214 (1977). *See also* FLA. STAT. §197.062(3) (1977). The lien created by the tax certificate sale may only be foreclosed or enforced in the manner prescribed in chapter 197 of the Florida Statutes (1975). *See* notes 570-571 *infra* and accompanying text.

42. *In re* David, 54 F.2d 140 (S.D. Fla. 1931).

43. *See* Citizens State Bank v. Jones, 100 Fla. 1492, 1495, 131 So. 369, 371 (1930).

44. Platt v. Platt, 50 Fla. 594, 600, 39 So. 536, 537 (1905). Not all obligations incurred in purchasing a homestead need to be based on money alone to come within the exception to the forced sale exemption. *See* Porter v. Teate, 17 Fla. 813 (1880), where Porter conveyed Georgia property to Teate with full covenants in exchange for Teate's 400 acres in Florida. Teate obtained a judgment in Florida against Porter for breach of the Georgia covenants. Teate bought Porter's 400 acres at the execution sale but Porter claimed a rural homestead exemption of 160 acres. The court held that the purchase price had never been paid for the property and therefore the exemption would not prevent a forced sale of the property even though a third party had purchased the homestead for value but with notice. *Accord*, Wilhelm v. Locklar, 46 Fla. 575, 35 So. 6 (1903) (note used to refinance an original purchase money obligation held a mere contract to repay money loaned). Further, while "purchase money" must be used as consideration for the acquisition of the homestead, it need not be so employed immediately once it has been advanced. *See* Sonneman v. Tuszynski, 139 Fla. 824, 191 So. 18 (1939).

45. *See* FLA. CONST. art. X, §4(a) (1968), set forth in text following note 34 *supra;* La Mar v. Lechlider, 135 Fla. 703, 185 So. 833 (1939).

exception does not include an obligation to repay money borrowed to purchase materials or to pay for labor used on the homestead.[46] As with a purchase obligation, the debt is enforceable against the homestead if it arises directly from a contract for labor and materials used in constructing an improvement upon the homestead realty.[47]

3. Prior Liens. In addition to exceptions specifically provided for in the constitution, the homestead exemption from forced sale may not be asserted to avoid liens which existed prior to the time the property acquired homestead status.[48] Consequently, a statutory lien which arose prior to the time the realty became a homestead or a lien from a prior judgment at law or decree in equity is enforceable against the homestead. It should be noted, however, that a mortgage is voluntarily created as a lien on the land. A mortgage foreclosure, then, is not a forced sale within the meaning of the homestead laws. Thus, a validly executed mortgage of specific realty or personalty may be enforced by the mortgagor regardless of whether it was executed before or after the time the realty became a homestead.

4. Non-Contractual Obligations. The Florida homestead exemption from forced sale applies to both tort and contract creditors alike.[49] There is no exception that will allow an injured party to enforce his claim against a tortfeasor's exempt property.[50] The obvious policy behind this provision is the

46. Lewton v. Hower, 18 Fla. 872 (1882). *Cf.* Giddens v. Dickenson, 60 Fla. 320, 53 So. 929 (1910), where a carpenter purchased materials on credit that he used to construct a building, and then argued against his suppliers that he was entitled to a $1,000 homestead *personalty* exemption out of the money owed to him by the owner of the building. The court reasoned that his entire claim of exemption was directly created by obtaining the materials from the supplier. Consequently, his obligation was considered a purchase-money liability and was therefore enforceable as an exception to the homestead personalty exemption from forced sale. *See also* Perry v. Beckerman, 97 So. 2d 860 (Fla. 1957). The homesteader in that case had issued a note to a contractor for construction of an improvement on the real estate. The payee-contractor subsequently sold the note to a third party who advanced funds for completion of the project. The homesteader defaulted, and while the holders of the note obtained a judgment against the contractor, it could not be enforced against the maker's homestead even though the original payee-contractor could have so enforced it.

47. Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931). *See also* Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925), where a corporate president fraudulently used funds of the corporation to repair his house. The company subsequently went bankrupt and the trustee sued to recover the money wrongfully appropriated. The president claimed a homestead exemption but the court found that as a matter of equity the corporation was deemed to have furnished the materials and labor. This holding brought the transatcion within the purchase-money exception to the forced sale exemption. However, in Lamb v. Ralston Purina Co., 155 Fla. 638, 21 So. 2d 127 (1945), the supreme court held that a bill for seed and insecticide was not a lien against the homestead of a poultry farmer for materials used in the repair of improvement of the homestead realty.

48. *In re* Porter, 3 F. Supp. 582 (S.D. Fla. 1933) (lien which attached to property prior to time debtor became head of a family and occupied the property was enforceable against the homestead).

49. Olesky v. Nicholas, 82 So. 2d 510 (Fla. 1955). *Cf.* Graham v. Azar, 204 So. 2d 193, 195 (Fla. 1967) (remarried husband's personal property exemption from forced sale through judgment obtained by former wife for child support).

50. Although some jurisdictions allow the exemption from forced sale to be asserted only

protection of debtors and their families from the overly burdensome liability that may result from an accident. But intentional tortfeasors do not bear liability as the result of an "accident." The injury they inflict is not simply the result of negligence. Rather, it arises from action taken with knowledge that the probability of harm is substantially certain.[51]

It does not seem harsh that if one of two parties must suffer, it should be the intentional tortfeasor. There are strong policy reasons to support an exception to the homestead exemption in favor of those who have been injured by the intentional acts of a homesteader. Unlike contract creditors, tort creditors do not have an opportunity to evaluate the collectible assets of their debtors. In addition, there are some instances in which the victim is disabled or otherwise unable to work. Under such circumstances high medical expenses may force the victim's family to sell or mortgage their own exempt property. If the victim's family is near poverty, the wrongdoer should not be permitted to declare an exemption for property in excess of his family's needs. Nevertheless, there is no exception to the homestead exemption for claims arising out of intentional torts.[52]

Head of the Family

The Florida homestead exemption only protects a homeowner who is the "head of a family."[53] Although the constitution does not define the term, it is apparent that the purpose of this condition is to ensure a home for debtors who support dependents.[54] Marital status is not determinative of the issue;[55] the criterion is whether the debtor supports dependents.

The courts have developed two tests to determine family headship:[56] 1) the

against the holders of contractual obligations, most states do not restrict the application of their exemption laws in this fashion. *Compare* ALA. CONST. art. 10, §204; ARK. CONST. art. 9, §§1-3 *with* CAL. CIV. CODE §1241 (West Supp. 1973); COLO. REV. STAT. ANN. §38-41-201 (1973); TEX. CONST. art. 16, §50; N.Y. CIV. PRAC. LAW §5206(a) (McKinney Supp. 1973).

51. W. PROSSER, LAW OF TORTS 32 (4th ed. 1971); *see also* Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

52. Olesky v. Nicholas, 82 So. 2d 570 (Fla. 1955) (homestead exempt from execution on judgment against debtor for malicious prosecution).

53. FLA. CONST. art. X, §4(a) (1968) provides that "[t]here shall be exempt from forced sale . . . the following property owned by the head of a family. . . ." It is not a violation of equal protection that heads of families are granted greater relief as debtors than single persons. *See In re* Statham, 483 F.2d 436 (9th Cir. 1973); Rietz v. Butler, 322 F. Supp. 1029 (N.D. Ga. 1971). Exemption laws merely recognize that the needs of a family differ from those of a single person.

54. *See* Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588, 592 (1931), in which Justice Terrell stated that the homestead exemption was "designed for the head of the family for the family's protection" and that consequently actual residence was a strict condition precedent to asserting the homestead exemption.

55. *See* Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962) (divorced mother). *See also* Stephens v. Campbell, 70 So. 2d 579 (Fla. 1954); Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (1940).

56. Crosby & Miller, *supra* note 1, pt. I at 24. *See also* Solomon v. Davis, 100 So. 2d 177 (Fla. 1958); Beck v. Wylie, 60 So. 2d 190 (Fla. 1952); *In re* Estate of Wilder, 240 So. 2d 514 (Fla. 1st D.C.A. 1970); *In re* Estate of Van Meter, 214 So. 2d 639 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970); Brown v. Hutch, 156 So. 2d 683 (Fla. 2d D.C.A. 1963).

existence of a legal duty arising out of the family relationship at law (family at law); or 2) the maintenance of continuing communal living by at least two individuals under such circumstances that one is recognized as the person in charge (family in fact).[57]

Whether the head of a family is required actually to live with that family before he may assert the homestead exemption from forced sale remains unsettled in Florida. As long as the head of a family has a legal obligation to support other members, it should not be necessary that the parties live together.[58] If his dependents do not reside with him, however, it has been held that the family head must not only be obligated to support them but must actually do so.[59] Nonetheless, these principles are not clearly established and their applicability depends upon the peculiar facts of each case — predominantly upon why homestead status is being asserted and by whom. The issue was raised in *In re Estate of Van Meter*,[60] where the husband had occupied his homestead for twenty-one years prior to his death. After having lived with him in the family relationship for ten years, his wife "voluntarily abandoned the premises as her home."[61] She filed for separate maintenance and obtained a final decree seven years later, stating that she would never live with him again. The husband supported his former wife from the time of separation until his death. In holding that if there are no other dependents a husband and wife must occupy the property in a family relationship before it acquires homestead status,[62] the Second District Court of Appeal noted that the effect of her decree for alimony unconnected with divorce was to release her from her husband's control. The overriding factor in the case, however, was the fact that

57. *See, e.g.*, Hill v. First Nat'l Bank, 73 Fla. 1092, 75 So. 614 (1917) (family in fact exists when a single man supports his mother and the children of his deceased sister in his own home). Florida courts have been hard pressed to define the term "family" with precision. For example, Justice Drew used six phrases in Solomon v. Davis, 100 So. 2d 177 (Fla. 1958), to illustrate the quality necessary to make property a homestead: "family home," "household," "family group," "common home," "family unit," and "family relationship." *Id.* at 178-79.

58. *See In re* Kionka's Estate, 113 So. 2d 603 (2d D.C.A. 1959), *aff'd*, 121 So. 2d 644 (Fla. 1962) (not necessary for parties to live together as long as the head of the family has a legal obligation to support other members).

59. Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962). *But see* Estate of Deem v. Shinn, 297 So. 2d 611 (Fla. 4th D.C.A. 1974), discussed in the text accompanying note 70 *infra*.

60. 214 So. 2d 639 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970).

61. *Id.* at 643.

62. This holding requires actual residence on the property by the husband and wife only when there are no other dependents. *See In re* Noble's Estate, 73 So. 2d 873 (Fla. 1954); Hussa v. Hussa, 65 So. 2d 759 (Fla. 1953); Richards v. Byrnes, 153 Fla. 105, 15 So. 2d 610 (1943); Collins v. Collins, 150 Fla. 374, 7 So. 2d 443 (1942); Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (1940); Jordan v. Jordan, 100 Fla. 1586, 132 So. 466 (1931); Davis v. Miami Beach Bank & Trust Co., 99 Fla. 1282, 128 So. 817 (1930); Hill v. First Nat'l Bank, 79 Fla. 391, 84 So. 190 (1920); Johns v. Bowden, 68 Fla. 32, 66 So. 155 (1914); Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912); Miller v. Finegan, 26 Fla. 29, 7 So. 140 (1890). The court conceded that there were "isolated cases" which "watered down" any such rule but stated that these cases were decided upon facts that could be distinguished from the present case. 214 So. 2d at 642. *See* Brodgon v. McBride, 75 So. 2d 770 (Fla. 1954); Lockhart v. Sasser, 156 Fla. 339, 22 So. 2d 763 (1945); O'Neal v. Miller, 143 Fla. 171, 196 So. 478 (1940); Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 123 So. 780 (1929); Marsh v. Hartley, 109 So. 2d 34 (Fla. 2d D.C.A. 1959).

there had been no family relationship on the premises for eleven years prior to the husband's death.[63]

When husband and wife are physically separated by reason of age and financial difficulties, courts have not adhered to the rule set forth in *Van Meter*.[64] Under such circumstances, the family relationship remains intact so that a widow can enjoin her husband's executor from taking possession of the family home. This rule contrasts sharply with the settled principle that permanent separation of the husband and wife, whether by divorce or by separation agreement, eliminates the family relationship if there are no dependents in the home.[65]

A husband may also remain the head of a family when he actually supports legal dependents living with his wife or former wife on separate property.[66] This property may be a homestead and thus not subject to forced sale even though the husband does not reside together with his wife and dependents if he fulfills his legal obligation to contribute to the support of his dependents not living with him. This rule is distinguishable from that in *In re Estate of Van Meter*[67] because dependents, and not the husband and wife alone, constitute the family. Since the homestead laws were designed to protect persons dependent upon a debtor, they are construed liberally in favor of dependents

63. According to the court's rationale, in the absence of dependents, the family relationship to be protected is that of husband and wife. When the husband and wife do not reside together, this relationship does not exist and there is no family unit warranting protection. *But see* [1971] FLA. ATT'Y GEN. ANN. REP. 228 (woman legally separated from her husband at time of his death and who had not lived on the property for four years could move back to assert her widow's exemption from taxation). Significantly, the *Van Meter* court did not find a homestead even though the husband had a duty to support his wife under a legal decree and did in fact provide such support. This holding renders the family in law test inapplicable to situations in which the relationship of husband and wife is relied upon to constitute the "family" by requiring both of them actually to occupy the homestead. Thus, in order for a wife to acquire the homestead when there are no other dependents or lineal descendants, she must 1) not only survive her husband, but 2) the family relationship of husband and wife must have existed at the time of her husband's death, and 3) the property must have been occupied at the time of his death by a family, consisting of the husband and wife, of which he was the head. Weitzner v. United States, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1962). It is submitted, however, that no sound policy is facilitated by cases that disallow the homestead exemption on the basis of legal dependence coupled with *actual support* of the separated wife by the husband. The requirement of co-occupancy does not seem to indicate the nature or degree of the wife's actual dependence upon her husband, who may for reasons beyond her control choose to live in a separate abode. The explanation of the instant holding may lie in the fact that this was a descent case and that no outside creditor was involved. See notes 64-65 *infra* and accompanying text.

64. *See, e.g.*, Monson v. First Nat'l Bank, 497 F.2d 135 (5th Cir. 1974) (communal living on the homestead not essential to the Florida homestead exemption even though the husband and wife both lived outside the state while attempting to resolve marital difficulty); Nelson v. Hainlin, 89 Fla. 356, 104 So. 589 (1925) (property remained a homestead even though the 80-year-old husband was cared for elsewhere by a third party who was paid from money earned by the wife taking boarders into the home).

65. *See* Jordan v. Jordan, 100 Fla. 1586, 132 So. 466 (1931).

66. Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962); *In re* Estate of Kionka, 113 So. 2d 603 (2d D.C.A. 1959), *aff'd*, 121 So. 2d 644 (Fla. 1960).

67. 214 So. 2d 639 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970).

whose rights in the homestead would be abrogated by its wrongful alienation.[68] This overriding principle of liberal construction was apparently utilized by a minor child in *Estate of Deem v. Shinn*[69] to prevent her separated father from alienating his homestead even in the absence of actual support.[70] Clearly, the exemption laws are construed in a different light when a creditor is attempting to force the sale of the homestead as opposed to a situation that deals with the alienation or devise of the property. The cases indicate that a homeowner who claims against a creditor that he is the head of a family because of a legal obligation to support a minor child residing with his former wife, must show that he actually contributes to the child's support. On the other hand, if that child wishes to prevent his or her father from alienating the homestead, the "dependent" need not show actual support because a showing of legal dependency would be sufficient. This rule is both logical and consistent with the purposes of the homestead laws; any other construction would enable the family head to alienate property that ceased to be homestead when support was voluntarily withheld from dependents.

Of course, continual communal living by at least two individuals under such circumstances that one is recognized as the person in charge also constitutes a "family" for purposes of the homestead exemption.[71] However, under this test a "family in fact" must actually live together.[72] Although it has been stated that a family head's obligation to support his dependents may be moral or legal,[73] only a legal obligation can dispense with the requirement that the parties reside together on the homestead.[74]

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68. *See generally* Quigley v. Kennedy & Ely Ins., Inc., 202 So. 2d 610 (3d D.C.A. 1967), *rev'd*, 207 So. 2d 431 (Fla. 1968).

69. 297 So. 2d 611 (Fla. 4th D.C.A. 1974).

70. *Id.* In this case, a husband and wife were divorced in Massachusetts before he established residence in Florida. At the time of his death, he had two daughters — one of whom was a minor — living in Massachusetts with their mother. The court refused to allow the devise of the husband's property because he was the head of a family consisting of himself and his minor daughter whom he was legally obligated to support although he did not do so.

71. Beensen v. Burgess, 218 So. 2d 517 (Fla. 4th D.C.A. 1969) (divorced debtor remained head of family when minor daughter married but continued her communual living with him while her husband was in the service). *See also* Beck v. Wylie, 60 So. 2d 190 (Fla. 1952); Brown v. Hutch, 156 So. 2d 683 (Fla. 2d D.C.A. 1963).

A grandmother supporting her grandchildren in her home is the head of a family in fact even though she never formally adopts them. Hill v. First Nat'l Bank of Marianna, 73 Fla. 1092, 75 So. 614 (1917) (grandmother supported son and grandchildren). The same is true in the case of a grandfather. Adams v. Clark, 48 Fla. 205, 37 So. 734 (1904) (grandfather head of family by supporting grandchildren). *But see In re* Estate of Wilder, 240 So. 2d 514 (Fla. 1st D.C.A. 1970), in which the grandson testified that he considered his grandmother the family head. Nevertheless, the court held that where the grandmother only earned $56 per month from social security and her grandson and his wife who were living with her were both gainfully employed, she was not the head of the family.

72. *In re* Estate of Kionka, 113 So. 2d 603 (2d D.C.A. 1959), *aff'd*, 121 So. 2d 644 (Fla. 1960).

73. Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962). It appears that anyone meeting the requisite test could be the head of a family in fact. Nonetheless, the leader of a New York commune has been denied "family head" status for purposes of a zoning ordinance. Village of Quoque v. Ladd, 40 App. Div. 2d 859, 337 N.Y.S. 2d 868 (1972).

74. Whether a family in fact or at law is involved, the family head is never required to

1. Married Women. A married woman may be the head of a family for homestead exemption purposes.[75] But since each family can have only one head,[76] it was generally presumed under the former constitution that when a married couple lived together in a common home the husband was the head of the family.[77] Consequently, in *Barnett v. Pan American Surety Co.*,[78] a judgment debtor supporting two children remarried while a suit was pending to determine whether she was the head of a family. Her new husband moved into her home and hence was presumed to be the family head. Because headship and ownership had to be joined in one individual,[79] she was held not to be entitled to the homestead exemption from forced sale at the time of final decree.[80]

The presumption that a husband is the head of the family was extended in *Anderson v. Garber*.[81] In that case, the Third District Court of Appeal held that this presumption exists even though the parties do not live together so long as the primary husband and wife relationship remains intact. Mrs. Anderson, her three children, and her husband all resided on her separate property, which she had mortgaged as a free dealer. Mrs. Anderson alleged that her husband did not support her or the children and had abandoned his

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furnish all of the support for a dependent as a prerequisite to claiming the homestead exemption. Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962).

75. Stephens v. Campbell, 70 So. 2d 579 (Fla. 1954) (woman's devise of her home ineffective if survived by dependent husband and adult children). *See also* Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 13 So. 2d 448 (1943) (care for injured veteran son and wife); Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (1940) (incapacitated husband); Davis v. Miami Beach Bank & Trust Co., 99 Fla. 1282, 128 So. 817 (1930) (adult dependent son); Setton Lumber Co. v. Hall, 67 Fla. 61, 64 So. 440 (1914) (minor dependent child); Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903) (two adult unmarried daughters).

76. Solomon v. Davis, 100 So. 2d 177 (Fla. 1958); Anderson v. Garber, 183 So. 2d 693 (3d D.C.A.), *appeal dismissed*, 189 So. 2d 631 (Fla. 1966); Barnett v. Pan Am. Sur. Co., 139 So. 2d 192 (3d D.C.A. 1962), *appeal dismissed*, 150 So. 2d 444 (Fla. 1963). Parties cannot stipulate to a family relationship or agree as to who will be the family head. *In re* Estate of Kionka, 113 So. 2d 603 (2d D.C.A. 1959), *aff'd*, 121 So. 2d 644 (Fla. 1960).

77. Solomon v. Davis, 100 So. 2d 177 (Fla. 1958); Barnett v. Am. Sur. Co., 139 So. 2d 192 (3d D.C.A. 1962), *appeal dismissed*, 150 So. 2d 444 (Fla. 1963). But this presumption does not relieve a mortgagee or a grantee of his duty to ascertain the rights of those in actual possession of the real property to be mortgaged or conveyed. Bigelow v. Dunphe, 144 Fla. 330, 198 So. 13 (1940) (holding that even though the wife was a free dealer and that the homestead was in her name, her husband had to join her in alienating the property).

78. 139 So. 2d 192 (3d D.C.A. 1962), *appeal dismissed*, 150 So. 2d 444 (Fla. 1963).

79. Solomon v. Davis, 100 So. 2d 177 (Fla. 1958); Anderson v. Garber, 183 So. 2d 693 (3d D.C.A.), *appeal dismissed*, 189 So. 2d 631 (Fla. 1966). Property owned by the wife does not constitute a homestead merely because it is the home of herself and her husband if he is the head of the family. *See* De Jonge v. Wayne, 76 So. 2d 273 (Fla. 1954); Abernathy v. Gruppo, 119 So. 2d 398 (Fla. 3d D.C.A. 1960).

80. It makes no difference that the property was a homestead prior to the final decree if such status did in fact cease beforehand. Nor would it matter that the property became a homestead after the time of the final decree determining whether the wife was the head of a family, since the homestead exemption will not defeat preexisting liens. All of the factors which constitute a homestead must exist at the material time. See notes 198-238 *infra* and accompanying text.

81. 183 So. 2d 693 (3d D.C.A.), *appeal dismissed*, 189 So. 2d 681 (Fla. 1966).

position as head of the family by the time the mortgage was executed. She claimed to have become the family head by fulfilling the legal obligation to support her children. As a result, she contended that the mortgage was void because she had alienated her homestead property without the joinder of her spouse. Although Mrs. Anderson testified that her husband did not support or permanently reside with the family, the court upheld the chancellor's finding that Mrs. Anderson was not the head of a family, and sustained the validity of the mortgage. Note, however, that Mrs. Anderson was attempting to assert the invalidity of her own actions — a contention that courts have traditionally not favored even in situations where there can be no estoppel. Further, the 1968 Florida Constitution may have invalidated the presumption that the husband is the family head. Florida Constitution, article X, section 5 (1968) provides that there shall be no distinction between men and women in the control and disposition of their property. The traditional presumption is also probably invalid in states that have passed an equal rights amendment.[82]

2. Family Dispersion. Family dispersion sometimes makes it difficult to determine who is the head of the family. When there has been a dissolution, if the husband has not remarried and is not paying alimony or child support, he is no longer the head of a family for purposes of the forced sale exemption.[83] However, if the husband continues to support the wife or children, his role as head of the family remains substantially unchanged.[84]

In *Anderson v. Anderson,*[85] it was determined that a former husband who had not remarried could not assert the homestead personalty exemption against the family that he claimed to head.[86] In that case the husband was obligated to support his two minor children who were in the custody of their mother pursuant to a divorce decree. The wife had remarried, and brought suit against her former husband for delinquent support payments. The supreme court appropriately held that the homestead exemption did not apply to intra-family debts.[87]

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82. *See* Note, *Effects of Extending the Homestead Exemption to Single Adults,* 26 BAYLOR L. REV. 658, 660 (1974).

83. *See* Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950). Obviously, divorce in the absence of children destroys the family. *See* Miller v. West Palm Beach Atl. Nat'l Bank, 142 Fla. 22, 194 So. 230 (1940); Jordan v. Jordan, 100 Fla. 1586, 132 So. 466 (1931).

84. Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 123 So. 780 (1929) (divorced husband paying support remained head of family for purpose of asserting homestead exemption against an outside creditor). It should also be noted that a wife who retains custody of children after a divorce may qualify as the head of a family provided that responsibility for the children's support falls on her. See text accompanying notes 72-81 *supra.*

85. 44 So. 2d 652 (Fla. 1950).

86. The former husband can, however, assert the homestead privilege against third party creditors. *See* Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 123 So. 780 (1929), where the ex-husband actually did support his wife and minor child from his rural homestead.

87. A contrary holding would have operated to defeat the very purpose for which the homestead exemption exists. The court based its decision on a different ground, theorizing that the ex-husband ceased to be the head of a family when he lost custody of the children and failed to pay for their support. This theory was apparently reaffirmed in Graham v. Azar, 204 So. 2d 193 (Fla. 1967). The holding does not imply that a divorced husband who has not remarried is free to devise property that lost its homestead status when he refused to support

The *Anderson* rationale could also be applied if the ex-husband remarries.[88] But in such cases courts have held that the ex-husband becomes the head of a new family and therefore the homestead exemptions bar a forced sale of his property to pay back child support.[89] The cases ignore the proposition that the husband's remarriage should not obviate the duty to support children of a former marriage.[90] If the husband is unable to support both families, providing both need his support, the legislature should amend the constitution to provide that the courts can exercise equitable powers to balance the needs and rights of all the parties.[91]

Desertion by the husband does not terminate his status as head of the family so long as he has children and continues to support them. Of course, in the absence of dependent children, the assertion of the homestead exemption fails because he no longer resides with his wife.[92] And in the absence of continued support the husband may not claim that he is the head of a family at law.[93]

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his children. *See* Comment, *Florida Homestead: Availability of Exemption After Divorce*, 3 U. FLA. L. REV. 242 (1950).

The *Anderson* court also held that orders regarding property rights between the husband and wife in divorce proceedings may be modified with regard to homestead real estate. 44 So. 2d at 655. *See also* Andruss v. Andruss, 144 Fla. 641, 198 So. 213 (1940); Francis v. Francis, 133 Fla. 495, 182 So. 833 (1938). The court can require the husband in a divorce suit to set aside property as security for the payment of child support or alimony. Landy v. Landy, 62 So. 2d 707 (Fla. 1953) (husband had demonstrated tendency to leave jurisdiction to avoid payment); McRae v. McRae, 52 So. 2d 908 (Fla. 1951) (husband attempted to conceal property to avoid support payments). Alternatively, if the husband and wife owned property as a tenancy by the entireties prior to their divorce, the court can award use and possession of the homestead to the wife. *See* Starling, *The Tenancy by the Entireties in Florida*, 14 U. FLA. L. REV. 111, 128 (1961). The ex-wife can then sell the former husband's interest in the property if he defaults on her support payments.

88. *See* Comment, *supra* note 87, at 245.

89. Graham v. Azar, 204 So. 2d 193 (Fla. 1967).

90. *See id.* at 196. (Ervin, J., dissenting). Justice Ervin took a more pragmatic view of the fact that the action against which the husband was successfully able to assert a claim of homestead exemption was for child support. He noted that a judgment creditor does not have the same entitlements as a child of the debtor. Arguing that the child's right to support vested at the time of his father's divorce, Justice Ervin contended that the father's property should not be exempted from child support merely because the child does not reside with him as a member of his second family. He concluded that child support was a continuing charge against the father's estate from the time of birth presumably until majority.

91. *See generally* Comment, *Florida Homestead: A Balancing of Equities Between Two Dependent Families*, 20 U. FLA. L. REV. 422 (1968). A majority of states do not provide the husband with an exemption for child support, but in Florida the former wife can only request that the courts use their contempt power to enforce the divorce decree. Graham v. Azar, 204 So. 2d 193 (Fla. 1967).

92. *See In re* Estate of Mahaffey, 194 So. 2d 636 (2d D.C.A.), *cert. denied*, 201 So. 2d 559 (Fla. 1967), where a husband who lived in his home apart from his second wife was not the head of a family. Although the *Mahaffey* court noted that the deceased husband had paid nothing toward the wife's support since their separation, a year later this same court held that a separated husband who had actually been paying his wife's support was not the head of a family in the absence of dependent children. *In re* Estate of Van Meter, 214 So. 2d 639 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970).

93. *But see* Estate of Deem v. Shinn, 297 So. 2d 611 (Fla. 1970).

Desertion by the wife does terminate the family relationship in the absence of dependent children, especially when such action is coupled with an intent to procure a divorce.[94] But if the wife leaves her husband for reasons of cruelty and moves to another state with her minor daughter, she may return a decade later to assert rights in her deceased husband's homestead so long as the daughter is still a minor at the time of her father's death and the wife has never maintained a suit for divorce or separate maintenance.[95] This result is consistent with cases holding that even though wife and child have moved out of the homestead, in the absence of the acquisition of a permanent domicile apart from the husband,[96] the husband is considered as still contributing to their support.[97]

Vandiver v. Vincent[98] is yet another case in which a Florida court supported a decision to grant a homestead exemption by considering not only legal and actual support obligations but also the need for preserving a communal relationship. The *Vandiver* court held a divorced mother to be the head of a family consisting of herself and her minor son even though the remarried father provided most of the son's support. This decision recognized that the family "would be completely torn asunder" if the claim of homestead did not prevail against a particular tort judgment creditor.[99] Consequently, the court decided that the "value of the services provided the son by his mother far exceed the amount of money expended on the son by his father,"[100] and that the mother furnished her son all of the care inherent in a communal relationship. As a practical matter, however, communal relationship is the only factor to be considered in establishing family headship between two parents who both contribute to their child's support. The result will also depend upon the nature of the creditor's claim, the consequence of denying the homestead exemption, and which of the two parents asserts headship first.

3. Adult Children. Family headship complications also arise when an adult

94. Barlow v. Barlow, 156 Fla. 458, 23 So. 2d 723 (1945); *In re* Estate of Van Meter, 214 So. 2d 639 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970).

95. O'Neal v. Miller, 143 Fla. 171, 196 So. 478 (1940). *See also In re* Estate of Van Meter, 214 So. 2d 639 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970). In *Van Meter* the court indicated that when there are no dependents, the wife's reason for leaving her husband is immaterial. *Id.* at 643.

96. O'Neal v. Miller, 143 Fla. 171, 196 So. 2d 478 (1945).

97. *See* Monson v. First Nat'l Bank, 497 F.2d 135 (5th Cir. 1974).

98. 139 So. 2d 704 (Fla. 2d D.C.A. 1962).

99. *Id.* at 710. The creditor in *Vandiver* was not a contract creditor but had secured a judgment against both the husband and wife for injuries suffered from a dog bite. The court emphasized that enforcement of this claim would impoverish the family. The father contributed $25 a week for a 17-year-old son's support and provided all of his clothing. But the mother paid the monthly mortgage payments of $83.00 from her weekly income of $30.00.

100. *Id.* Although the father was precluded from being the head of the family because he had remarried and moved to Indiana, the court indicated that *services* can be considered "support" for purposes of the homestead laws. "She is providing for his necessities other than possibly food and clothing in her house. He naturally needs these clothes maintained and cleaned, he needs someone to purchase, select, prepare and serve him proper meals. He needs someone to love, counsel with, advise and guide him as he attends school and prepares for manhood, and the inferences are that all these services are furnished by his mother." *Id.*

child resides in his parents' home. When all of the children of a family reach majority and permanently depart from their father's home to reside elsewhere, the father is no longer the head of a family unless he is married and his wife lives with him on the property.[101] But even though dependents residing on the homestead do not have to be minors or invalids,[102] there is no guarantee that the courts will find a family relationship when the only dependents are adult children.

Courts have had little difficulty in finding that even a healthy adult female who performs substantial services within the household can be a dependent of her elderly mother.[103] Thus, an adult daughter need not be dependent in fact upon the parent with whom she resides in order for that parent to be considered the head of a family.[104] But when a daughter marries and continues to reside on her father's property with her husband, the property loses its homestead status unless her husband relinquishes his responsibility to maintain the family to his wife's father.[105] Of course, if a single adult female moves back into her invalid mother's home to run the household, she becomes the head of a family if the mother is physically and financially dependent upon her,[106] and the property therefore does not attain homestead status.

In the absence of blood relationship, it appears that an adult female living with her deceased uncle's wife must be dependent in fact upon her aunt to prevent a devise of the property. Thus, in *In re Estate of Kionka*,[107] the court found that any moral obligation incurred by Mr. and Mrs. Kionka in requesting Mr. Kionka's twenty-eight-year-old German niece to come to live with them was fulfilled prior to his death in the absence of legal adoption. The court stressed that the niece was a fully competent adult able to earn her own living. The communal association over which Mrs. Kionka exercised "controlling authority" was merely an arrangement for the mutual benefit of both parties.

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101. The father may remain the head of a family even though his wife does not reside with him on the homestead property provided that her absence is excused by illness or financial difficulties. Nelson v. Hainlin, 89 Fla. 356, 104 So. 589 (1925).

102. DeCottes v. Clarkson, 43 Fla. 1, 29 So. 442 (1901); Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962).

103. *See* Beck v. Wylie, 60 So. 2d 190 (Fla. 1952), where a thrice-married daughter performed all the household duties while her mother managed the business affairs. The court held that the mother was the head of the family consisting of the two even though the daughter had moved out five months before her mother's death. The mother's residence was homestead property which could not be devised into a spendthrift trust for the daughter. This decision is not consistent wth the requirement that there be actual support of a dependent not residing with the purported head of a family at law. *See also* DeCottes v. Clarkson, 43 Fla. 1, 29 So. 442 (1901).

104. Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903).

105. Brown v. Hutch, 156 So. 2d 683 (Fla. 2d D.C.A. 1963). In *Brown*, a minor daughter continued to reside on her father's property after her marriage because her husband was on active duty in the Navy. The court found that the property retained its homestead status since the father was the head of a family in fact. *But see* Beensen v. Burgess, 218 So. 2d 517 (Fla. 4th D.C.A. 1969). The cases may be differentiated, however, in that *Brown* involved an intra-family dispute by one daughter trying to invalidate a deed to another whereas *Beensen* involved an outside creditor.

106. Aetna Ins. Co. v. La Gasse, 223 So. 2d 727 (Fla. 1969).

107. 113 So. 2d 603 (2d D.C.A. 1959), *aff'd*, 121 So. 2d 644 (Fla. 1960).

This conclusion, based on an array of decisions from other states, indicated the court's reluctance to find a family in fact when such a decision would have abrogated Mrs. Kionka's right to dispose of her home by will.

If a married son and his family move back into his parent's residence, the parent is usually not regarded as the family head without clear and convincing evidence that the son has abdicated his position as the head of a family at law.[108] Communal living in such circumstances is usually for the mutual benefit of all parties concerned,[109] and it is settled that a mere collection of individuals does not constitute a family.[110] In addition, when an adult son is already living with his father at the time of his marriage it has been held that the son becomes the head of his new family unless the father and son demonstrably regarded the son's family as part of the father's family.[111]

4. Surviving Spouse. When the head of a family dies, the surviving spouse, although not the head of a family, can claim the homestead exemption from forced sale against the decedent's creditors. The exemption for the decedent's debts passes to the spouse or heirs of the homestead owner[112] and never expires.[113]

Prior to the enactment of Florida Statutes, section 222.19 in 1976, if a husband died without issue and devised homestead property to his wife, she would own the property but would not qualify as a family head for purposes of the constitutional homestead provisions if she had no dependents.[114] Florida Statutes, section 222.19, however, now provides for head of family status automatically to "inure to the benefit of the surviving tenant by the entirety or spouse of the owner" at the previous family head's death. The statute expressly removes the requirement for two persons to reside at the homestead with one in authority so that the purposes of sheltering "the family and the surviving spouse" can be effectuated.

5. Desirability of the Family Headship Requirement. Only debtors who are the head of a family may assert the Florida homestead realty or personalty exemption from forced sale. The rationale behind this requirement is that persons who support dependents need greater exemptions than single debt-

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108. Dania Bank v. Wilson & Toomer Fertilizer Co., 127 Fla. 45, 172 So. 476 (1937). *See* Whidden v. Abbott, 124 Fla. 293, 168 So. 253 (1936); Brown v. Hutch, 156 So. 2d 683 (Fla. 2d D.C.A. 1963).

109. *See* Whidden v. Abbott, 124 Fla. 293, 295, 168 So. 253, 254 (1936).

110. *In re* Estate of Kionka, 113 So. 2d 603, 607 (2d D.C.A. 1959), *aff'd*, 121 So. 2d 644 (Fla. 1960) (quoting Union Trust Co. v. Cox, 55 Okla. 68, 79, 90, 155 P. 206, 209 (1916)).

111. *See also* Brady v. Brady, 55 So. 2d 907 (Fla. 1950), where a married son who, along with his wife and two children, continued to live with his father was held to be the head of his own family since he was able-bodied and supported them. The law regarding an adult son residing with a parent is murky, and no broad generalizations can be drawn.

112. FLA. CONST. art. X, §4(b) (1968).

113. This is contrary to the rule adopted in some states which provides that the original exemption terminates when the children reach majority and the surviving spouse dies. *See, e.g.*, ALA. CODE tit. 7, §661 (Supp. 1973); N.Y. CIV. PRAC. LAW §5206(c) (McKinney 1977).

114. Seashole v. O'Shields, 139 Fla. 839, 844, 191 So. 74, 76 (1939); Cowdery v. Herring, 106 Fla. 567, 143 So. 433 (1932); Moore v. Price, 98 Fla. 276, 285, 123 So. 768, 771 (1929).

ors.[115] Granting greater debtor exemptions to family heads comports with the underlying policy of the homestead laws: the preservation of a home where the family may live sheltered from economic misfortune.[116] Nevertheless, although every family head supports a dependent, dependents are not necessarily supported by a head of a family who qualifies for the homestead exemption. Thus, many dependents are not protected by the constitutional provision. Consequently, several states have extended homestead protection to single adults.[117] Other states have a two-tiered dollar limit on the value of the homestead that may be exempted from forced sale, thereby providing greater exemptions for the head of a family than for other debtors.[118]

Florida's concept of family headship is not a necessary or desirable method of protecting debtors and their dependents. For example, a couple who reside together as a family without children may satisfy the requirements of the homestead exemption because of one's legal obligation to support the other. Yet this same couple will lose their homestead exemption if they dissolve their marriage even though the decree specifies that a legal obligation to support still exists.[119] States which extend the homestead exemption to single persons eliminate this inequity by permitting the continuation of a homestead through marital changes of the homestead claimant.[120]

The family headship requirement is an indirect method of extending the homestead debtor exemption to people who support dependents. But the exemption should be extended to all debtors who actually provide for the support and maintenance of persons who do not have assets sufficient to support themselves or are unable to do so. Such a provision in the Florida law would allow a child supporting an elderly or disabled parent to assert the homestead exemption when it is impractical for them to reside together.[121] If extended to single persons, it would also protect the aged or infirm who live alone. To base exemption statutes on the presumption that most dependents are supported by family heads is an indirect, inefficient, and inequitable method of protecting those necessarily and actually dependent on debtors who may not be the head of a family.

Ownership of the Homestead Estate

A debtor is not entitled to assert the homestead exemption from forced sale simply because he is the head of a family. Except in the case of a tenancy by

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115. Note that the term "single persons" is not used literally but only to differentiate debtors who are not heads of families. Some family heads may well be single persons supporting a family in fact or a family at law as would be the case where the homesteader is divorced.

116. Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (1940).

117. *See, e.g.*, TEX. CONST. art XVI, §§50 & 51.

118. *See, e.g.*, CAL. CIVIL CODE §1260 (West Supp. 1976) ($30,000 for head of family; $15,000 for others); IDAHO CODE §55-1201 (Supp. 1977) ($10,000 for head of family; $4,000 for others).

119. *See* Crosby & Miller, *supra* note 1, pt. I at 24.

120. *See generally*, Note *supra* note 81.

121. *See* Moorhead v. Yongue, 134 Fla. 135, 183 So. 804 (1938).

the entirety,[122] both headship and ownership must be joined in one individual.[123]

The ownership requirement illuminates the true "chameleon" qualities of the homestead exemption. For example, if a husband and wife reside alone on property owned by the husband, he may assert the homestead exemption from forced sale against his creditors providing he is the head of the family. If the husband-owner becomes disabled and is dependent upon his wife for support, she becomes the family head and the property loses its homestead status since headship and ownership are no longer joined in the same individual. In such a case, the husband, no longer a family head, cannot prevent his creditors from levying upon the property. Similarly, his wife may not assert the homestead exemption against his or her creditors because she is not the owner of the estate in question.[124]

As has been previously mentioned, the enactment of Florida Statutes, section 222.19 has eliminated the inequities caused by the requirement that ownership and family head status be held by one person in the case of the death of a husband without issue and devise of a homestead to the surviving spouse.[125]

1. Nature of Property Interest Required. Fee simple ownership is not a prerequisite to the homestead exemption.[126] Case law has extended the exemption to any right or interest the head of a family may hold in land, whether legal or equitable in nature.[127] Thus, a debtor who owns or occupies a dwelling on land as a licensee[128] or who merely possesses land without objection by the legal owner[129] has an interest sufficient to sustain a claim of homestead, as does

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122. In a tenancy by the entirety, both spouses are vested with the entire estate. See notes 151-172 *infra* and accompanying text.

123. FLA. CONST. art X, §4(a) (1968) provides: "There shall be exempt from forced sale . . . the following property *owned* by the head of a family." (emphasis added).

124. As a practical matter, however, her creditors cannot levy upon the real property in which she has no interest; but they can levy upon her non-exempt personalty.

125. See text following note 114 *supra.*

126. *See* Arko Enterprises, Inc. v. Wood, 185 So. 2d 734 (Fla. 1st D.C.A. 1966); Anemaet v. Martin-Senour Co., 114 So. 2d 23 (Fla. 2d D.C.A. 1959).

127. Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So. 2d 832 (1946). *See also* Beall v. Pinckney, 150 F.2d 467 (5th Cir. 1945); Arko Enterprises, Inc. v. Wood, 185 So. 2d 734 (Fla. 1st D.C.A. 1966). Thus, the family head may be deemed the owner of homestead property purchased with his money even though legal title is vested in his spouse, unless an outright gift was made to the spouse. Crosby & Miller, *supra* note 1, at 25. It has been held that the family head's ownership interest may consist of an individual interest held in common with other parties. *See* Morgan v. Bailey, 90 Fla. 47, 105 So. 143 (1925) (undivided one-half interest); Hill v. First Nat'l Bank, 73 Fla. 1092, 75 So. 614 (1917) (tenant in common); Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912) (one-fourth interest as copartner).

128. FLA. STAT. §222.05 (1977) provides: "Any person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his own which he may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his homestead, shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid." *See* Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931).

129. Hill v. First Nat'l Bank, 73 Fla. 1092, 75 So. 614 (1917).

a purchaser of land who obtained a beneficial interest upon execution of the sales contract.[130]

An interest sufficient to support a claim of homestead, however, must be a present possessory right.[131] A vested or contingent future estate will not support a claim of homestead since "a remainder expectant upon cessation of a preceding estate creates no present right to possession and is not susceptible to immediate occupancy by the remainderman."[132] For example, in *Aetna Insurance Company v. La Gasse*,[133] an adult daughter acquired a vested remainder subject to her mother's life estate in what had been her father's homestead. She and her minor daughter moved into the home to care for her disabled mother who was physically and financially dependent upon her. The Florida supreme court held that consent by a life tenant to occupancy of property by a remainderman does not divest the life tenant of a paramount present interst, even though the remainderman is the head of the family. Therefore, the daughter had not acquired a possessory right sufficient to sustain a claim of homestead against a prior recorded judgment,[134] and her vested remainder was subject to levy. Mere possession by consent does not constitute a right to possession.[135]

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130. Arko Enterprises, Inc. v. Wood, 185 So. 2d 734 (Fla. 1st D.C.A. 1966) (equitable conversion). It has also been held that a deserted mother may assert the personalty exemption from forced sale in the equity of redemption she has in two encumbered business automobiles which her husband left behind.

131. Anemaet v. Martin-Senour Co., 114 So. 2d 23 (Fla. 2d D.C.A. 1959).

132. *Id.* at 27. In *Anemaet* a widowed mother conveyed five acres of rural land to her daugther and her husband, reserving a life estate to herself in one of the three dwellings on the premises. The court held that a subsequent judgment against the daughter and her husband attached to the remainder interest they received in the dwelling house occupied by the mother for life, since they had no right to occupy such dwelling house until the life tenant died. *See also* Joyner v. Williams, 156 Fla. 615, 617, 23 So. 2d 853, 854 (1945); Wise v. Wise, 134 Fla. 553, 565, 184 So. 91, 95 (1938).

133. 223 So. 2d 727 (Fla. 1969). *See* Comment, *Homestead Exemption: What Protection for the Widow and Heirs?*, 22 U. FLA. L. REV. 321 (1969).

134. Aetna Insurance Co. had gained a judgment against the daughter in 1961. Her father died in April 1965, and she acquired her vested remainder at that time. 223 So. 2d at 728. Aetna did not levy against respondent's interest in the property until after her mother's death in September 1965. The daughter argued that since Aetna failed to execute against the property until after she acquired fee ownership and thereby a homestead, her homestead claim was superior to the judgment. The court, however, held that the duly recorded judgment became a lien against the daughter's remainder interest and could not be defeated by a subsequent claim of homestead. *Id.* Note that even though Aetna recorded its judgment against the daughter four years prior to the time she obtained her vested remainder interest in the property, a claim of homestead would have prevailed over the judgment if a remainder interest was an interest susceptible to homestead protection. Where homestead status and a lien attach simultaneously, the homestead claim is granted priority. Such is the case when a judgment debtor purchases or inherits land and immediately establishes a homestead thereon. *Id.* at 729.

135. *Id.* There is logic in requiring a right to possession in the property claimed as a homestead. Unless the debtor has a right to possession, neither he nor his family may occupy the property. FLA. CONST. art. X, 4(a)(1) (1968) specifies that the urban homestead shall be limited to the residence of the owner or his family. And, since there can be no homestead without a home, the rural homestead also would seem to require a present right to possession.

2. Condominiums. Condominiums in Florida are real property by statute,[136] whether owned in fee simple, as a leasehold interest,[137] or by any other estate recognizable by law.[138] When considered as parcels of real estate, it is clear that the homestead exemption from forced sale should apply to condominiums.[139] Condominiums are merely a new form of home ownership unknown to the authors of the original exemption laws, and the homestead exemption should not depend upon the form of one's ownership. Certainly, a condominium owner faces the same problems as a homeowner and is entitled to the same protection.

The fact that a condominium owner only leases the real estate upon which his home is situated should not affect homestead status. Such a leasehold should qualify for the exemption from forced sale[140] under section 222.05 of the Florida Statutes.[141]

Whether a condominium homestead exemption could be asserted to prevent collection of assessments for the owner's share of common expenses incurred by the condominium assocation is uncertain.[142] The Florida Condominium Act specifically empowers the association to make and collect assessments against each unit owner.[143] The Act provides that a lien may be recorded against an owner's condominium for refusal to pay these charges,[144] but the constitutionality of this provision to condominiums which are homesteads is questionable. If these assessments are considered a pre-existing contingent liability for common expenses,[145] the exception to the homestead exemption for purchase money obligations should apply by analogy to permit a forced sale of the debtor's unit.[146]

3. Cooperatives. Unlike the owner of a condominium, a cooperative owner does not deal with real property;[147] he owns intangible personal property in the form of corporate stock or membership.[148] In addition, he usually owns his apartment under a lease, while the condominium owner probably holds a

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But see Hill v. First Nat'l Bank, 73 Fla. 1092, 1101, 75 So. 614, 617 (1917) (mere possession with consent of the owner is sufficient to support a homestead claim).

136. FLA. STAT. §718.106(1) (1977).

137. *Id.*

138. 3 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §39.20[2], at 1569 n.56 (1974).

139. *Id.* §39.20[2], at 1569.

140. See R. BOYER, *supra* note 138.

141. See note 128 *supra.*

142. McCaughan, *The Florida Condominium Act Applied,* 17 U. FLA. L. REV. 1, 23 (1964).

143. FLA. STAT. §718.111(6) (1977).

144. FLA. STAT. §718.116(4)(a) (1977).

145. *See* 3 R. BOYER, *supra* note 138, §39.29[2] at 1606.

146. If a condominium owner is entitled to assert the homestead exemption from forced sale against a creditor, a problem arises in determining whether he is within the constitutional area limitations. The owner should be considered as owning only that share of the area of the land upon which his condominium is located that is proportionate to his share of the common elements. *See* McCaughan, *supra* note 142, at 23. For a discussion on area limitations upon the Florida constitutional homestead, see notes 239-285 *infra* and accompanying text.

147. 2 FLORIDA REAL PROPERTY PRACTICE, §18.7 (Fla. Bar Continuing Legal Educ. Practice Manual No. 4, 1965).

148. *Id.*

deed.[149] As a result the Attorney General has declared that cooperative apartments are not subject to the law controlling descent of homesteads.[150] If a cooperative is not a homestead for purposes of devise and descent, it is not a homestead for purposes of the forced sale exemption. Thus, even though the family of a debtor residing in a cooperative needs the same protection afforded to families of traditional landowners, this form of home ownership is not within the ambit of the constitution or statutes.

4. Tenancy by the Entirety. When real property is held as a tenancy by the entirety, neither spouse owns the property.[151] The owner is a single legal entity consisting of both the husband and wife.[152] As a result, property held by the entireties cannot be subjected to the individual debts of one of the spouses.[153] Nevertheless, a creditor holding a joint judgment against both husband and wife can levy upon the entireties property unless it is homestead.[154]

Property held by the entireties may qualify for the homestead exemption from forced sale for individual or joint debts of the spouses provided that one of them is the head of a family and all other prerequisites to the exemption are present.[155] Joint debts, however, are barred only because of the property's homestead character and not because it is owned as a tenancy by the entirety.[156]

In contrast to the joint creditor, a creditor of only one spouse cannot enforce his claim against exempt property, not necessarily because it is homestead, but because it is held as a tenancy by the entirety.[157] Since both spouses own the whole estate as a single legal person, the debts of one cannot be satisfied out of the property without affecting property belonging to the other.[158] Additionally, when the debtor dies there is no interest or right which remains to be levied upon, not because the exemption inures to the surviving spouse

149. *Id. See generally* Note, *Land Without Earth — The Condominium*, 15 U. FLA. L. REV. 203 (1962); Comment, *A Survey of the Legal Aspects of Cooperative Apartment Ownership*, 16 U. MIAMI L. REV. 305 (1961).

150. [1971] FLA. ATT'Y GEN. ANN. REP. 27. *See also* Wartels v. Wartels, 338 So. 2d 48 (Fla. 3d D.C.A. 1976). The court held that a widow was not entitled to homestead in her deceased husband's cooperative apartment. Consequently shares of stock in a cooperative apartment corporation are subject to devise under general law and are not within the provisions of FLA. CONST. art. 10, §4 (1968) that restrict devise of a homestead. The *Wartels* court concluded that such a decision was reconcilable with Ammerman v. Markham, 222 So. 2d 423 (Fla. 1969), which held the homestead exemption applicable to cooperative apartments "solely for the purpose of taxation." 338 So. 2d at 50.

151. *See* Sheldon v. Waters, 168 F.2d 483 (5th Cir. 1948); Newman v. Equitable Life Assurance Soc'y, 119 Fla. 641, 160 So. 745 (1935); Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925).

152. Crosby & Miller, *supra* note 1, at 34.

153. This is true even if the property is not homestead because both spouses are considered to own the entire property as a legal unit and the property of one cannot be sold without selling the property of the other. Bailey v. Smith, 89 Fla. 303, 306, 103 So. 833, 834 (1925).

154. Coleman v. Williams, 146 Fla. 45, 200 So. 207 (1941).

155. Menendez v. Rodriquez, 106 Fla. 214, 143 So. 223 (1932).

156. Starling, *supra* note 87, at 140.

157. Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920).

158. Starling, *supra* note 87, at 139.

but because the survivor took the entire estate immediately upon the other's death by operation of law and the property of another cannot be sold to pay the deceased debtor's debts.[159] However, property held by the entireties is not always beyond the reach of a single spouse's creditor. Fraudulent conveyances that convert individual property into entireties property to avoid payment of debts have been set aside by the courts.[160] Similarly, a creditor of one spouse can reach entireties property purchased by installment payments if the debtor spouse alone made the payments on the property.[161] Futhermore, mechanic's and materialmen's liens for materials and labor used in building or repairing entireties property are enforceable against the property even though only one spouse signed the construction contract.[162] In such a case the contracting spouse is deemed the agent of the other spouse unless the noncontracting spouse gives notice to the contractor and files an objection with the clerk of the court within ten days after learning of the work being done on the property.[163]

Termination of an estate by the entireties occurs when both spouses join in a conveyance;[164] one spouse dies, whereupon the entire estate vests solely in the survivor;[165] one spouse conveys to the other;[166] or the relationship is dissolved by divorce.[167] In the latter instance the parties become tenants in common unless one of the spouses has an equitable interest in the property in addition to his legal interest.[168] The chancellor has no power to dispose of the parties' property merely as an incident of divorce.[169] Nevertheless, he may award one spouse's interest to the other as lump sum alimony.[170] Furthermore, the chancellor may grant either spouse use, occupancy, and control of entireties property to fulfill the other spouse's support obligations.[171] The supporting spouse is not divested of his interest, it merely becomes subject to the use of the other. As a result the courts will not partition the property while it is subject to use by the family.[172]

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159. Crosby & Miller, *supra* note 1, at 35.

160. *See, e.g.*, Sample v. Natalby, 120 Fla. 161, 162 So. 493 (1935).

161. Whetstone v. Coslick, 117 Fla. 203, 208, 157 So. 666, 668 (1934).

162. FLA. STAT. §713.12 (1977).

163. *Id.*

164. Starling, *supra* note 87, at 134.

165. Lopez v. Lopez, 90 So. 2d 456 (Fla. 1956). Although it is commonly said that a surviving spouse takes entireties property by survivorship, both spouses own the complete fee during their lives and when one dies, his estate is merely terminated.

166. Hunt v. Covington, 145 Fla. 706, 200 So. 76 (1941).

167. Clawson v. Clawson, 54 So. 2d 161, 162 (Fla. 1951).

168. Latta v. Latta, 121 So. 2d 42 (Fla. 3d D.C.A. 1960).

169. Boles v. Boles, 59 So. 2d 871 (Fla. 1952).

170. Kilian v. Kilian, 97 So. 2d 201 (Fla. 3d D.C.A. 1957).

171. This is true even if the property constitutes homestead. *See* Banks v. Banks, 98 So. 2d 337 (Fla. 3d D.C.A. 1957).

172. Pollack v. Pollack, 159 Fla. 224, 31 So. 2d 253 (1947). Courts have, however, made a distinction between homestead property held as a tenancy by the entirety when occupied under the terms of a divorce decree and such property occupied without the sanction of a court order. *Compare* Hoskin v. Hoskin, 329 So. 2d 19 (Fla. 3d D.C.A. 1976) *with* Tullis v. Tullis, 342 So. 2d 88 (Fla. 1st D.C.A. 1977). In *Tullis* the court stated that when a divorce decree awards neither spouse possession of a home, a claim of homestead will not apply to a

5. Desirability of the Ownership Requirement. As the population has moved from rural to urban areas, a trend has developed toward apartment dwelling. In 1860, single families occupied fourteen out of every fifteen dwellings in the United States.[173] As of 1970, thirty-seven percent of all families lived in rental units.[174] This means that current homestead laws protect only the sixty-three percent of the population that owns land. In addition, some homeowners, such as those who live in cooperative housing or mobile homes, are not included under current homestead statutes. Thus, a debtor who is the head of a family and supports those dependent upon him may not be entitled to set aside a certain amount of money to buy a home in the future or to pay the rent.[175]

Rather than subsidizing landowners, homestead laws should rely upon a dollar value exemption to put all debtors on the same footing. A tenant who currently may not exempt as much as the next month's rent should be entitled to set aside a predetermined amount of money to ensure his family an apartment, food, and clothing. Such an entitlement should also inure to the homeowner, but if his equity in the homestead exceeded the amount, creditors should be able to force a sale of the property and pay the debtor the dollar amount of the exemption in cash. The remainder would be paid to the creditor in an amount not exceeding his claim. The advantages of a dollar exemption from forced sale far outnumber those of today's ownership requirement. Under the current constitutional homestead provision, a homeowner gets everything and other debtors get nothing. All debtors would be treated alike under a fixed dollar exemption.

The Florida homestead exemption should not be designed to produce income to a debtor's dependents for life, but should only prevent them from becoming destitute during the period of debtor rehabilitation. Society is not obligated to guarantee a family's support in the future by exempting the proceeds of the property owner's previous debts from forced sale. Under a dollar value exemption, a debtor will be encouraged to earn a salary that is exempt if he is the head of a family.[176] He and his family will also be entitled to numerous other exemptions and benefits such as welfare, a life insurance exemption,[177] personalty exemption,[178] and exemptions for disability income benefits,[179] pension or retirement payments, and social security. It is apparent, then, that most debtors would not be adversely affected by a monetary limit upon the homestead exemption. A fixed dollar exemption would still guarantee

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forced sale for partition since the spouses have become tenants in common, each eligible for an exemption only on a 50% interest. 342 So. 2d at 89.

173. C. WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 1023 (1941).

174. STATISTICAL ABSTRACT OF THE UNITED STATES 684 (1972).

175. Yet the funds a homesteader receives from the sale of his property are exempt for a reasonable time if he intends to reinvest them in a new homestead. See notes 268-270 *infra* and accompanying text.

176. FLA. STAT. §222.11 (1977).

177. FLA. STAT. §§222.13-.14 (1977) (limited to policies payable to beneficiaries other than the insured or his estate).

178. FLA. CONST. art. X, §4(a)(2) (1968) (limited to $1,000).

179. FLA. STAT. §222.18 (1977).

adequate protection to a majority of debtors while at the same time preventing abuses by debtors residing in luxurious homesteads.[180]

Residence

When a husband separates from his wife and family and establishes his residence elsewhere in Florida, a question arises as to which residence the homestead exemption applies if he remains the head of a family by continuing to support his legal dependents. The Florida Constitution of 1885 provided that the urban homestead exemption was limited to "the residence and business house of the owner."[181] Clearly, the husband could not have claimed an exemption in his former residence under the 1885 constitution.[182] As a result, his creditors could sell his interest in such property to satisfy their claims, even though his family resided there.[183]

The Florida Constitution of 1968 states that the municipal homestead exemption is "limited to the residence of the owner or his family."[184] Does the exemption attach to the family's home or the husband's separate residence? Even though the husband owns both parcels, he can only claim a homestead exemption for one of them. Since he is legally obligated only to support his dependents, rather than to provide them with home ownership, the husband will probably be able to assert the homestead exemption only to prevent a forced sale of his curernt residence. Such a result obviously fosters rehabilitation of the debtor and in the long run will ensure greater protection for the family. The husband's obligation to support his family continues, and he cannot assert the homestead exemption against his dependents for intra-family debts[185] unless he remarries and becomes the head of a second family.[186]

The Florida Constitution of 1885 implied that the claimant of the homestead exemption must be a resident of Florida.[187] The 1968 constitution, however, does not require that the family head reside in the state or on the property in order to assert a claim of homestead.[188] Consequently, a family

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180. Florida's liberal exemption laws have been abused frequently. In France v. Hart, 170 So. 2d 52 (Fla. 3d D.C.A. 1965), a judgment creditor was unable to satisfy his judgment from the debtor's property, consisting of: 1) a $200,000 homestead; 2) a Cadillac automobile; 3) $67,000 annual salary, exempt from garnishment by statute; and 4) a one-half interest in the Castaways Motel, valued at $3,500,000, that was owned by the debtor with his wife as an estate by the entirety.

181. FLA. CONST. art. X, §1 (1885).

182. Crosby & Miller, *supra* note 1, at 28-29.

183. Note that because the husband is still supporting his legal dependents he, and not his wife, is the head of the family at law.

184. FLA. CONST. art. X, §4(a)(1) (1968).

185. Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950).

186. Graham v. Azar, 204 So. 2d 193 (Fla. 1967).

187. FLA. CONST. art. X, §1 (1885) provided: "A homestead . . . owned by the head of a family residing in this state" shall be exempted from forced sale. Presumably this could be satisfied by the homestead owner residing in the state but not on the homestead as long as his family continued to reside on the homestead. 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03, at 474.9 n.8(d) (1974).

188. FLA. CONST. art. X, §4(a)(1) (1968). *See* R. BOYER, *supra* note 187, at 747.9.

residing on a Florida homestead apparently is protected even though the head of the family resides in another state.[189]

Either the owner or his family must actually occupy the homestead.[190] As a result, a debtor and his family residing in a city may not claim a homestead in unoccupied rural farmland.[191] "Homestead" is commonly construed to mean "the dwelling house at which the family resides," "the home place," "the place where the home is," and "the place of the home."[192] There can be no homestead without a home. Thus, even though the constitution does not specifically limit the rural homestead to the residence of the owner or his family, it is apparent that the term homestead contemplates such a residence.

Neither the head of the family nor his dependents must reside on the homestead property continuously in order to claim the exemption from forced sale.[193] Absences from the property, however, must be temporary or with an intention to return.[194] Thus, in *Monson v. First National Bank*,[195] the Fifth Circuit Court of Appeals held that even though both husband and wife lived outside Florida while attempting to resolve marital difficulties, the homestead exemption continued.[196] The court emphasized that the household and its furnishings were left intact in the interim, no attempt was made to dispose of the property, and the couple retained their drivers' licenses and eligibility to vote in Florida.[197]

The Material Time

The Florida homestead is not exempt from liens that attach to the property before homestead status is acquired.[198] Forced sale of the property is permitted if a lien precedes the time when property held by the debtor becomes a home-

189. This is inconsistent with the theory that the head of a family establishing a separate residence within the state is only entitled to a homestead exemption as to his new residence. It has also been held that where a husband and wife were divorced in another state and the husband subsequently moved to Florida, the husband was head of a family at the time of his death since one of his two daughters residing with their mother in another state was a minor. Estate of Deem v. Shinn, 297 So. 2d 611 (Fla. 1974).

190. Lyon v. Arnold, 46 F.2d 451 (5th Cir. 1931); Solary v. Hewlett, 18 Fla. 756 (1882); Engel v. Engel, 97 So. 2d 140 (Fla. 2d D.C.A. 1957).

191. Oliver v. Snowden, 18 Fla. 823 (1882).

192. *Id.* at 834-36.

193. *See* Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d D.C.A. 1962).

194. Daily residence is not essential to create or maintain a homestead, nor is it disrupted by temporary absence with the intent to return. Collins v. Collins, 150 Fla. 374, 7 So. 2d 443 (1942) (renting to winter tourists with intent to return to property did not constitue abandonment of homestead). A list of factors bearing on the question of intent in this regard is contained in Crosby & Miller, *supra* note 1, at 30.

195. 497 F.2d 135 (5th Cir. 1974).

196. *Id.* at 139.

197. *Id.*

198. Aetna Ins. Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969); Kirkland v. Kirkland, 253 So. 2d 728 (Fla. 3d D.C.A. 1971); Abernathy v. Gruppo, 119 So. 2d 398 (Fla. 3d D.C.A. 1960). A majority of states apply the exemption regardless of when the debt was incurred. *See* Vukowich, *supra* note 8, at 804. It seems equitable, however, to honor the rights of pre-homestead creditors.

stead.[199] But if the lien attaches to the debtor's property contemporaneously with or subsequent to the time the property acquires homestead status, the homestead exemption prevails over the lien.[200]

The "material time" is when the creditor's lien attached to the property now claimed as homestead.[201] Although a lien may not attach to property while it is homestead,[202] a judgment at law or a decree in equity rendered after June 5, 1939, will attach to nonhomestead real estate owned by the debtor in each county in which the judgment is properly recorded.[203] A creditor's bill designed to reach equitable interests gives rise to a lien that attaches on the date the bill is filed.[204] In general, the lien comes into existence on the date of attachment.[205] Thus, a lien that arises from a mortgage or contract exists from the date of attachment and not from the date of foreclosure.[206] As between the parties, such liens attach on the date of execution; these liens will not prevail against third parties or creditors, however, until they are properly recorded.[207]

Mortgages to secure future advances are specifically recognized in Florida by statute.[208] Thus, a homestead established after the execution of a mortgage to secure future advances but prior to the time the advancements are made is

199. In Kirkland v. Kirkland, 253 So. 2d 728 (Fla. 3d D.C.A. 1971), a husband and wife were divorced and the wife was awarded use of the former marital home. She obtained a judgment against her ex-husband for unpaid child support and purchased his interest in the former marital home. She later sought to satisfy the remainder of her judgment from a parcel of land on which her former husband was supporting his elderly mother as the head of a family. The court held that his homestead property was subject to levy under judgments recorded prior to the time such property attained such status. *But see* Justice Robert's dissenting opinion in Aetna Ins. Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969), where he argued that the 1968 Florida Constitution provides an exemption against 1) attaching of the lien and 2) forced sale. Thus, according to Justice Roberts, even though the lien predates the time the property attained homestead status, no forced sale of the property can occur as long as it is homestead. *See* FLA. CONST. art. X, §4(a) (1968), which provides: "[t]here shall be exempt from forced sale under process of any court, *and* no judgment, decree or execution shall be a lien thereon. . . ." (emphasis added).

200. Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431 (Fla. 1968).

201. Crosby & Miller, *supra* note 1, at 35.

202. FLA. CONST. art. X, §4(a) (1968).

203. FLA. STAT. §§55.10, 28.29 (1977). Prior to 1939 judgments or decrees of Florida circuit courts created liens upon all property located within the county of the court when rendered and elsewhere when recorded. Judgments rendered during the period from June 5, 1939, to June 26, 1967, and those rendered after January 1, 1972, created or will create liens on property located within any county only when a certified copy of the judgment was or is recorded in the official records book of the county. Judgments rendered by a state court during the period from June 26, 1967, to January 1, 1972, became a lien on property located within the county of the court when the original judgment was recorded and in other counties when a certified copy of the judgment was recorded. The 1967 to 1972 procedure with respect to recordation of original judgments may create problems with the Federal Conformity Act, 28 U.S.C. §1962 (1970). *See* Venus Condominum Assn., Inc. v. Meadows Development Co., 352 So. 2d 1169 (Fla. 1977).

204. *See* Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So. 2d 832 (1946).

205. *See* Heddon v. Jones, 115 Fla. 19, 20, 154 So. 891, 891 (1934).

206. Crosby & Miller, *supra* note 1, at 37.

207. 2 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §32.03, at 1020 (1975).

208. FLA. STAT. §697.04 (1977). Such advances, however, must be made within 20 years from the date the mortgage was executed.

subject to the morgage lien.[209] This lien arises from the time of execution in regard to persons with actual notice and from the time of recordation in regard to subsequent purchasers and encumbrancers.[210] The lien does not arise at the time each advance is made, regardless of whether the advances are obligatory or optional.[211] The consideration relates back to the time the mortgage is recorded.[212]

In Florida, a debtor is not required to designate his homestead prior to incurring an obligation. The exemption may be asserted after the sheriff levies on the land or before the property is sold.[213] It is only essential that the debtor actually establish that his homestead existed prior to the time the lien asserted against it arose.

Before a debtor may assert his claim of homestead, he obviously must be the head of a family and the owner of the property in question. Both of these elements must coincide with the time a creditor's lien would ordinarily attach to secure the forced sale exemption for the debtor and must exist continuously thereafter to prevent the lien from attaching.[214] Merely because each of these elements has existed at different times is not sufficient to substantiate the debtor's exemption claim.

1. Abandonment. While the term "homestead" seemingly connotes continuous occupancy,[215] temporary absence of the family head for the benefit of the family will not constitute a physical abandonment of the homestead if he maintains an intent to return.[216] Absence from the household during a vacation,[217] or when necessitated by health,[218] family,[219] or financial reasons[220] will

209. Simpson v. Simpson, 123 So. 2d 289 (Fla. 2d D.C.A. 1960). At the time of the debtor's marriage, there was a recorded mortgage against his property to secure future advances to be made on demand. The payments were subsequently made, and when the debtor died, the mortgagee attempted to enforce his mortgage. The widow's defense was that the mortgage was invalid since it was not executed jointly by the husband and wife. The court held that the mortgage was a lien against the property prior to its becoming a homestead. The mortgage was enforceable even though it did not disclose on its face that it was to secure future advances. *Id.*

210. *Id.* at 293.

211. *Cf.* Silver Waters Corp. v. Murphy, 177 So. 2d 897 (Fla. 2d D.C.A. 1965) (dealing with non-homestead property).

212. See Simpson v. Simpson, 123 So. 2d 289, 295 (Fla. 2d D.C.A. 1960). The courts will have to exercise caution to prevent creditors from taking unfair advantage of debtors through use of a "dragnet clause." Such a clause may be included in a mortgage on otherwise exempt property. Unethical creditors sometimes will make "future advances" by buying up the obligations of other creditors against the same debtor at a discount. The creditor may thus increase his security interest in the debtor's property without the debtor's consent or knowledge.

213. FLA. STAT. §222.02 (1977).

214. Milton v. Milton, 63 Fla. 533, 538, 58 So. 718, 719 (1912) (dictum).

215. Read v. Leitner, 80 Fla. 574, 86 So. 425 (1920).

216. Marsh v. Hartley, 109 So. 2d 34 (Fla. 2d D.C.A. 1959). But under the new constitution, the homestead may be the residence of the family or the head of the family.

217. Olesky v. Nicholas, 82 So. 2d 510, 512 (Fla. 1955) (extended period of absence was not abandonment where the debtor retained the intent to return).

218. Saint-Gaudens v. Bull, 74 So. 2d 693 (Fla. 1954). Although temporary absence from the homestead by a person committed to a mental hospital also does not constitute abandon-

not affect the homestead status of property. The question of whether an abandonment of the homestead has occurred is determined by considering the facts and circumstances of each case.[221] When a man moves his family from one piece of property to another for the purpose of establishing a new permanent residence, he has obviously abandoned his former residence as a homestead.[222] But in *United States Fidelity & Guaranty Co. v. Marshall*,[223] the Florida supreme court held that a husband and wife who spent the major portion of each week living on and directing the operations of her farm did not abandon their city homestead. The *Marshall* court relied on the fact that the debtor's children lived on the homestead and the debtor continued to vote and otherwise participate in local city politics. Accordingly, his absence was deemed temporary and for the benefit of the family.[224]

In *Beensen v. Burgess*,[225] the facts of the case similarly controlled the issue of abandonment. In *Beensen* the judgment debtor's grantees prevailed in a suit to quiet title against creditors who alleged that the debtor had abandoned his homestead by surrendering possession to the grantees five weeks prior to the closing of the sale. The district court found that the debtor and his married minor daughter had moved into the home of another daughter as part of the overall sales transaction.[226] The court held that no abandonment had occurred and that the vacated home remained a homestead until the sale was closed.

A particular type of abandonment, termed "functional abandonment," commonly arose under the 1885 constitution which provided an exemption for the urban homesteader's "residence and business house."[227] Usually the issue was whether an improvement or building had been "functionally" abandoned as a residence or business house although the homestead itself had not been physically abandoned. Often it was difficult to determine whether the residence and business house were both exempt when they constituted separate buildings located on the same piece of realty.[228] Although the exemption was probably

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ment for purposes of the tax exemption, rental of the homestead by his legal guardian would terminate the tax exemption. FLA. STAT. §196.061 (1977); [1977] FLA. ATT'Y GEN. ANN. REP. 554. Whether rental of the homestead is an abandonment for purposes of the forced sale exemption is a factual not a statutory question.

219. Monson v. First Nat'l Bank, 497 F.2d 135 (5th Cir. 1974) (preservation of marriage); Poppell v. Padrick, 117 So. 2d 435 (Fla. 2d D.C.A. 1959) (visiting elderly mother).

220. *See* Marsh v. Hartley, 109 So. 2d 34, 38 (Fla. 2d D.C.A. 1959); Olesky v. Nicholas, 82 So. 2d 510, 512 (Fla. 1955).

221. *See, e.g.*, Murphy v. Farguhar, 39 Fla. 350, 22 So. 681 (1897).

222. Crosby & Miller, *supra* note 1, at 37.

223. 148 Fla. 286, 4 So. 2d 337 (1941).

224. *Id.* at 292, 4 So. 2d at 339.

225. 218 So. 2d 517 (Fla. 4th D.C.A. 1969).

226. Although the closing did not take place until October, the grantees wanted to enroll their children in school beginning in September and therefore assumed early possession for this purpose.

227. FLA. CONST. art. X, §1 (1885). *See also* text accompanying notes 244-248 *infra*. Crosby & Miller, *supra* note 1, at 40-47.

228. *Compare* Cowdery v. Herring, 106 Fla. 567, 143 So. 433 (1932) (finding that a two-story brick garage and a one-story frame building were exempt as "business houses" along with the residence) *with* McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939) (holding that a rental garage and apartment house were physically separate from the residence and were

designed for situations where one building served both of these functions, it was nevertheless difficult physically to divide a building that was used for a third purpose that was not exempt.[229] The 1968 constitution, however, has eliminated the "business house" exclusion and all of the problems related thereto.[230] The urban homestead exemption is now limited to the residence of the owner or his family.[231]

Functional abandonment is still important, however, because it is not limited to a business house. In 1931 the supreme court decided a functional abandonment case that did not deal with a business house.[232] A homesteader had allowed his son-in-law as licensee to build a small house on a corner of his lot. A lumber company sued the homesteader to foreclose on its materialman's lien and the court held that the small house and the land on which it stood had been functionally abandoned by the parents as part of their homestead and was therefore subject to forced sale.

2. *Waiver.* As a general rule the homestead exemption may be waived only by abandonment or by alienation in the manner provided by law.[233] Additionally, it has been held that a widow, by executing an antenuptial agreement, may waive her marital rights including dower, homestead, and all other inheritance or property rights of a married woman.[234]

The new probate code provides that a woman may validly waive her marital rights by contract before or after marriage.[235] While no disclosure is necessary for an antenuptial agreement,[236] any waiver executed after the marriage is valid only if there has been full disclosure of all the husband's property.[237] In either case, no consideration is needed beyond the mere signing of the contract.[238]

The Nature and Physical Extent of the Homestead

Although a particular debtor qualifies for the homestead exemption not all of his property necesarily constitutes a homestead. Both the constitutions of 1885 and 1968 limit the rural homestead to 160 acres of land[239] and extend the

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therefore not exempt) *and* O'Neal v. Miller, 143 Fla. 171, 196 So. 478 (1940) (which held that only the residence and not four small houses and a fish store also located on the homestead property was exempt).

229. *See, e.g.*, Smith v. Guckenheimer, 42 Fla. 1, 27 So. 900 (1900).

230. *See* FLA. CONST. art. X, §4(a)(1) (1968). Problems still arise, however, in determining what part of a dwelling constitutes the debotor's residence. *See* Weiss v. Stone, 220 So. 2d 403 (Fla. 3d D.C.A. 1969) (only that portion of an apartment complex actually occupied by the debtor was exempt from an execution sale).

231. FLA. CONST. art. X, §4(a)(1) (1968). Thus, if a person converts part of his residence into a business house he has abandoned those parts of the premises as his homestead.

232. Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931).

233. Marsh v. Hartley, 109 So. 2d 34 (Fla. 2d D.C.A. 1959).

234. Johnson v. Johnson, 140 So. 2d 358 (Fla. 2d D.C.A. 1962).

235. FLA. STAT. §732.702 (1977).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Compare* FLA. CONST. art. X, §1 (1885) *with* FLA. CONST. art. X, §4(a)(1) (1968).

rural exemption to improvements upon the real estate.[240] In addition, it has always been impossible to reduce the area of a rural homestead by subsequent inclusion within a municipality without homesteaders' consent.[241] The rural homestead embraces all of the essentials of a farm. It was designed not only to provide the family with a place to live but also to preserve the "minimum physical necessities for producing a living."[242] Nevertheless, there is no requirement that the land be cultivated or used for grazing.[243]

The 1885 constitution provided the urban dweller with a homestead exemption for one-half an acre including "the residence and business house of the owner."[244] The exemption of the business house was to create some degree of parity between urban and rural debtors who were allowed an exemption for an entire 160 acre farm to support their families. Furthermore, it was not uncommon at the time the exemption laws were enacted for a residence and business house to be located in the same building or at least on the same one-half acre of land.[245] The new constitution, however, recognized that the business house was obsolete and limited the municipal homestead exemption to "the residence of the owner or his family."[246] This appears to be both an expansion and a contraction of the exemption. Although the business house is abolished, the home does not have to be the residence of the family head. The 1968 constitution continues to limit the urban exemption to one-half an acre including the residence and, by judicial implication, appurtenances thereto.[247] Unlike the rural exemption, neither constitution extended the urban exemption to all improvements upon the real estate.[248]

1. Contiguity. There was no express requirement under the former constitution that the land comprising the homestead be contiguous. Article X, section 7 of the 1885 constitution, however, created the homestead tax exemption "on the home and contiguous real property, as defined in article 10 [*sic*], section 1."[249] This section implied that contiguity was a prerequisite to the con-

240. *Id.*

241. *See* FLA. CONST. art. X, §5 (1885); FLA. CONST. art. X, §4(a)(1) (1968).

242. *See* Crosby & Miller, *supra* note 1, at 40.

243. The use to which the rural homestead is put is immaterial. Thus, if the constitutional provisions are taken literally, the rural debtor could exempt 160 acres including not only his residence, but his factory or resort motel—regardless of the total value of the exemption: For an example of such an abuse in Texas totallying $3,000,000, *see* N.Y. Times, May 25, 1967, at 41, col. 3; N.Y. Times, May 26, 1967, at 25, col. 1; N.Y. Times, May 27, 1967, at 28, col. 2.

244. FLA. CONST. art. X, §1 (1885).

245. *See, e.g.*, Heil Co. v. Lavieri, 205 So. 2d 21 (Fla. 2d D.C.A. 1967) (municipal homestead consisted of commercial showroom, offices, and garage on the first floor and defendant's residence on the second).

246. FLA. CONST. art. X, §4(a)(1) (1968).

247. *See* White v. Posick, 150 So. 2d 263 (Fla. 2d D.C.A. 1963), where a garage, swimming pool, and patio could not be severed from the dwelling house even though all three were located upon an adjoining lot and such separation could be made without material injury to the dwelling house; they were conventional residential appurtenances.

248. *See, e.g.*, O'Neal v. Miller, 143 Fla. 171, 196 So. 478 (1940).

249. FLA. CONST. art. X, §7 (1885, amended 1938).

stitutional exemption from forced sale.[250] The legislature lent its authority to the contiguity requirement in 1941 by enacting section 222.03 of the Florida Statutes.[251] The Florida Constitution of 1968 expressly provides that both the rural and the urban homestead must be composed of contiguous land.[252]

Because of the contiguity requirement, there can only be one parcel of homestead land.[253] If a debtor owns a one-half acre lot in the city and a 100 acre farm in the country he cannot claim both as his homestead even though together they do not exceed 160 acres. Which parcel constitutes the debtor's residence is to be determined from the facts and circumstances of each case.[254] If the debtor resided in a city, it seems clear that he would not be able to claim a rural homestead. Although neither constitution expressly requires that a homesteader reside on his rural homestead, there can be no homestead without a home.[255]

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250. *See* Buckels v. Tomer, 78 So. 2d 861 (Fla. 1955) (contiguity required with respect to rural land constituting a homestead).

251. FLA. STAT. §222.03 (1977) is a most ambiguously written statue. It provides: "If the creditor in any execution or process sought to be levied is dissatisfied with the quantity of land selected and set apart, and shall himself, or by his agent or attorney, notify the officer levying, the officer shall at the creditor's request cause the same to be surveyed, *and when the homestead is not within the corporate limits of any town or city, the person claiming said exemption shall have the right to set apart that portion of land belonging to him which includes the residence, or not, at his option,* and if the first tract or parcel does not contain 160 acres, the said officer shall set apart the remainder from any other tract or tracts claimed by the debtor, but in every case taking all the land lying contiguous until the whole quantity of 160 acres is made up. The person claiming the exemption shall not be forced to take as his homestead any tract or portion of a tract, if any defect exists in the title, except at his option. The expense of such survey shall be chargeable on the execution as costs; but if it shall appear that the person claiming such exemption does not own more than 160 acres in the state, the expenses of said survey shall be paid by the person directing the same to be made" (emphasis added).

Crosby & Miller, *supra* note 1, at 49, noted that the statute may allow a debtor to elect to meet his obligation when sued thus waiving his homestead exemption. (See FLA. STAT. §222.02 (1977)). In such a case problems would arise regarding the rights of the spouse and minor child under the constitution. On the other hand, the quoted statute may be construed to allow a rural debtor to claim property as his homestead on which he does not reside. Such a construction would arguably render the statute unconstitutional as a violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States. This is because the statute would allow owners of nonhomestead property to exempt certain land solely on the basis of whether or not it is located within a municipality.

252. FLA. CONST. art. X, §4(a)(1) (1968).

253. Nevertheless, it is possible for the homestead to be situated upon more than one tract of land. Quigley v. Kennedy & Ely Ins. Co., 207 So. 2d 431 (Fla. 1968) (rural land); White v. Posick, 150 So. 2d 263 (Fla. 2d D.C.A. 1963) (urban lots). Furthermore, variant ownership of the two contiguous tracts does not defeat homestead status. Thus, in Wilson v. Florida Nat'l Bank & Trust Co. at Miami, 64 So. 2d 309 (Fla. 1953), the supreme court held that an entire parcel of 40 acres was a homestead even though the head of a family owned 5 acres with his wife as an estate by the entirety and the other 35 acres in his own name. *See generally* Comment, *Homestead: Effect of Variant Ownership on Descent*, 6 U. FLA. L. REV. 576 (1953).

254. *See* Crosby & Miller, *supra* note 1, at 47.

255. Both the old and new constitutions, however, do provide that the rural homestead includes improvements upon the real estate and this provision contemplates that the debtor's residence, as well as his barn and other buildings if he is a farmer, will be located on the

Once property has originally satisfied the contiguity requirement, involuntary divisions of a parcel resulting from eminent domain proceedings should not destroy the homestead character of the lot or any portion thereof.[256] Abandonment compelled in the public interest should be limited to the portion of the lot relinquished and should not destroy the homestead nature of the remaining portions. Even if the property is completely severed by a railroad or a highway the entire lot up to 160 acres should fall within the exemption from forced sale.[257] If the owner voluntarily splits his property, however, or if it was divided when he purchased it by a road or highway, his homestead should only extend to that portion of the property that is contiguous to his residence.[258]

A rural debtor may only exempt 160 acres of land and improvements from forced sale.[259] If he owns more than 160 acres, he may designate the homestead portion before[260] or after[261] levy upon the property by his creditors. However, his creditors may request a survey if the owner refuses to designate the homestead portion of the property or if they are dissatisfied with the designation.[262] In such a case the chancellor shall determine what property the debtor will retain as a homestead.[263]

Additional, contiguous property purchased by a rural homesteader after a judgment has been recorded against him is exempt from forced sale if the size of the total tract remains within the constitutional acreage limitation.[264] The

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premises. By allowing a debtor to exempt land which does not contain his residence, the courts would not be fulfilling the underlying purposes of the homestead laws. *See* FLA. CONST. art. X, §1 (1885); FLA. CONST. art. X, §4(a)(1) (1968). *See also* FLA. STAT. §222.03 (1977), set forth in note 251 *supra*.

256. *See* Clark v. Cox, 80 Fla. 63, 85 So. 173, 174 (1920).

257. Clark v. Cox, 80 Fla. 63, 85 So. 173 (1920) (property remained homestead even though later divided by a railroad and a highway, which occupied a 100 foot strip of land that the homesteader had conveyed in fee simple).

258. *But see* Croker v. Croker, 7 F.2d 218 (S.D. Fla. 1925) where a federal court held that separation of some portions of the homestead tract from the rest by the sale of intervening land did not result in abandonment of one of the separated portions. The court cited no authority for its decision, which is unsound because it would enable an individual to establish a homestead consisting of separated parcels merely by temporarily holding title to the intervening land. Contiguity should be an element of both acquisition and abandonment of the homestead.

The Florida supreme court held in Buckels v. Tomer, 78 So. 2d 861 (Fla. 1955) that the mere platting of unsold rural land occupied by the head of a family does not destroy the homestead character of the property. *See also* Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918). The *Buckels* court further found that the debtor's property was contiguous even though divided by streets, where the lots were on either side of the street. This latter finding is contrary to the more logical and practical rule that only if originally contiguous homestead property is severed involuntarily after its acquisition, will nonadjacent property constitute a homestead.

259. FLA. CONST. art. X, §4(a)(1) (1968).

260. FLA. STAT. §222.01 (1977).

261. *Id.* §222.02.

262. *Id.* §222.03, *quoted in* note 251 *supra*.

263. *Id.*

264. It is important to note that homestead property is not only exempt from forced sale in Florida, but that no judgment, decree or execution can even be a lien thereon. It is there-

effect of this rule is illustrated by *Quigley v. Kennedy & Ely Insurance, Inc.*[265] Mr. and Mrs. Quigley owned a seven and one-half acre homestead at the time a judgment was entered against them. Within three months they purchased a vacant seven and one-half acre tract of land adjacent to their homestead tract. When the judgment creditor attempted to levy upon the newly acquired tract, the Quigley's claimed an exemption for the entire fifteen acres. The trial court rejected such an expansion of exempt property. The district court affirmed and stated that if the new tract were considered part of the homestead, judgment debtors would be allowed to deposit after-acquired funds beyond the reach of their creditors. The supreme court, however, held that judgment debtors may enlarge their homesteads to the maximum limits even in the face of a recorded judgment, provided that subsequent additions are adjacent to the existing homestead. The court noted that the district court's opinion overlooked the possibility that additional homestead lands could be purchased with inherited or borrowed funds.[266]

The real issue in *Quigley* was whether a debtor may acquire exempt property by transferring nonexempt property in the face of a recorded judgment. The supreme court believed that the district court's refusal to grant homestead status to the newly acquired tract was "contrary to the clear intent of the homestead provision of the Constitution." That belief is mistaken. The debtor and his family received all of the protection intended when they were allowed to insulate their residence and existing homestead from the collection of just debts. In addition, the court relied upon AMERICAN JURISPRUDENCE which in turn relied upon cases that are easily distinguishable from the *Quigley* facts. In all of those cases either the new property was being used as part of the homestead prior to the transfer of title or no homestead existed at the time the new property was acquired.[267] The court conceded that its decision would have been different if the two parcels had not been adjacent, but failed to adopt the better rule that when homestead already exists and the debtor acquires new adjacent property that has not previously been used in conjunction with the

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fore clear that no lien can attach to property of homestead character. Florida is thus distinguished from states which permit a lien upon the homestead but merely exempt it from forced sale. A comparison of the majority and dissenting opinions in Aetna Ins. Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969) is helpful.

265. 207 So. 2d 431 (Fla. 1968); *see* Comment, *Homestead Exemption: Extension of Protection After Judgment*, 21 U. FLA. L. REV. 134 (1968).

266. Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431, 433. It should make no difference that the funds used to purchase additional homestead property are borrowed or inherited. If a debtor borrows $35,000 to purchase a $40,000 lot adjacent to his homestead, he has created a "shelter" to preserve his future surplus monies from the legal claims of creditors. Although he only has an equitable interest of $5,000 in the new property, when the loan is finally paid off from wages which are exempt from garnishment, the debtor will have successfully transformed nonexempt cash into an exempt homestead.

267. *E.g.*, Maples v. Rawlins, 105 Tenn. 457, 58 S.W. 644 (1900) (when a judgment debtor purchased property with money furnished by his wife and sons, the homestead right attached at the same time as the judgment lien, but was superior to it); Freiberg v. Walzern, 85 Tex. 264, 20 S.W. 60 (1892) (when debtor sold his old homestead and purchased a new one with the sale proceeds, the homestead right attached at the moment of purchase and a lien could not operate against it).

homestead, the new property should not fall within the constitutional exemption from forced sale.

Instead of acquiring property adjacent to his homestead, a judgment debtor may desire to sell his residence and purchase a new home elsewhere. The supreme court has held that the homestead exemption from forced sale extends to the proceeds of a voluntary sale of the homestead[268] when the owner intends in good faith to reinvest such proceeds in a new homestead within a reasonable time.[269] This rule is both logical and reasonable since economic necessity may require a family to move from one locality to another.[270] The homestead exemption was not designed to tie down a homeowner and his family to a particular home for the remainder of their natural lives. Thus, the principle of exempting funds parallels the doctrine of equitable conversion.[271] The funds resulting from a voluntary sale of the homestead are "converted," and while "in transit" assume the character of the exempt real estate. The property is simply changed into the form of cash before once again being transformed into a bona fide homestead. On similar reasoning, Florida courts have exempted the proceeds from a fire insurance policy paid for the destruction of the homestead.[272] Damages recovered by a homesteader for an unlawful invasion of the homestead are also exempt.[273] In both cases the exempt funds were for the purpose of replacing or restoring the homestead property.

2. Nature of the Exemption. The homestead exemption from forced sale lacks many of the characteristics of an estate.[274] It does not create alienable property rights in the husband, wife or children, but is merely an exemption that inures to the surviving spouse and heirs of the homestead owner.[275] The

268. Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So. 2d 201 (Fla. 1962). In adopting the minority rule, the court relied only upon cases which had exempted such funds for purposes of *voluntary* sale. See Note, *The Exemption of Proceeds From a Voluntary Sale of Homestead Property*, 17 U. MIAMI L. REV. 99, 101-04 (1962).

269. The "reasonable time" for investment is determined from the facts of each case. Furthermore, only so much of the proceeds of the sale as are intended to be invested in another homestead are exempt. Surplus monies are treated as general assets of the debtor which are subject to levy by his creditors. *Id.* at 206. It is to the homeowner's benefit to purchase and occupy a new homestead within eighteen months of the date of the sale of the old homestead, if the homeowner wants to take advantage of the partial nonrecognition provisions in the Internal Revenue Code. *See* I.R.C. §1034. Of course proceeds from the sale of homestead property are not exempt if held for other than the specific purpose of acquiring a new homestead. Consequently such funds cannot be comingled with other monies of the vendor but must be separately held for the sole purpose of acquiring another home. In the absence of sufficient evidence as to the origin of assets used in a post-judgment purchase of homestead property, the rule exempting funds derived from a former homestead has no application. *See* Weiss v. Stone, 220 So. 2d 403 (3d D.C.A.), *appeal dismissed*, 225 So. 2d 913 (Fla. 1969) (only the apartment unit physically occupied by the debtor was exempt from forced sale where the origin of funds used to buy his five-unit apartment complex was unknown).

270. The general rule, however, is that a voluntary sale of a homestead is a complete extinguishment of the homestead right in the absence of any statute to the contrary.

271. *See* Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940).

272. Kohn v. Coats, 103 Fla. 264, 138 So. 760 (1931).

273. Hill v. First Nat'l Bank, 79 Fla. 391, 84 So. 190 (1920).

274. 1 REDFEARN, WILLS AND ADMINISTRATION OF ESTATES 416-17 (1957).

275. The Florida supreme court has often confused the homestead exemption which

exemption does not necessarily pass to the same people who take the homestead property upon the death of the owner. And, of course, the exemption may only be asserted by those who inherit title to the homestead under the laws of descent.[276]

3. Limitations Upon the Homestead Property. Most states that offer homestead protection afford debtors an exemption to the extent of their property interest limited to a certain dollar value.[277] In more than half of these states the monetary limitation is $5,000 or less[278] and applies to the value of the debtor's equity rather than the fair market value of the property.[279] Consequently, a $40,000 home would be immune if the debtor has no more than a $5,000 equity in it after all liens, mortgages and other encumbrances are subtracted from the market value. If the value of the debtor's equity exceeds $5,000 at the time a creditor attempts to levy upon the homestead, the creditor may force a sale of a portion of the land. Generally the unsold property must include the residence[280] and obviously must be within the dollar value limitation.[281] If the value of the debtor's equity in the residence alone exceeds the statutory limit, the entire property will be sold[282] and the debtor would be paid the dollar amount of his exemption in cash.[283]

The cry for a dollar value limitation in Florida has fallen on deaf ears for more than a quarter of a century.[284] Courts in other jurisdictions have noted that exemption laws without such a limitation are nothing more than "a vehicle for fraud and rank injustice."[285] The Florida rural homestead ex-

inures to the children with an estate in which the children have an interest. *See, e.g.*, Norton v. Baya, 88 Fla. 1, 102 So. 361 (1924).

276. Weitzner v. United States, 309 F.2d 45 (5th Cir. 1962). Thus, clearly, a spouse's constitutional right to homestead protection during the lifetime of the spouse who owns the property is a marital right and not a property right. For an example of when the exemption is "lost," see text accompanying note 357 *infra*.

277. *See* Vukowich, *supra* note 8, at 800.

278. *Id.*

279. *See, e.g.*, ARIZ. REV. STAT. ANN. §33-1105(c) (Supp. 1972); CAL. CIV. CODE §1260(1) (West Supp. 1973).

280. MASS. GEN. LAWS ANN. ch. 236, §18 (Supp. 1973); WASH. REV. CODE ANN. §6.12.220 (1963).

281. *See, e.g.*, CAL. CIV. CODE §§1246(3), 1253-1254 (West 1970); GA. CODE ANN. §51-501 (1965); ILL. ANN. STAT. ch. 52, §§8, 10 (1978); ORE. REV. STAT. §23.270(1) (1971); VT. STAT. ANN. tit. 27, §102 (1975); WIS. STAT. ANN. §272.21(2) (West 1970).

282. *See, e.g.*, CAL. CIV. CODE §1254 (West 1954); KY. REV. STAT. ANN. §427.090 (Baldwin 1972); NEB. REV. STAT. §40-111 (1968).

283. *See, e.g.*, CAL. CIV. CODE §§1255-1257 (West 1970); KY. REV. STAT. ANN. §427.090 (Baldwin 1972); NEB. REV. STAT. §40-112 (1968); WIS. STAT. ANN. §272.21(2), (5) (West 1958 & Supp. 1977).

284. *See* Crosby & Miller, *supra* note 3, at 47.

285. *See* O'Brien v. Johnson, 275 Minn. 305, 148 N.W.2d 357 (1967), where the Minnesota supreme court "deplored the injustices" of the statutory exemptions but nevertheless felt "reluctantly compelled" to apply the statute granting an urban homestead of one-third of an acre to the O'Briens. Mrs. Johnson had recovered a $96,300 judgment against the O'Briens for personal injuries. During an appeal, the O'Briens sold their $13,000 homestead and moved into an apartment located on property they owned valued at $100,000. The court was bound by various statutes to exempt the $100,000 property and all the rental therefrom in addition to the $13,000 received by the O'Briens from the sale of their former homestead.

emption for 160 acres of land and all improvements thereon, certainly falls within this category. The value of such an exemption will commonly approach a quarter of a million dollars. It is no longer necessary to exempt this much land to protect a rural family, especially in light of the legislature's removal of the urban dweller's exemption for a business house. Since both exemptions were designed to exempt the family's means of support, it is clear that if one is obsolete, so is the other. Furthermore, a dollar value exemption would prevent an urban debtor from exempting one-half acre of extremely valuable urban property. When we are dealing with monetary debts, common sense tells us that homestead exemption laws will be ineffective unless they too are phrased in terms of dollars and cents. The present exemptions from creditors' claims are in terms of acres, which have no fixed dollar value. If only one percent of present debtor homestead claims abuse the exemption laws, a dollar figure that should encompass ninety-nine percent of the debtors who need the exemption could be easily approximated. Of course, any amount enacted by the legislature should be dependent upon a consumer price index or other barometric device to ensure that future debtors will always receive the full value of their intended exemption.

PART II — ALIENATION AND TRANSFER OF HOMESTEAD REALTY

Whenever real estate is held by its owners under such circumstances as to make it exempt from forced sale, it is also subject to certain restrictions on alienation. These restrictions are set forth in the Florida constitution and have been embellished by both the legislature and the judiciary. Part II of this article discusses restraints on intervivos and testamentary disposition of homestead property.

Intervivos Transfer

The right of an owner to transfer property during his lifetime is an inherent right incident to the ownership of that property.[286] Therefore, in the absence of constitutional or statutory restrictions, a family head should be able to convey homestead property as if the property were not homestead in nature.[287]

Voluntary transfers of the homestead are not prohibited in Florida, but the constitution does attempt to protect the beneficiaries of the homestead exemption by placing one express limitation upon an intervivos alienation of the realty:[288] the spouse of the homesteader is required to join in any conveyance alienating the homestead. Article X, section 4 of the former constitution provided: "Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if

286. Hinson v. Booth, 39 Fla. 333, 348, 22 So. 687, 692 (1897).

287. *See* FLA. CONST. art. X, §4 (1885).

288. Buchwald, *Florida Homestead: A Restraint on Alienation by Judicial Accretion*, 19 U. MIAMI L. REV. 114, 118 (1964).

such relation exists . . . ."[289] In addition, article X, section 1 stated that "the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. . . ."[290] It is clear that execution of a deed or mortgage of the homestead by both the husband and wife was absolutely essential under the 1885 constitution whenever the property was conveyed to a third party, regardless of how title to the property was held.[291] Similarly, any conveyance or encumbrance of the realty had to be "duly executed."[292] This meant that every deed, mortgage, or specifically enforceable contract to sell[293] had to be witnessed by two subscribing witnesses, although such witnesses were not required to be disinterested nor were attesting witnesses necessary.[294] In addition, it was a sound practice to mention the owner's spouse in the body of the instrument as a party to the transaction because the former constitution required "joint consent" of the husband and wife. While the execution of the instrument by the spouse is prima facie evidence of joinder,[295] proof that the execution was not voluntary obviously invalidates the instrument.[296] Thus, in *Heath v. First National Bank*,[297] the court held that the signature of the wife was insufficient for "joinder" in an alleged homestead mortgage that 1) did not name her elsewhere in the instrument and 2) appeared to be a security agreement for her husband's business debts.[298]

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289. FLA. CONST. art. X, §4 (1885).

290. FLA. CONST. art. X, §1 (1885).

291. *See* Williams v. Foerster, 335 So. 2d 810 (Fla. 1976) where the court upheld the constitutionality of FLA. STAT. §689.11(1)-(2) (1977) allowing inter-spousal alienability of homestead property held as a tenancy by the entirety without joinder of the grantee spouse.

292. *See* Crosby & Miller, *supra* note 1, at 63-64.

293. The explicit language of the 1885 constitution did not include contracts for the sale of homestead property within the "duly executed" requirement. However, the courts interpreted that provision to require that specifically enforceable contracts and mortgages of homestead property be executed with the formalities required by the conveyancing statute — FLA. STAT. §689.01 (1977). Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957); McEwen v. Schenck, 108 Fla. 119, 146 So. 839 (1933); Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920). The statute did not include contracts and mortgages within its scope. Zimmerman v. Diedrich, 97 So. 2d at 124; Teate v. Anderson, 122 Fla. 81, 164 So. 649 (1935). However, prior judicial interpretations used the statutory formalities required for deeds as the standard by which compliance with the "duly executed" constitutional phrase was measured. Zimmerman v. Diedrich, 97 So. 2d at 124; McEwen v. Schenck, 108 Fla. at 121, 146 So. at 840; Hutchinson v. Stone, 79 Fla. at 165, 84 So. at 153. Because the 1968 constitution did not continue use of the phrase "duly executed" it has been held that there is no longer any requirement that contracts and mortgages of homestead property be executed with the same formalities required for deeds. See notes 301, 302 *infra* and accompanying text.

294. Ross v. Richter, 187 So. 2d 653 (Fla. 2d D.C.A. 1966).

295. New York Life Ins. Co. v. Oates, 122 Fla. 540, 555, 166 So. 269, 275 (1935).

296. Shad v. Smith, 74 Fla. 324, 76 So. 897 (1917).

297. 213 So. 2d 883 (Fla. 1st D.C.A. 1968).

298. Lack of acknowledgment by the owner does not affect the validity of an instrument purporting to alienate homestead property. Acknowledgment is only necessary for purposes of the recording acts. Mere execution is therefore sufficient to pass title to homestead realty except in the case of subsequent creditors and good-faith purchasers who rely upon the recording statutes. Prior to 1943, lack of acknowledgment did render a deed invalid if the property was owned by a married woman. Although the legislature amended §693.03 of the Florida Statutes in 1943 to dispense with the necessity for acknowledgment by married women, this

By eliminating the "duly executed" phrase, the Florida Constitution of 1968 removed the requirement of two subscribing witnesses to a contract for sale[299] or a mortgage[300] of homestead property. However, the 1968 constitution retained the joinder requirement for the transfer or encumbrance of homestead. Article X, section 4(c) provides that "[t]he owner of the homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale, or gift. . . ."[301] While this section may seem to relax the requirement of "joint consent," apparently a bare signature without the intent of a spouse to join the homesteader in alienating the real estate would not comply with the "joined by the spouse" requirement.[302]

Questions concerning the necessity for joinder of the grantee-spouse in an interspousal conveyance of fee simple title in a homestead have now been resolved. In 1941 the Florida Legislature enacted section 689.11 of the Florida Statutes, which provided:

> A conveyance of real estate, made by a husband direct to his wife, or by a wife direct to her husband, shall be effectual to convey the legal title to such wife, or husband, as the case may be, in all cases in which it would be effectual if the parties were not married, and the grantee need not join in the execution of such conveyances.[303]

Subsequently, the Florida supreme court determined in *Estep v. Herring*[304] that this statute did not apply to homestead property.[305] In 1971, after the enactment of the new constitution, the legislature amended section 689.11 to include a conveyance of homestead realty. The amended statute provides:

> A conveyance of real estate, including homestead, made by one spouse to the other shall convey the legal title to the grantee spouse in all cases in which it would be effectual if the parties were not married, and the grantee need not execute the conveyance.[306]

The legislature clearly intended this amendment to permit interspousal trans-

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legislation did not affect the requirement that spouses must sign a homestead deed in the presence of two subscribing witnesses.

299. Wickes Corp. v. Moxley, 342 So. 2d 839 (Fla. 2d D.C.A. 1977), *aff'd*, No. 51,277 (Fla., filed January 26, 1978).

300. Carroll v. Doughterty, No. 77-1002 (Fla. 2d D.C.A. filed March 3, 1978). *But see* Kaplan v. Smith, 271 So. 2d 762 (Fla. 1972) (dictum); Shedd v. Lake, 299 So. 2d 58 (Fla. 1st D.C.A. 1974).

301. FLA. CONST. art. X, §4(c) (1968).

302. *See* Heath v. First Nat'l Bank, 213 So. 2d 883 (Fla. 1st D.C.A. 1968). Since leasehold interests for less than one year will support a claim to homestead, consent by a spouse to transfer such an interest could apparently be obtained by parol. The Statute of Frauds does not require a writing to transfer such an interest. *See* FLA. STAT. §689.01 (1977).

303. 1941 Fla. Laws, ch. 20954, §6 (codified at FLA. STAT. §689.11 (1977)).

304. 154 Fla. 653, 18 So. 2d 683 (1944).

305. Moore v. Moore, 237 So. 2d 217, 220 (Fla. 4th D.C.A. 1970); Moorefield v. Byrne, 140 So. 2d 876, 877 (Fla. 3d D.C.A. 1962).

306. FLA. STAT. §689.11(1) (1977).

fers of homestead realty without joinder,[307] and the supreme court upheld its constitutionality in 1976.[308]

1. Creation of a Tenancy by the Entirety in Homestead Property.[309] The tenancy by the entirety is a concurrent estate in land combining the four unities of the common law joint tenancy with the additional unity of husband and wife, who were considered one person at common law.[310] Consequently, an interspousal conveyance without the use of a strawman was legally impossible because it would constitute an admission that the wife existed independently of her husband.[311] Section 689.11 of the Florida Statutes was amended in 1947 to provide that one spouse holding fee simple title could convey directly to the other spouse in order to create an estate by the entirety.[312] Such a deed, however, had to state on its face that the purpose of the conveyance was to create an estate by the entirety.[313]

The 1968 constitution provides: "The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse."[314] This sentence is composed of a single subject and a compound predicate containing two verbs – "may alienate" and "may transfer." The compound predicates convey two separate thoughts:

(1) The owner of homestead real estate, joined by the spouse if married, may alienate the homestead . . .

307. FLORIDA LAW REVISION COMMISSION, ANNUAL REPORT AND RECOMMENDATIONS 40 (1970-1971).

308. *See* Williams v. Foerster, 335 So. 2d 810 (Fla. 1976).

309. The authors would like to express their appreciation to Richard A. Belz for making available to them his research on homestead held as a tenancy by the entirety.

310. Four unities were necessary to create a joint tenancy at common law: time, title, interest and possession. Tenancy by the entireties includes the additional unity of marriage. Survivorship was characteristic of both estates. Nevertheless, the manner of holding each estate is different. A joint tenant is said to be seized of a share and of the whole (*per my et per tout*), but tenants by the entirety are seized of the whole and not of a share (*per taut et non per my*). C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 229 (1962).

Tenants by the entireties, unlike joint tenants, have an indestructible right of survivorship. Although both spouses may join in a conveyance of the property to a third person, neither alone can sever the tenancy or do any act which would defeat the right of survivorship of the other spouse. This is unlike joint tenancies and tenancies in common which can be partitioned under Florida law. Furthermore, the constitutional restrictions on alienation do not apply to homesteads held by the entireties, since the whole estate vests in the surviving spouse. FLA. CONST. art. X, §4(c) (1968); Denham v. Sexton, 48 So. 2d 416, 418 (Fla. 1950). Once the spouses are divorced, however, they become tenants in common and the property may again be considered a homestead for purposes of alienation. FLA. STAT. §689.15 (1977); Hoskins v. Hoskins, 329 So. 2d 19 (Fla. 3d D.C.A. 1976).

311. Since the husband and wife were considered one unity, one spouse could not convey to another since he could not convey to himself.

312. 1947 Fla. Laws, ch. 23964, §1.

313. *Id.* Although this statute did not provide that a husband alone could convey to himself and his wife without a statement of purpose, the Fifth Circuit has held that such a deed carries with it an implied purpose to create an estate by the entirety and is therefore valid. Schuler v. Claughton, 248 F.2d 528 (5th Cir. 1957).

314. FLA. CONST. art. X, §4(c) (1968).

(2) The owner of homestead real estate . . . if married, may by deed transfer the title to an estate by the entirety with the spouse.[315]

It is clear that the words "joined by the spouse" modify the word "alienate" and do not inferentially modify "may transfer." It follows, therefore, that a conveyance by the owner of the homestead alone to his spouse is a constitutionally permissible means to create an estate by the entirety. In 1971 the Florida Legislature amended section 689.11(1) of the Florida Statutes to provide that "[a]n estate by the entirety may be created by the action of the spouse holding title: (a) Conveying to the other by a deed in which the purpose to create the estate is stated; or (b) Conveying to both spouses."[316] While no case has yet so held, it thus appears that a husband may create a tenancy by the entirety without the joinder of his wife by conveying to her alone and stating that the purpose of the deed is to create an estate by the entirety or merely by conveying to himself and his wife.

It is both logical and constitutional to allow these conveyances between a husband and wife to create a tenancy by the entirety. These conveyances were originally prohibited on the theory that the children's interests should not be extinguished by a transfer when adequate consideration was not paid. Such a rationale is unsupportable in light of the 1968 constitution which allows an intervivos disposition of the homestead by gift.[317] Moreover, the supreme court has ruled that children do not have a vested interest in homestead property.[318] Of course, if no minor children exist the new constitution permits one spouse to devise to the other.[319] In light of these approved methods of transferring the homestead, the joinder requirement for purposes of creating an estate by the entirety is no longer a rational restriction upon the alienation of the homestead.

2. Consideration. The 1968 constitution specifically allows a gratuitous transfer of homestead realty. Article X, section 4(c) provides that the homestead may be alienated "by mortgage, sale or gift"[320] and the existence of children imposes no limitation upon this provision.[321] Although it was uncertain under the former constitution whether consideration was required for gratuitous conveyances to third parties,[322] the 1968 constitution alleviates the problem by

315. FLORIDA LAW REVISION COMMISSION, ANNUAL REPORT AND RECOMMENDATIONS 40 (1970-1971).

316. 1971 Fla. Laws, ch. 71-54, §1 (amending FLA. STAT. §689.11 (1969)).

317. FLA. CONST. art. X, §4(c) (1968). Moreover, under the former constitution, several cases indicated that adequate consideration was created when a husband and wife relinquished one set of rights for another. *Cf.* Pace v. Woods, 177 So. 2d 779 (Fla. 3d D.C.A. 1965) (conveyance from tenancy by the entirety to spouses as tenants in common upheld since both spouses relinquished their right to survivorship for their right to devise). *See also* Gregory v. Lloyd, 284 F. Supp. 264 (N.D. Fla. 1968); Parrish v. Robbirds, 146 Fla. 324, 200 So. 925 (1941); Betts v. Hawkins, 202 So. 2d 135 (Fla. 2d D.C.A. 1967).

318. Reed v. Fain, 145 So. 2d 858 (Fla. 1962).

319. FLA. CONST. art. X, §4(c) (1968).

320. *Id.*

321. *See* Note, *supra* note 3, at 705. *See also* Reed v. Fain, 145 So. 2d 858, 868 (Fla. 1962).

322. Denham v. Sexton, 48 So. 416 (Fla. 1950) (dictum).

specifically providing that no consideration is needed for any conveyance. The new provision is a most welcome remedy to judicial interference with the ownership of real property and the inherent right to its management and control.

3. Power of Attorney. The Florida Constitution of 1885 required that a deed conveying homestead be "duly executed *by himself or herself,* and by husband and wife, if such relation exists."[323] This language was thought to require physical joinder of the husband and wife to convey the homestead effectively.[324] Physical joinder, as distinguished from mere joinder, requires that both spouses actually execute the instrument.[325] Although mere joinder may generally be accomplished through a power of attorney, physical joinder may not.

In 1943, the state legislature enacted a statute authorizing a married woman to give her husband powers of attorney and to receive such powers from him.[326] The statute included the power to convey property "owned by her, or by herself and her husband as tenants by the entirety, or by her husband"[327] alone. It was expressly provided, however, that this law did not dispense "with the joinder of husband and wife in conveying or mortgaging homestead property."[328]

The 1968 constitution also requires joinder by the husband and wife in any conveyance of the homestead except to create a tenancy by the entirety.[329] However, it states only that the owner must be "joined by the spouse if married."[330] Arguably, the present constitution allows mere joinder. This would comport with the legislative intent behind section 689.11 of the Florida Statutes, which was adopted in 1971.[331] That statute provides that any deed or mortgage of a homestead may be executed by virtue of a power of attorney that was executed and recorded in the same manner as a deed. The statute further provides: "Nothing in this section shall be construed as dispensing with the requirement that husband and wife join in the conveyance or mortgage of homestead realty, but the joinder may be accomplished through the exercise of a power of attorney."[332] It is therefore apparent that the legislature intended to authorize a conveyance of the homestead without the necessity of physical joinder.[333]

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323. FLA. CONST. art. X, §4 (1885) (emphasis added).

324. Note, *supra* note 3, at 712.

325. Comment, *Homestead: Conveyance by One Spouse Joined by Himself as Attorney in Fact for the Other Spouse,* 1 U. FLA. L. REV. 108 (1948).

326. FLA. STAT. §708.09 (1977).

327. *Id.*

328. FLA. STAT. §708.10(5) (1977).

329. FLA. CONST. art. X, §4(c) (1968).

330. *Id.*

331. This statute became effective May 12, 1971.

332. FLA. STAT. §689.111 (1977).

333. An earlier power of attorney provision was enacted in 1970 pertaining solely to servicemen. FLA. STAT. §709.015(4) (1977). Often a serviceman and his family will be stationed in Florida prior to his tour of duty abroad. If the serviceman becomes "missing" or "missing in action," his wife usually desires to leave Florida and return to her former home, but many

Although the power of attorney statutes are desirable as a matter of public policy, they may be unconstitutional. The Florida Constitution of 1968 explicitly requires that "the owner of the homestead real estate, joined by the spouse if married, may alienate the homestead. . . ."[334] This provision should be construed to permit mere joinder through a power of attorney. Nevertheless, until the constitutionality of the power of attorney statutes has been determined, a conveyance or encumbrance of homestead property accomplished by the exercise of a power of attorney constitutes a cloud upon the title.[335] As a result, title insurers and real estate attorneys are reluctant to accept such a deed.[336]

4. Incompetency. The constitution of 1885 provided that homestead realty could only be alienated by a deed or mortgage duly executed with the joint consent of husband and wife.[337] In so doing, it provided no mechanism for the conveyance of homestead when one spouse had become incompetent. Florida Statutes, section 745.15, which provided for conveyances of property by an incompetent's guardian, was specifically made *inapplicable* to homestead realty.[338] Acknowledging the problem, the 1968 constitution omitted the due execution requirement and provided that "if the owner or spouse is incompetent the method of alienation or encumbrance shall be as provided by law."[339] However, since section 745.15(6) was still in force, the problem remained unsolved. Finally, in 1969, section 745.15(6) was repealed, and section 745.15(1) amended to permit specifically the guardian of the incompetent spouse to convey or mortgage any right or interest of the ward in any property, including homestead.[340] Section 745.15(4) authorized the guardian of an incompetent spouse to join in the *sale* of property owned by the entirety.[341] Perhaps subsection (1) encompassed all homestead property including that held by the entirety. However, if it did not, and subsection (4) controlled

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times will find that she cannot sell the homestead. This statute is designed to enable the wife to sell homestead property acting as her husband's agent pursuant to a duly executed power of attorney. However, if the property is held by the entireties, the wife must wait one year following the date her husband was reported as "missing" before she may make such a conveyance as her husband's attorney in fact. *Id.*

334. FLA. CONST. art. X, §4(c) (1968).

335. *See* FLORIDA BAR, TITLE STANDARD 18.4.

336. *See, e.g.*, LAWYERS' TITLE GUARANTY FUND, TITLE NOTES 505-64 (1964).

337. FLA. CONST. art. X, §1 (1885).

338. 1945 Fla. Laws, ch. 22750, §2 provided: "Nothing contained in this section shall be construed to apply to homesteads under §1, Art. X of the State Constitution."

339. No method for alienation of a homestead under such circumstances existed until the legislature passed 1969 Fla. Laws, ch. 69-216, §19, which became effective on October 1, 1970, but was repealed by the new Probate Code as of January 1, 1976. Conveyances made prior to the effective date of this now repealed statute constitute clouds upon titles. *See* FLORIDA BAR, TITLE STANDARD 18.5.

340. "A guardian of the property may, on petition and order and upon such terms as the order directs, execute and deliver a deed, lease or mortgage in the name of the ward, conveying, leasing, mortgaging or releasing any actual or apparent right or interest of the ward in any property, *including the homestead*, real or personal. . . ." FLA. STAT. §745.15(1) (1969) (emphasis supplied). Effective Oct. 1, 1970.

341. See note 339 *supra.*

homestead entireties property, it was not clear until 1974 that the guardian could join in a *mortgage* of such property.[342]

When Florida's guardianship statutes were revised in 1974 and 1975, sections 745.15(1) and 745.15(4) were replaced by sections 744.441(15) and 744.457, respectively. Section 744.441(15) was a general provision authorizing a guardian of the property to sell, mortgage, and lease any property owned by the incompetent ward.[343] Section 744.457(1)(a) virtually repeated subsection 4(a) of section 745.15.[344] While neither provision specifically included homestead, the use of "all" and "any" renders it probable that the legislature intended homestead property to be covered by those sections.[345]

If homestead was encompassed by those sections, it is then clear that a guardian could join to sell or mortgage homestead property owned either as an estate by the entireties or solely by his ward. However, it is unclear whether the guardian was authorized under section 744.441(15) to join in the conveyance of homestead owned solely by the other spouse.[346]

In an effort to resolve this uncertainty section 744.441(15) was amended in 1977 to include specifically "homestead property or any interest therein."[347] This amendment certainly settles the first query posed by its predecessor — whether homestead property was within its scope — and probably answers the second — whether the guardian can join in the conveyance of homestead owned solely by the other spouse.[348]

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342. In 1973, subsection 4(a) was amended to expressly authorize the transfer, conveyance, or mortgage of entireties property by a guardian of a spouse. The amendment became effective January 1, 1974. See 1973 Fla. Laws, ch. 73-61, §1.

343. "After obtaining approval of the court in accordance with s.744.447, a guardian of the property may: * * * (15) Sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash or credit, or for part cash and part credit, and with or without security for the unpaid balances." FLA. STAT. §744.441 (West Supp. 1977).

344. "All legal or equitable interests in real and personal property owned *as an estate by the entirety* by an incompetent for whom a guardian of the property has been appointed may be sold, transferred, conveyed or mortgaged in accordance with s.744.447, if the spouse who is not incompetent joins in the sale, transfer, conveyance, or mortgage of the property." FLA. STAT. §744.457(1)(a) (West Supp. 1977) (emphasis supplied).

345. Note, however, that since the specific inclusion of homestead in §745.15 was not carried over into the new statutes, an argument can be made that the new statutes were not intended to cover homestead property. Furthermore, the absence of the due execution requirement in the 1968 Constitution could be construed as authorizing conveyance by the guardian of an incompetent spouse even without express statutory authority.

346. FLA. STAT. §745.15 (1970) authorized a guardian to both release any apparent rights of the ward in any property and to sell any interest of the ward therein. Section 744.441(15) only authorizes a guardian to sell any interest in the property of the ward. Perhaps one's constitutional right in homestead property owned by one's spouse is an interest in property and part of one's estate. If so, the newer statute would authorize a guardian to join in the sale of homestead solely owned by the other spouse. If, in contrast, one's right in homestead property owned by one's spouse is only a right and does not attain the status of an interest in property, §744.441(15) may not authorize a release of this right.

347. FLA. STAT. §744.441(12) (1977). The amendment became effective October 1, 1977.

348. Since the recent amendment refers to an *interest in* homestead property in addition to ownership of homestead property, it seems clear that the legislature deems one's rights in homestead owned by one's spouse an interest in property.

Note that §744.457(1)(a) was not amended to include homestead. Section 744.441 may en-

Devise and Descent of the Homestead

1. Early Development. Since the exemption laws are designed to provide a shelter for a debtor's dependents, the homesteader's family is generally assured that the homestead will not be subject to forced sale because of the owner's improvidence.[349] Because a homesteader's family needs the same protection from his creditors after his death that they enjoyed while he was alive, limitations have also been placed upon the devise and descent of homestead realty. Furthermore, once the property passes to the spouse or heirs, it should remain exempt from forced sale to pay his creditors.

Although the Florida Constitution of 1868 provided that the homestead exemptions "should accrue to the heirs of the party having enjoyed or taken advantage of the exemption,"[350] it did not restrict the devise or descent of the homestead. These restrictions developed judicially. Courts ruled that a husband could not devise the homestead, finding the right to devise incompatible with the accrual of the homestead exemption to the heirs of the head of the family.[351] Consequently, the property descended to his heirs, subject to the widow's dower rights, notwithstanding any testamentary attempt to deny their interests.[352]

The logic underlying the "common law of homestead descent" was that the exemption that accrued to the heirs was not an estate in the homestead and was separate from the title to the physical property.[353] If title to the homestead did not pass to the same persons to whom the exemption accrued, the exemption was meaningless.[354] Therefore, the title must also descend to the persons to whom the exemption accrued. Thus, the homestead descended to the heirs and was not subject to the claims of creditors in the hands of the personal representative because the exemption also accrued to the heirs.

The 1885 constitution attempted to incorporate the correlation between the accrual of the exemption and the descent of the homestead. First, it provided that the exemptions from forced sale "shall inure to the widow and heirs of the party entitled to such exemption."[355] Then, the article contained a clause that has been considered by some to be an implied restraint upon devise by the head of the family when he was survived by children.[356] Article X, section 4 of the constitution stated: "[I]f the holder [of the homestead] be without children . . . [then nothing in this Article shall] prevent him or her from disposing of his or her homestead by will in a manner prescribed by

compass all homestead property including property owned by the entireties. However, it can be argued that §744.457 exclusively controls entireties property, regardless of its character as homestead. If so, some doubt may still exist as to a guardian's powers concerning homestead owned by the entireties. See text accompanying note 460 *infra*.

349. Collins v. Collins, 150 Fla. 374, 7 So. 443 (1942).

350. FLA. CONST. art. IX, §3 (1868).

351. Wilson v. Fridenburg, 19 Fla. 461 (1882).

352. Coleman v. Williams, 146 Fla. 45, 200 So. 207 (1941). *See* Hinson v. Booth, 39 Fla. 333, 346, 22 So. 687, 691 (1897) (exempt personal property).

353. Inures does not mean descends. Hinson v. Booth, 39 Fla. 333, 22 So. 687 (1897).

354. *See* Crosby & Miller, *supra* note 1, at 54.

355. FLA. CONST. art. X, §2 (1885).

356. *See, e.g.*, Shapo, *supra* note 2, at 77.

law." Apparently this article was designed to protect the children by ensuring that the homestead woud descend to them under the laws of intestate succession. The widow was already protected by her dower right; but the widower was not. Thus, if the wife headed the family and the family consisted of the husband and wife alone without children, the constitution did not prohibit her from willing the homestead to a third person. So in the absence of children, the constitution did not protect the widower.

In 1899, the legislature enacted a statute on the descent of homestead that basically codified the prior law.[357] If the husband-head of the family died and was survived by a widow and children, the widow could elect dower or a child's part in the homestead. If he died survived by a widow but no children, he could not devise the homestead; instead, it descended to the widow. Although this statute expressly prohibited devise in the latter case, the Supreme Court of Florida ruled that the statute was not in conflict with the homestead article of the Florida Constitution of 1885.[358] That article stated that a homestead could be disposed of by will if the holder were without children but it did not limit the legislature's power to prevent the devise of homestead in other circumstances. The supreme court said: "Our State Constitution is a limitation upon power; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution the courts have no authority to pronounce it invalid."[359]

The 1899 descent statute did not contemplate the situation where the wife-head of a family predeceased the husband. Presumably, she could disinherit him with respect to the homestead. If she did, however, the property's exemption from forced sale for her debts would inure to her husband (heir) rather than the actual devisee of the homestead. Thus, it would seem that the personal representative would have the power to sell the homestead if necessary to satisfy the claims of her creditors,[360] and the devisee would lack standing to object because he did not gain the benefit of the exemption. To this extent, the homestead laws concerning devise and descent of the property and the inurement of the exemption were equitable. In many respects, the laws of descent and distribution have been unfair in their treatment of the widower[361] and of the persons who actually constituted the family.[362]

2. The Law From 1933-1975. In 1933, the laws governing devise and descent were amended, and although the constitution was revised in 1968, the laws were not materially changed by the legislature again until January 1, 1976. Section 731.05 of the 1973 Florida Statutes provided that any property could be devised by will unless the property was homestead and the head of the family was survived by a widow or lineal descendants, in which case the homestead would descend as specified in section 731.27 of the 1973 Florida Statutes.

357. 1899 Fla. Laws, ch. 4730.

358. Thomas v. Williamson, 51 Fla. 332, 40 So. 831 (1906).

359. *Id.* at 341-342, 40 So. at 833-834.

360. FLA. STAT. §733.608 (1977) provides that the personal representative takes possession of real estate *except* for homestead.

361. See note 372 *infra* and accompanying text.

362. See text accompanying note 387 *infra.*

Under the latter statute, a homestead descended as other property under the laws of intestate succession[363] unless the head of the family was survived by both a widow *and* lineal descendants. Then, the widow would take "a life estate in the homestead, with vested remainder to the lineal descendants in being at the time of the death of the decedent."[364]

This legislative plan produced the following results: If the head of the family died and was not survived by a widow or lineal descendants then he or she could devise the property to anyone. If the family head was not survived by a widow but was survived by lineal descendants, then he or she could not devise the homestead, and it would descend to the lineal descendants. If the husband was survived by a widow but no lineal descendants, then the property would descend to the widow. If the husband was survived by a widow *and* lineal descendants, then the widow had a life estate and the lineal descendants vested remainders.

Under the statutory scheme, an inequitable situation could arise concerning the treatment accorded the widower whose wife was the head of the family upon her death. If the head of the family was survived by a widower and lineal descendants, the property descended to them equally. The widower did not get the life estate in the homestead guaranteed a widow if there were lineal descendants. If the head of the family was survived by a widower but no lineal descendants, then she was not prohibited from devising the property, and the property did not automatically descend to the widower as it would have descended to the widow. Whether this treatment of the widower deprived him of equal protection of the laws under the fourteenth amendment of the United States Constitution or denied him due process of law under the federal and state constitutions[365] has never been answered. If a court were to decide that widowers' constitutional rights were violated and the decision were given retroactive effect many chains of title involving homesteads would be insecure. It should also be noted that the exemption that would inure to the widow would only inure to the widower if he were considered his wife's heir.[366]

Another inequitable situation was sometimes created when the head of the family attempted to devise the homestead to those persons who comprised the family for homestead purposes. For instance, a widow who lived wth two of her adult daughters was considered the head of a family.[367] When she attempted to devise the property, her other children objected and instead, the property descended in part to seven children and three grandchildren, who were not living with her or taking care of her at her death. Thus, the "family home" that the widow had attempted to preserve was destroyed.

In 1968, the Florida Constitution was revised to eliminate the possibility of different treatment of widows and widowers. Under the new constitution, the exemptions inure to the surviving spouse or heirs of the owner.[368] Further, the

363. *See* FLA. STAT. §731.23 (1973).
364. *See* FLA. STAT. §731.27 (1973).
365. U.S. CONST. amend. XIV, §1; FLA. CONST. art. I, §9 (1968).
366. Heir is defined in FLA. STAT. §731.201(18) (1977).
367. Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903).
368. FLA. CONST. art. X, §4(b) (1968).

homestead will not be subject to devise if the owner is survived by a spouse or minor child.[369] Also, the constitution limits the legislature's power to provide for devise of the homestead if the head of the family is survived by a spouse or minor child.[370]

The statutes governing devise and descent remained unchanged by the legislature; thus, many potential problems still existed. In *In re Estate of McGinty*,[371] the Florida supreme court considered whether a homestead was subject to devise when the family head was survived by lineal descendants, but no minor children. A widower died survived by four children all over twenty-one years of age. He devised his residence to one of his daughters. The majority ruled that the statutory provision preventing devise if the owner was survived by lineal descendants was inconsistent with the constitutional prohibition against devise of the homestead if the owner was survived by a minor child.[372] The court found that the new constitution impliedly repealed the inconsistent provision, because: "The restraint on the right of an individual to devise his property at death should not be extended beyond that expressly allowed by the constitution."[373] Thus, the *McGinty* court interpreted the constitutional provision that "the homestead shall not be subject to devise if the owner is survived by spouse or minor child" to mean that a homestead shall be subject to devise unless the owner is survived by spouse or minor child.

The majority's interpretation is technically incorrect, as asserted in Justice Adkins' dissent. Justice Adkins interpreted the constitution as merely limiting legislative power to determine the laws of devise and descent of homestead when the owner is survived by a spouse or minor child. In such a case, the legislature could only provide for the homestead's descent. But the constitution does not limit the legislature's power to prohibit devise in other situations. Consequently, the legislature can restrict the owner's right to devise homestead.

The Supreme Court of Florida purported to follow the *McGinty* case in *In re Estate of McCartney*.[374] In that case, James McCartney, survived by a wife and three adult daughters, devised his homestead to his wife. The court upheld the devise by erroneously construing *McGinty* to be controlling. The court stated that since *McGinty* established: "the right of a decedent to devise homestead property to an adult child or children in the absence of a surviving spouse, we hold that the obverse is true and that, in the absence of a minor child, the decendent could devise homestead property to his surviving spouse."[375] The court's logic seems questionable for two reasons. *McGinty* es-

369. FLA. CONST. art. X, §4(c) (1968) (before amendment in 1972). It appears that a spouse's children from a former marriage will not prevent the homesteader from devising his homestead unless the child is factually dependent upon the homesteader or has been legally adopted by him.

370. Compare this with the majority and dissenting opinions in *In re* Estate of McGinty, 258 So. 2d 450 (Fla. 1971). See also text accompanying note 380 *infra*.

371. 258 So. 2d 450 (Fla. 1971).

372. Because of the ultimate decision, the supreme court found it "unnecessary to consider the correctness of the trial court's findings regarding the dependency of the testator's adult children and the contiguous nature of the property in question." *Id.* at 451.

373 *Id.*

374. 299 So. 2d 5 (Fla. 1974).

375. *Id.* at 6.

tablished no more than the right to devise in the absence of both surviving spouse *and minor children.* In fact when McCartney died in 1970, the constitution said that "[T]he homestead shall not be subject to devise if the owner is survived by spouse or minor child." Thus, McCartney's homestead should have descended as provided by law.[376] The court in *McCartney* seems to have read the "or" as an "and" so that the homestead is not subject to devise if the owner is survived by a spouse *and* minor child. Such a reading could suggest that the obverse of *McCartney* is true and that in the absence of a surviving spouse, the owner can devise the homestead to a minor child. Clearly this result would violate the constitution if there was more than one minor child. One problem in *McCartney* is that if McCartney had died on or after January 3, 1973, the devise to his spouse would have been constitutional. Since as of then Florida Constitution, article X, section 4(c) was amended to provide: "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, *except the homestead may be devised to the owner's spouse if there be no minor child.*" The court's decision seems to have made the substance of this amendment effective retroactively to January, 1969.[377]

The *McCartney* decision threw the laws of devise and descent of homestead into chaos. If the owner was survived by a spouse but not a minor child, he or she could devise the homestead to the spouse. If the property was not devised and the owner was survived by a widow and lineal descendants, she received a life estate and the lineal descendants in being at his death received vested remainders. If the property was not devised and the owner was survived by a widower and lineal descendants, he took a child's share, and the title to the homestead descended to him and the lineal descendants in being at her death in fee simple absolute. Thus, a widow and a widower received different interests in the homestead, and the constitutionality of the distinction is questionable.[378] If instead the owner was survived by a minor child but not by a spouse, the property could not be devised and would descend to the lineal descendants, including the minor child. If there was no surviving spouse and no minor child, the property could be devised to anyone by will or would descend as

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376. FLA. CONST. art. X, §4(2)(c) (1968, amended 1973). Under FLA. STAT. §731.27 (1973), the widow should have taken a life estate and the three daughters (and any other lineal descendants) should have taken vested remainders. But this solution was rejected.

377. *McCartney* is a very puzzling case. McCartney died testate on February 5, 1970. The amendment permitting a devise to the surviving spouse if there are no minor children was ratified November 7, 1972. The trial court rendered an order prohibiting the devise of the homestead on November 8, 1972. The amendment became effective January 3, 1973. The Fourth District Court of Appeal affirmed the order on September 19, 1973. When the supreme court quashed the district court's decision, it stated: "a case will be decided on the basis of the law prevailing at the time of appellate disposition and not according to the law prevailing at the time of the rendition of the judgment appealed." 299 So. 2d at 7. What is even more confusing is the court's statement that the amendment permitting devise to the owner's spouse, "in effect, affirmed the result of *McGinty. . . .*" *id.* at 6-7, when in fact McGinty was not survived by a spouse.

378. *See* FLA. CONST. art. X, §5 (1968): "There shall be no distinction between married women and married men in the holding, control, *disposition*, or encumbering of their property, both real and personal . . . (emphasis added)."

other property under the laws of intestate succession. Obviously the law needed reform.

3. Post-1975 Developments. The new Florida Probate Code became effective January 1, 1976, with respect to the devise and descent of homestead.[379] Florida Statutes, section 732.4015 (1977), entitled "Devise of Homestead," states: "As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by spouse or minor child, except that the homestead may be devised to the owner's spouse if there be no minor child."[380] This provision codifies the *McGinty* and *McCartney* decisions. Florida Statutes, section 732.401(1) (1977), entitled "Descent of Homestead" provides:

> If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal decendants, in being at the time of the decedent's death.[381]

If the homestead is not devised as permitted by the constitution and statutes and a spouse and lineal descendants survive, the property will descend to them as provided in the code. This statute eliminated the potential unconstitutional distinction between the disposition of a man's or a woman's homestead to the respective widow or widower. However, the devise and descent statutes still do not complement one another inasmuch as the existence of a minor child precludes devise; whereas the homestead does not descend exclusively to the minor child, but instead to lineal descendants. Through an extension of the *McGinty* rationale, it could be argued that the descent statute is implicitly connected to and inconsistent with the constitutional restraints on devise. However, this argument would appear to have only a remote chance for success.

4. Present Law. Under the present laws, the rules of devise and descent of the homestead should operate as described below, assuming the homestead is not held as a tenancy by the entirety. *If the owner is survived by a spouse, but no minor child*: The owner may devise it to the spouse, and the exemption will inure to the spouse. If no such devise is made, and the owner is also survived by lineal descendants, according to the statute, the spouse will have a

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379. 1975 Fla. Laws ch. 75-220, §113.

380. It is clear that when a homesteader is survived by a spouse and no minor child, he cannot devise his property to a third party. Nevertheless he or she could still control the disposition of the homestead by making a gift of other property to the spouse conditioned upon the spouse's conveyance of the homestead to another.

381. Because the surviving spouse takes a life estate, he or she is only responsible for the interest on any mortgage on the realty. Children who have a remainder interest are liable for the principal. If the mortgagee decides to rely upon his security interest rather than file a claim against the homesteader's estate, the children can pay off the mortgage and be subrogated to the mortgagee's right to interest payments or his claim against the estate. In this manner they will be able to protect their remainder interest should the widow default. *See* Furlong v. Leybourne, 171 So. 2d 1 (Fla. 1964).

life estate and the lineal descendants in being at the owner's death will have a vested remainder. The exemption will then inure to the spouse and the heirs, the lineal descendants.

If the owner is survived by a spouse and a minor child: The homestead may not be devised. The spouse will take a life estate and vested remainders will go to the minor child or children and any other lineal descendants of the owner. If the "lineal descendants" in the homestead descent statute is changed to minor child or children, then only the minors will receive the vested remainder.[382] In any event, the exemption will inure to the spouse and the lineal descendants, including the minor child or children. It should also be noted that the spouse's life estate in the homestead is a terminable interest and thus, will not qualify for the marital deduction for federal estate tax purposes.[383]

If the owner is survived by neither a spouse nor a minor child: The owner may devise the homestead to anyone. The exemption, however, will only inure to the owner's heirs. For purposes of the new probate code, "heirs" is now defined by statute to means "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.[384] If the property is not devised, it will descend as other intestate property would. Thus, the persons to whom it will descend will by definition be the heirs to whom the exemption inures.

DECEDENT'S ESTATE FOR PROBATE AND ESTATE TAX PURPOSES

Generally, the homestead is not subject to the claims of creditors while it is in the hands of the personal representative,[385] because the exemption inures to the spouse and heirs of the deceased owner. However, the homestead is part of the gross estate for estate tax purposes.[386] Although the homestead is exempt from the apportionment of federal and state estate taxes,[387] if the estate taxes are not paid, it seems possible that a lien for the unpaid taxes could attach to the homestead.

PART III: EXEMPTION OF THE HOMESTEAD PERSONALTY FROM FORCED SALE

In addition to the real property exemption from forced sale, the 1968 constitutional revision retained the forced sale exemption for personal property to the value of $1,000.[388] This provision has remained substantially unchanged

382. See note 381 *supra* and accompanying text.
383. I.R.C. §2056(b).
384. FLA. STAT. §731.201(18) (1977).
385. Freeman v. Holland, 122 So. 2d 791 (Fla. 1st D.C.A. 1960).
386. I.R.C. §2031.
387. FLA. STAT. §733.817(1)(d) (1977).
388. FLA. CONST. art. X, §4(a) (1968).

since 1868[389] and is similar to the realty exemption in that the exempt personal property need not be owned in fee simple, but must be owned by a family head.[390] Like the realty exemption,[391] the personalty exemption is subject to the exceptions specifically enumerated in the constitution[392] and may not be asserted against a lien acquired prior to the time the personalty attained homestead status.[393] Once the property is exempted, however, no judgment may become a lien thereon.[394] In addition, because the exemption is construed liberally in favor of the family,[395] it cannot be waived[396] and upon the owner's death will inure to the surviving spouse or heirs.[397]

In other respects, however, the homestead personalty exemption differs radically from the realty exemption. There are no restrictions on the intervivos alienation or testamentary disposition of homestead personalty;[398] whereas homestead realty cannot be alienated without the joinder of the spouse and may not be devised if the owner is survived by a spouse or minor child, except that it may be devised to the owner's spouse in the absence of minor children.[399] In addition, the personalty exemption may be composed of assorted items not exceeding $1,000 in value whereas only one parcel of real estate can be exempt.[400] The most significant difference between the realty and personalty exemptions, lies in the dollar value limitation applied to personalty.[401]

389. Article IX, §1 of the Florida Constitution of 1868 provided for the first homestead personalty exemption in the state: "A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, . . . together with one thousand dollars' worth of personal property, . . . shall be exempted from forced sale. . . ." This same provision appeared in article X, §1 of the 1885 constitution.

390. *See* Graham v. Azar, 204 So. 2d 193 (Fla. 1967); Larsen v. Autin, 54 So. 2d 63 (Fla. 1951); Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917).

391. *See* notes 122-180 *supra* and accompanying text.

392. *See* notes 30-52 *supra* and accompanying text. *See also* text accompanying notes 413-417 *infra*.

393. *See* notes 198-238 *supra* and accompanying text.

394. FLA. CONST. art X, §4(a) (1968). The procedure for designating exempt personal property requires the debtor to submit an inventory of his personal property including correct cash valuations. FLA. STAT. §222.06 (1977). He may then designate the property he claims as exempt. FLA. STAT. §§222.01-.02 (1977). The creditor may challenge these valuations and designations, in which case an appraisal will be made. FLA. STAT. §222.03 (1977). Any property concealed by the debtor is treated as a selection *pro tanto* by him as exempt property. Shollar Crate & Box Co. v. Passmore, 148 Fla. 466, 4 So. 2d 530 (1941).

395. Citizens' State Bank v. Jones, 100 Fla. 1492, 131 So. 369 (1931).

396. Carter's Adm'rs v. Carter, 20 Fla. 558 (1884). *See also* McMichael v. Grady, 34 Fla. 219, 15 So. 765 (1894). In *McMichael* the court held that failure to assert the personalty exemption prior to the attempt to levy upon the property does not constitute a waiver or estoppel.

397. FLA. CONST. art. X, §4(b) (1968).

398. A testator has an unrestricted right to dispose of his personal property by will. *In re* Hawkin's Estate, 63 So. 2d 313, 314 (Fla. 1953); Comment, *Homestead: Right to Bequeath Personalty*, 7 U. FLA. L. REV. 116 (1954). But in the absence of a will, the decedent's surviving spouse or heirs are entitled to assert the personalty exemption to immunize $1,000 of the estate from forced sale to satisfy creditors' claims, including funeral expenses. Seashole v. O'Shields, 139 Fla. 839, 191 So. 74 (1939).

399. FLA. CONST. art. X, §4(c) (1968).

400. FLA. CONST. art. X, §4(a)(1) (1968).

401. FLA. CONST. art. X, §4(a)(2) (1968).

Classification as Personalty

Because the personalty exemption is limited to property having a fair market value of $1,000 or less, the characterization of property as realty or personalty is extremely significant. Personal property in excess of $1,000 is regarded as part of the debtor's general assets which are subject to levy and forced sale by his creditors.[402] In contrast, property classified as real estate, no matter how valuable, is completely exempt from forced sale up to a given area limitation. Thus, a mobile home that is usually deemed to be personalty[403] might be totally exempt as real property if it is permanently attached to the ground.

Cash is a form of personal property encompassed by the homestead exemptions for personalty. Indeed, in some situations cash will be exempted as homestead realty. Proceeds from a voluntary sale of homestead real estate will qualify for the realty exemption if the vendor can show, by a preponderance of the evidence, the existence of a bona fide pre-sale intention to reinvest the designated amount in another homestead within a reasonable time and also that the proceeds of the sale were segregated from other monies and not put to any intervening use.[404] In such a case, the purchase of a new home is regarded as the continuance of the old homestead rather than the formation of a new one.[405]

402. Clearly, more than $1,000 worth of personalty must be available before an execution reaches property. Shollar Crate & Box Co. v. Passmore, 148 Fla. 466, 4 So. 2d 530, 531 (1941).

403. See [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 288 and [1949-1950] FLA. ATT'Y GEN. BIENNIAL REP. 362. Agricultural crops are also difficult to classify as either realty or personalty. However, as products of the land, they descend as homestead realty. Crosby & Miller, *supra* note 1, at 77, 78. *But see* Gentile Bros. v. Bryan, 101 Fla. 233, 133 So. 630 (1931) (a mortgage of a fruit crop grown on homestead real estate was not an alienation of homestead realty and therefore joint consent of spouses was not required). Consequently, a tenant cannot claim a personalty exemption in the products of rented land against his landlord's claim for rent. Schofield v. Tiody, 35 Fla. 1, 16 So. 780 (1895); Hodges v. Cooksey, 33 Fla. 715, 15 So. 549 (1894); Cathcart v. Turner, 18 Fla. 837 (1882).

404. Orange Brevard Plumbing & Heating Co. v. LaCroix, 137 So. 2d 201 (Fla. 1962). An involuntary conversion of homestead real estate into personalty does not destroy the realty exemption. Thus, in Kohn v. Coats, 103 Fla. 264, 138 So. 760 (1917), the court held that fire insurance proceeds received from damage to the homestead were protected from the claims of creditors even in the absence of an express statutory provision to this effect. Although the supreme court in *Kohn* stated that insurance proceeds were intended for restoration of the homestead, it did not require the homesteader to reinvest these funds in a new home. Nevertheless, it would seem that the requirements for exempting the proceeds of a voluntary sale of the homestead should also apply in exempting proceeds received from involuntary conversions of the homestead. These conditions should apply because proceeds from an involuntary conversion are not otherwise subject to the joint alienability requirements which restrict the disposition of homestead realty. Under the suggested approach only the $1,000 personalty exemption and not the realty exemption would apply to proceeds from involuntary conversion of the homestead unless they are intended for reinvestment in the homestead and are not used for any intervening purposes.

405. Article X, §4, of the pre-1968 constitution provided: "Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed. . . ." Article X, §4(c) of the present constitution provides that "[t]he owner of homestead real estate, joined by the spouse if married, may alienate the homestead. . . ." Both constitutions intended that the homestead was to be freely

Money and certificates of debt may also fall within the purview of the personalty exemption.[406] Thus, in *Tracy v. Lucik*[407] a judgment debtor was permitted to exempt funds in his bank account even after the bank, under a writ of garnishment, had issued a cashier's check. Significantly, the check had not been paid and payment had been stopped pending judgment in the homestead exemption proceedings. If payment had been made, it is doubtful that the debtor could have recovered the money by alleging that it was exempt.[408]

The difficulty in determining what constitutes personalty for purposes of the homestead exemption is particularly acute with respect to property used by the debtor as a home but technically classified as personal property. For example, one who resides in a cooperative apartment usually holds stock in a cooperative association which entitles him to "permanent" occupancy of the apartment by virtue of a "proprietary" lease. In both cases the owner has only an interest in personal property[409] and can only exempt up to $1,000 of his interest from forced sale by his creditors.

The $1,000 dollar value limitation upon the personalty exemption does not necessarily restrict a homesteader to items valued at less than $1,000 when designating his personalty exemption. In *Williams v. Wirt*,[410] the Fifth Circuit Court of Appeals held that if a debtor elects to designate property that has a value exceeding the limits of the homestead personalty exemption, he may keep the whole of that property if he pays the trustee in bankruptcy the value of the nonexempt portion.

When an exemption is asserted for property secured by a lien or subject to a conditional sales contract, the fair market value of the property may exceed $1,000. In such a case the amount secured by the lien or the unpaid balance under the contract should be considered in determining the debtor's equity in the item sought to be exempted from forced sale.[411] In no case, however, may the debtor's equity exceed $1,000 unless he pays the excess to his creditor.

Liabilities Enforceable Against the Personalty Homestead

Liabilities enforceable against homestead real estate may also be enforced against homestead personalty.[412] Thus, all of the debtor's personal property may be sold to satisfy taxes and special assessments, purchase obligations[413]

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alienable provided that the owner, if married, was joined by his spouse in such alienation. If the proceeds of a voluntary sale did not assume the character of the exempted realty, the homestead would not be freely alienable.

406. Carter's Adm'rs v. Carter, 20 Fla. 558 (1884).

407. 138 Fla. 188, 189 So. 430 (1939).

408. This result would be consistent with the decision in McDougall v. Brokaw, 22 Fla. 98 (1886), where an executor applied all of the testator's personal property to satisfy creditors' claims. The court held that the heirs, who would have otherwise received $1,000 of such property pursuant to the constitutional exemption, were not entitled to reimbursement out of the testator's real property as against his other creditors.

409. *See* [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 89.

410. 423 F.2d 761 (5th Cir. 1970).

411. [1953-1954] FLA. ATT'Y GEN. BIENNIAL REP. 316.

412. *See* notes 30-52 *supra* and accompanying text.

413. *In re* David, 54 F.2d 140 (5th Cir. 1931); Citizens' State Bank v. Jones, 100 Fla. 1492,

and claims for labor and materials used to build, repair or improve the homestead personalty.[414] In addition, the homestead personalty exemption may not be asserted to avoid liens which existed prior to the time that the homestead exemption attached to that property.[415] Exceptions to the homestead personalty exemption, like those applying to realty, are limited to those provided by the constitution. The legislature cannot mandate that other liens, such as a landlord's lien for rent, override the constitutional exemption.[416]

Desirability of the Personalty Exemption

The policy behind the homestead personalty exemption represents an acknowledgment that it is less costly to society for the creditor to write off a debt and pass the loss to others than to allow him to strip the debtor of his few remaining assets. One must question how well this policy is served when the dollar amount of the homestead personalty exemption has not changed since Florida's first constitution was enacted in 1868. Since the exemption's value has not kept abreast of inflation, its significance has greatly diminished. Instead of a fixed sum, the personalty exemption should reflect variations in the cost of living index or a consumer price index to preserve the value of the original exemption.

Addressing another policy concern, it is noteworthy that Florida debtors, unlike those in many states, are not required to exempt only necessary personal items. While most states designate items that are vital to the debtor in their exemption laws, a debtor in Florida is not prohibited from exempting an item of personal property with only sentimental or family value. An argument could therefore be made that the state should specifically exempt only those items which could be classified as basic necessities.

The Florida personalty exemption differs from other states' exemptions in still another manner. Most states have placed a dollar value limitation on the combined amount of real estate and personalty that may be exempted by a debtor.[417] Debtors not using the full value of their realty exemption are able to increase the value of their personalty exemption accordingly. In this manner apartment dwellers and homeowners are placed on an equal footing.

Additional Exemptions

The personalty exemption exists independently of the homestead realty exemption. The lack of real property does not bar exemption of personal property. Furthermore, the constitutional exemption for personal property does

131 So. 369 (1931); Giddens v. Dickenson, 60 Fla. 320, 53 So. 929 (1910); Platt v. Platt, 50 Fla. 594, 39 So. 536 (1905); Cator v. Blount, 41 Fla. 138, 25 So. 283 (1899); Smith v. Gufford, 36 Fla. 481, 18 So. 717 (1895).

414. All of these exceptions are set forth in article X, §4(a) of the 1968 Constitution. Furthermore, each of them is to be strictly construed. Citizens' State Bank v. Jones, 100 Fla. 1492, 131 So. 369 (1931).

415. See notes 30-52 *supra* and accompanying text.

416. Hodges v. Cooksey, 33 Fla. 715, 15 So. 549 (1894). For a thorough discussion of this case, see Crosby & Miller, *supra* note 1, at 79.

417. *E.g.*, ALAS. STAT. §09.35.080 (1976); ARIZ. REV. STAT. §§33-1121 to -1129 (1974).

not preclude the operation of other statutory exemptions.[418] These can include exemptions of such income sources as the wages of a family head,[419] disability payments,[420] proceeds from life insurance[421] and the cash surrender value of life insurance policies.[422] These various debtor exemptions, when combined, may provide a judgment debtor and his family with more than adequate protection. Consequently, dollar value limitations should be utilized in all of the exemptions to provide the same rehabilitative protection to all debtors.

PART IV: PROCEDURE

To understand fully Florida homestead rights, one must examine the procedural aspects of the homestead exemptions. Assuming the substantive requirements for a homestead are satisfied, it is important to know how to designate certain property as homestead, what to do if exempt real or personal property is levied upon, what judicial remedies exist to protect homestead property, and which court can grant such remedies.

Designation of Homestead Before Levy

As a preventive measure the head of the family seeking the homestead exemption from forced sale may make a signed statement describing the real property claimed to be exempt and declaring the property to be his homestead.[423] This statement should be recorded in the circuit court.[424] While this declaration does not create a homestead debtor exemption,[425] it may provide evidence of an intent to establish a homestead.[426] Failure to file such a declaration does not preclude one from later asserting the right to the homestead exemption.

Designation of Homestead After Levy

1. Real Property. If the exempt property has not been properly designated

418. Milam v. Davis, 97 Fla. 916, 123 So. 668, *cert. denied*, 280 U.S. 601 (1929).

419. FLA. STAT. §222.11 (1977).

420. FLA. STAT. §222.18 (1977).

421. FLA. STAT. §222.13 (1977).

422. FLA. STAT. §222.14 (1977).

423. If the homestead is not within the corporate limits of any town or city, the homestead claimant may select up to 160 acres of contiguous lands. FLA. STAT. §222.03 (1977) states that: "[w]hen the homestead is not within the corporate limits of any town or city the person claiming said exemption shall have the right to set apart that portion of land belonging to him *which includes the residence, or not*, at his option. (emphasis added)." Although the statute intimates that the family head could set aside land which did not include his residence as homestead property, land without a residence probably does not qualify as homestead. See note 253 *supra*.

424. FLA. STAT. §222.01 (1977).

425. Drucker v. Rosenstein, 19 Fla. 191 (1882).

426. In one case, property was owned by spouses as tenants by the entireties and the husband declared the property to be homestead. The declaration was considered evidence tending to establish the fact that the property was the homestead of the husband and wife, and the homestead status continued to exist and inured to the surviving wife after her husband's death. Knapp v. Fredricksen, 148 Fla. 311, 4 So. 2d 251 (1941).

and is levied upon, the debtor, his agents, or attorney should notify the officer making the levy as to which land is his homestead.[427] The notification must be in writing, must describe the property, and must be made before the day appointed for sale.[428] If this procedure is followed, only the property levied upon and not designated as homestead shall be subject to sale. If the creditor is dissatisfied with the quantity of land selected by the homesteader and set aside as exempt, the creditor, his agent, or his attorney should notify the officer levying and request the officer to survey the property.[429] However, the creditor cannot express dissatisfaction with the quality of the land selected as homestead.

Once the requested survey has been made, the officer making the levy may sell the land that was levied upon but was not set aside.[430] If the head of the family owns and occupies a dwelling house that he claims as a homestead and leases or otherwise lawfully possesses the land without owning it, he may follow the same procedure to protect his house, which may be a condominium or mobile home, from levy and sale.[431]

2. Personal Property. If property levied upon is part of the homestead exemption for $1000 worth of personal property a different procedure applies. If the debtor wishes to claim such property as exempt, he or an agent should make an inventory of all his personal property including the correct cash valuations; prepare an affidavit that such inventory is a correct schedule of all of the debtor's personal property in the state and its value;[432] and designate which property he claims as exempt and wishes to have set aside.

The debtor should have the inventory and affidavit delivered to the officer making the levy or serving the writ, and the officer must then serve the creditor or plaintiff with the schedule.[433] The creditor may then file a notice of contest

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427. FLA. STAT. §220.02 (1977). For the debtor's judicial remedies, see FLA. STAT. §§222.08-.09 (1977).

428. FLA. STAT. §222.02 (1977).

429. FLA. STAT. §222.03 (1977): "The expense of such survey shall be chargeable on the execution as costs; but if it shall appear that the person claiming such exemption does not own more than 160 acres in the state, the expenses of said survey shall be paid by the person directing the same to be made." If the statute is applied literally, it appears that a municipal homesteader could wrongfully claim more than one-half acre as homestead after levy upon the land, and a dissatisfied creditor, if he ordered a survey, would have to pay the costs of the survey. Yet, a rural homesteader could rightfully claim up to 160 acres as homestead and if he owned a total of more than 160 acres in Florida because of other nonhomestead property, then the debtor would ultimately bear the burden of the cost of the survey.

430. FLA. STAT. §222.04 (1977).

431. FLA. STAT. §222.05 (1977).

432. The debtor, his attorney or his designated agent may make the affidavit. FLA. STAT. §222.06(1) (1977). FLA. STAT. §222.06(1) (1977) states that the debtor "shall make or cause to be made an inventory of the whole of his personal property." Presumably, this would include all personal property owned by the debtor in any state. However, the statute then provides that the debtor "shall attach to such inventory an affidavit . . . that said invenory contains a true and correct list or schedule of all the personal property owned by him in the state. . . ." Thus the debtor need only inventory the personal property owned by him in the state.

433. FLA. STAT. §222.06(2) (1977). The inventory or schedule shall be delivered in duplicate to the officer. The officer must serve the schedule within 24 hours after delivery to him. *Id.*

of such exemption.[434] If no notice is filed, the officer should release the property from levy and redeliver it to the debtor. If the property is held under a writ of garnishment, the officer should file the schedule of property claimed to be exempt with the clerk or judge of the court that issued the writ and the clerk or judge should make an order releasing or discharging the writ.[435]

If a notice of contest is filed, however, the officer shall appoint three disinterested appraisers to value the property.[436] After the inventory is completed, the head of the family or his agent may select the property he wishes to claim as exempt. If the head of the family or his agent does not appear, the officer shall make the selection for him.[437] The property that was not selected as exempt may then be sold.[438]

Jurisdiction of Circuit Court Over Homestead

A homestead owner or his creditor may also seek relief in circuit court. The circuit courts have equity jurisdiction:

1. To order and decree the setting aside of homesteads and of exemptions of personal property from forced sale.[439]
2. To enjoin the sale of all property, real and personal, that is exempt from forced sale.[440]

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434. FLA. STAT. §222.06(3) (1977). The creditor, his attorney, or his agent has 24 hours after receiving the schedule to file a notice of contest.

435. FLA. STAT. §222.06(3), (6) (1977). Apparently, if a timely notice of contest is not filed by or for the creditor, then the officer has 36 hours to file the debtor's schedule with the clerk or the judge.

The order "may be delivered to the garnishee by the debtor, his attorney or agent, or may be served by said officer." *Id.* §222.06. The court or clerk may collect one dollar for serving the order. "[N]o other or further charges therefor shall be made against the debtor." *Id.*

436. FLA. STAT. §222.06(4) (1977). The disinterested appraisers must 1) be citizens of the county; 2) make an oath before the officer faithfully to appraise the property; 3) appraise the property levied upon at its cash value; 4) affix a cash value to the items enumerated in the inventory or schedule; and 5) sign and swear to the appraisement.

The creditor, his attorney, or his agent must be given 24 hours notice of the time and place of the appraisement. The appraisers' fees, the same allowed to jurors, are costs upon the process in the hands of the officer. "No costs shall be required of the debtor for the proceedings to appraise and exempt any property claimed by him;" provided the debtor's nonexempt property is "liable to sell under such process, and for the costs of this proceeding." The officer may demand a sufficient deposit of costs to pay the expenses of appraisement from the creditor prior to the appointment of appraisers. The maximum deposit which can be required is $12. FLA. STAT. §222.06(5) (1977).

437. FLA. STAT. §222.07 (1977). The property which was appraised and selected as exempt is not necessarily legally exempt, even if FLA. STAT. §§222.06-.07 (1977) are complied with.

438. The debtor may select "an amount of property not exceeding, according to such appraisal, the amount of value exempted." FLA. STAT. §222.07 (1977). *See* Christopher v. Bowden, 17 Fla. 603 (1880).

439. FLA. STAT. §222.08 (1977). The jurisdiction of the circuit court could be invoked by the heirs entitled to the homestead when another is wrongfully in possession. Barco v. Fennell, 24 Fla. 378, 5 So. 9 (1888).

440. FLA. STAT. §222.09 (1977). The circuit judge may find it necessary to enjoin a mortgage foreclosure sale of exempt personal property. Shollar Crate & Box Co. v. Passmore, 148 Fla. 466, 4 So. 2d 530 (1941).

3. When a creditor's bill has been filed, to determine whether any real or personal property is exempt as claimed.[441]

Florida Statutes, sections 222.08-.10 have been held to give the courts of equity:

> full and complete jurisdiction over the matter of homesteads and exemptions, not only to adjudicate as to the rights of the party thereto, but to control and direct the setting apart thereof, and to restrain interference therewith by any inhibited process of law, and to pass upon and adjudicate the property of any exemption set apart by any officer and to rectify it if improper.[442]

The homestead owner has both legal and equitable remedies[443] available to protect exempt property, and he is entitled to relief whether or not a forced sale is threatened or attempted. On the other hand, the creditor has remedies by which to question the correctness of a claimed exemption. If a creditor's bill is filed for this purpose, the circuit judge can determine whether property is exempt. If he finds it is not exempt, he may subject such property to the satisfaction of a judgment, enjoin a sheriff or officer from setting apart such property as exempt, and annul all exemptions made and set apart by a sheriff or officer.[444]

The question of homestead rights and exemptions may arise during the administration of the estate of the head of the family. Homestead realty is not considered to be part of the estate and homestead realty and personalty are not subject to the claims of creditors. Thus, query whether a probate judge can determine the status and title to homestead. Under Florida's prior court system, it had been decided that the county courts could determine the status of homestead but that only circuit courts had jurisdiction to determine the title.[445] The 1968 Florida Constitution abolished the county judge's court and the circuit court now has probate jurisdiction.[446] The new probate code states that a circuit court may determine all issues concerning claims or matters not requiring trial by jury.[447] The question that may arise in the future is whether the circuit court that is probating the estate may also determine the title to the homestead. The answer should be yes.

PART V: THE HOMESTEAD TAX EXCLUSIONS

The exemptions of homestead realty and personalty from forced sale and from taxation are four separate and independent exemptions. At any one time an individual may be entitled to several or all of the exemptions. For instance, a person may find 1) that his house and real property may not be sold to pay

441. FLA. STAT. §222.10 (1977).

442. Bennett v. Bogue, 88 Fla. 109, 112, 101 So. 206, 207 (1924).

443. The legal right to replevin, if it is not constitutionally infirm, may be invoked when exempt property is wrongfully seized. Allen v. Ingram, 39 Fla. 239, 22 So. 651 (1897).

444. FLA. STAT. §222.10 (1977).

445. Wakeman v. Noble, 73 So. 2d 873 (Fla. 1954), commented upon in Comment, *Homestead: Determination of Status by Probate Court*, 8 U. FLA. L. REV. 127 (1955).

446. FLA. CONST. art. V, §5 (1968).

447. FLA. STAT. §§733.705(5), 731.201(6) (1977).

certain debts, 2) that $1,000 worth of his personal property may not be levied upon to satisfy certain debts, 3) that the first $5,000 (or $10,000 in some cases) of the assessed value of his residential real estate is not subject to taxation and 4) that all of his household goods and personal effects are not subject to taxation.

Basically, all property is subject to taxation unless specifically exempted. Exemptions are strictly construed against the claimant and in favor of the taxing power. In the area of homestead taxation in Florida, cases are rare because the procedures are primarily administrative. Consequently, opinions of the Attorney General of Florida, which are persuasive authority, have played a very important part in defining the law of homestead tax exemption.

The Personalty Tax Exemption

The personalty tax exemption is the simpler of the two tax exemptions dealing with homestead property and is provided for in article VII, section 3, of the Florida Constitution: "There shall be exempt from taxation, cumulatively to every head of a family residing in this state, household goods and effects to the value fixed by general law, not less than one thousand dollars." The head of the family test is the same for the personalty tax exemption as it is for the forced sale exemption.[448] The legislature has extended the personalty exemption to all household goods and effects of "*every person* residing and making his or her permanent home in this state,"[449] even though the imposition of such tax would be constitutional.[450]

Title to exempt household goods and personal effects may be held individually, by the entireties, jointly, or in common with others.[451] The statutory definition of household goods is goods which are not held for commercial purposes or resale, such as "[w]earing apparel, furniture, appliances, and other items ordinarily found in the home and used for the comfort of the owner and his family."[452] The Attorney General has ruled that the furniture, tools, hobby equipment, appliances, and furnishings located in the common areas of condominiums meet this statutory definition.[453] However, the exemption does not apply to all personal property. Thus, tangible personal property,[454] intangible personal property,[455] and inventory[456] are subject to taxation unless otherwise exempted.[457]

448. Note, however, that the family head must be a Florida resident to qualify for the personalty tax exemption. FLA. STAT. §196.181 (1977).

449. *Id.*

450. [1949-1950] FLA. ATT'Y GEN. BIENNIAL REP. 218.

451. FLA. STAT. §196.181 (1977).

452. FLA. STAT. §192.001(11)(a) (1977).

453. [1974] FLA. ATT'Y GEN. ANN. REP. 19.

454. Property whose chief value is intrinsic, that is capable of manual possession, and that is not inventory or household goods. FLA. STAT. §192.001(11)(d) (1977).

455. All forms of property whose value is based upon what the property represents rather than the property's intrinsic value, such as money and evidences of debts owed the taxpayer. FLA. STAT. §192.001(11)(b) (1977).

456. Items held for sale or lease to customers in the ordinary course of business. A detailed explanation is found in FLA. STAT. §192.001(11)(c) (1977).

457. FLA. STAT. §196.001(1) (1977).

The Realty Tax Exemption

Article VII, section 6 of the Constitution of Florida provides:

> a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner or another legally or naturally dependent upon the owner shall be exempt from taxation thereon, except assessments for special benefits up to the assessed valuation of five thousand dollars upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.
> b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner, or in case of ownership through stock or membership in a corporation, the value of the proportion which his interest in the corporation bears to the assessed value of the property.
> c) By general law and subject to conditions specified therein the exemption may be increased up to an amount not exceeding ten thousand dollars of the real estate if the owner has attained age sixty-five or is totally and permanently disabled.[458]

This constitutional provision authorizes the legislature to specify the manner in which a person may establish his right to a homestead tax exemption and to allow an increased exemption for senior or disabled citizens. Thus, legislation enacted accordingly does not violate other constitutional provisions that generally require equality and uniformity of tax rates and otherwise limit tax exemptions to property used only for specified purposes. The constitution does not establish an absolute right to a homestead tax exemption, and a taxpayer who otherwise qualifies, must follow the statutory procedures to be granted the tax exemption.[459]

1. January 1 — Tax Day. Taxes are assessed as of January 1 of each year.[460] For the homestead tax exemption to be granted, the substantive requirements for the homestead tax exemption must be met by January 1, and certain procedural requirements must be complied with during the taxable year.[461] January 1 is also the date on which an inchoate tax lien arises on all real property in Florida.[462]

2. Every Person. In 1934, every head of a family who was a citizen of Florida was eligible for the homestead tax exemption.[463] In 1938 the headship and

458. FLA. CONST. art. VII, §6 (1968).

459. Horne v. Markham, 288 So. 2d 196 (Fla. 1973). FLA. CONST. art. VII, §4 (1968). *See also* Clark, *Homestead Tax Exemption in Florida*, 13 U. MIAMI L. REV. 261, 262 (1959).

460. FLA. STAT. §192.042 (1977).

461. *See* Lake Worth Towers, Inc. v. Gerstung, 262 So. 2d 1 (Fla. 1972).

462. FLA. STAT. §192.053 (1977); Ammerman v. Markham, 222 So. 2d 423 (Fla. 1959).

463. FLA. CONST. art. X, §7 (1885, *amended* 1934).

citizenship requirements were eliminated;[464] since then "every person" has been eligible.[465] Under the 1885 constitution, the word persons was held to refer to individuals and not to include corporations or other entities,[466] but this requirement should not be confused with the fact that under the 1968 constitution a member of a corporation which holds title to condominiums or cooperative apartments may be entitled to a tax exemption for his condominium or cooperative.

3. Legal or Equitable Title to Real Estate. The 1968 constitution replaced the phrase "legal title or beneficial title in equity to real property" with the new phrase "legal or equitable title to real estate."[467]

For purposes of the homestead tax exemption, a vendee in possession of real estate under a bona fide contract to purchase is deemed to have legal or beneficial and equitable title to the property if the vendee has recorded the instrument under which he claims title, resides upon the realty in good faith and makes the same his permanent home.[468] Even if the vendee fails to record the contract, he has the equitable title by virtue of the doctrine of equitable conversion.[469] Moreover, the Florida attorney general has ruled that although a contract states that equitable title will not pass until the full purchase price is paid, the vendee can claim a homestead tax exemption if he otherwise qualifies.[470] The vendee in possession can also assign his interest to a third party as security for a loan without losing his eligibility for the tax exemption.[471] January 1 is still the decisive date and if a person qualifies then for the homestead tax exemption, he may enter into a contract after that date to sell his homestead without losing his tax exemption for that year to the vendee.[472]

"[P]ersons residing on real estate by virtue of dower or other estates therein limited in time by deed, will, jointure or settlement"[473] shall be deemed to have legal or beneficial and equitable title to the property. A person who maintains his permanent residence on real property in which he owns a life estate

464. FLA. CONST. art. X, §7 (1885, *amended* 1938).

465. Every person includes single and married persons, males, females, minors, aliens, military personnel, and felons. *See, e.g.*, [1971] FLA. ATT'Y GEN. ANN. REP. 87 (military personnel); [1971] FLA. ATT'Y GEN. ANN. REP. 342 (aliens); [1969-1970] FLA. ATT'Y GEN. BIENNIAL REP. 226 (felons); [1957-1958] FLA. ATT'Y GEN. BIENNIAL REP. 72.

466. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 238.

467. The legal significance of this change seems slight, but existing legislation should be amended to conform with the present constitutional language. *See* FLA. STAT. §196.031(1) (1977).

468. FLA. STAT. §196.041 (1977). This statute contains the manner by which the claimant can establish the right to a homestead tax exemption.

Even if the contract contained a forfeiture clause for nonpayment of installments, equitable title would exist until a default occurred. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 359.

469. [1974] FLA. ATT'Y GEN. ANN. REP. 602 (FLA. STAT. §196.041 (1973) provides one means to establish equitable title, but it is not exclusive); [1974] FLA. ATT'Y GEN. ANN. REP. 351.

470. [1971] FLA. ATT'Y GEN. ANN. REP. 461.

471. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 117 (deed must be recorded).

472. [1949-1950] FLA. ATT'Y GEN. BIENNIAL REP. 288.

473. FLA. STAT. §196.041 (1977); [1953-1954] FLA. ATT'Y GEN. BIENNIAL REP. 210.

may claim a homestead tax exemption, not to exceed the value of the real estate assessable to him.[474] A leasehold interest for life has also been considered as a freehold for purposes of the homestead tax exemption.[475] On the other hand, remaindermen, whose titles are subject to a life estate, are not entitled to a homestead tax exemption even though they possess the property and maintain permanent residences on it, because they lack a present possessory interest.[476]

A beneficiary of a trust can be equated with a remainderman in that generally the beneficiary has no present possessory right and thus lacks the legal or equitable title necessary to assert the exemption.[477] If the trust, however, is a passive trust and the beneficiary has a present possessory interest in the property on which he maintains his permanent residence, then the beneficiary may have sufficient title to claim a tax exemption.[478] In each case the trust agreement will determine possessory rights.

Lessees owning the leasehold interest in a bona fide lease having an original term of ninety-eight years or more in a condominium parcel have legal or beneficial and equitable title to the property for homestead tax purposes.[479] If the lease existed prior to June 19, 1973, the original term of the lease can be for only fifty years. According to the Florida attorney general, the legislature may grant a homestead tax exemption to holders of existing condominium leases of fifty to ninety-eight years without violating section six of Article VII of the Constitution of Florida.[480] This provision is an exception to the general rule that a person who occupies property under a ninety-nine year lease or any other lease for a term of years does not have equitable ownership to property[481] because a leasehold interest for a term of years is personalty.[482] Section 196.041 of the Florida Statutes also provides that:

> a tenant-shareholder or member of a cooperative apartment corporation who is entitled solely by reason of his ownership of stock or membership in the corporation to occupy for dwelling purposes an apartment in a building *owned* by the corporation, for the purpose of homestead exemption from ad valorem taxes and for no other purpose, is deemed to have beneficial title in equity to said apartment and a proportionate share of the land on which the building is situated (emphasis added).

The statutory language refers only to ownership of the cooperative apartment

474. FLA. CONST. art. VII, §6(b) (1968); [1969-1970] FLA. ATT'Y GEN. BIENNIAL REP. 285.

475. [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 360.

476. [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 492, 494.

477. [1974] FLA. ATT'Y GEN. ANN. REP. 519; [1972] FLA. ATT'Y GEN. ANN. REP. 19.

478. [1974] FLA. ATT'Y GEN. ANN. REP. 519.

479. FLA. STAT. §196.041, *incorporating* FLA. STAT. ch. 718 (1977). " 'Condominium parcel' means a unit together with the undivided share in the common elements which is appurtenant to the unit." FLA. STAT. §718.03(9) (1977).

480. [1973] FLA. ATT'Y GEN. ANN. REP. 217, because FLA. CONST. art. VII, §6 (1968) limits homestead tax exemptions to situations in which the leases by cooperative apartment condominiums are initially in excess of 98 years.

481. [1965-1966] FLA. ATT'Y GEN. BIENNIAL REP. 289.

482. [1957-1958] FLA. ATT'Y GEN. BIENNIAL REP. 339, 440. *See also* [1974] FLA. ATT'Y GEN. ANN. REP. 578.

building. In order for application of the statute to be constitutional, however, the corporation must also own the real estate or have a leasehold interest initially in excess of ninety-eight years.

4. Permanent Residence. The constitution requires the owner or one who is legally or naturally dependent on the owner to maintain a permanent residence on the real estate for which the exemption is sought.[483] The accompanying legislation requires the owner to *reside* thereon and "in good faith make the same his or her permanent home," or that of his or her legal or natural dependents.[484] This variance in language may be insignificant, for Florida Statutes section 196.051 states that the words "permanent residence" or "home:"

> shall not be construed so as to require continuous physical residence on the property, but mean only that place which the person claiming the exemption may rightfully and in good faith call his home to the exclusion of all other places where he may, from time to time, temporarily reside.[485]

However, if the owner's legal or natural dependents maintain their permanent residence on the property, this should obviate any constitutional necessity for "the owner to reside."

While the claimant of the homestead tax exemption need not be a citizen of Florida or of the United States,[486] he must permanently reside in Florida. Accordingly, a person in this country on a temporary visa is ineligible for the homestead tax exemption, because he cannot establish a permanent residence.[487]

A married woman may establish a permanent residence apart from that of her husband[488] and thus be eligible for a separate homestead tax exemption. The former constitution required a showing of good faith in the establishment of a permanent home, but the new constitution does not explicitly require such a showing. In any event, a married woman need not prove necessity for the establishment of a separate residence. A minor should also be eligible for a homestead tax exemption if he establishes a permanent residence in Florida.[489]

Although the term permanent residence generally refers to the intent of the occupant of the dwelling, it also may refer to the dwelling. Thus, a trailer

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483. FLA. CONST. art. VII, §6(a) (1968).

484. FLA. STAT. §196.031(1) (1977).

485. FLA. STAT. §196.051 (1977).

486. Smith v. Voight, 158 Fla. 366, 28 So. 2d 426 (1946).

487. Juarrero v. McNayr, 157 So. 2d 79 (Fla. 1963) (denial of homestead tax exemption does not violate state due process or equal protection under the federal Constitution).

488. Judd v. Schooley, 158 So. 2d 514 (Fla. 1963); [1975] FLA. ATT'Y GEN. ANN. REP. 252 (if a husband and wife have established separate permanent residences and separate "family units," both may be granted homestead tax exemptions, if they otherwise qualify).

489. [1963-1964] FLA. ATT'Y GEN. BIENNIAL REP. 13, 15. *But see* Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907) (where it was held that a minor was incapable of choosing a domicile).

or mobile home may qualify as a permanent residence provided that it is permanently affixed to the land and all other qualifications are met.[490] Presumably one who lives in a prefabricated modular home upon land that he owns or leases may be eligible for the tax exemption.[491]

5. Temporary Absence vs. Abandonment. A temporary absence by the owner or dependent will not deprive the owner of real property of his right to qualify for a homestead tax exemption unless the intent exists permanently to abandon the property as a residence.[492]

Each case of alleged abandonment must be decided on its facts and the mere fact that the owner or dependents are temporarily absent from the premises on January 1 of the tax year should not be fatal.[493] The Florida supreme court has indicated that the rules governing the abandonment of property for purposes of the homestead exemption from forced sale apply to abandonment of property for homestead tax exemption purposes.[494] Each year, however, a determination is made as to whether a tax homestead exists and the property appraiser is not bound by his decisions in prior years.[495]

The legislature has provided an exception to the abandonment-by-rental rule for members of the armed forces who were drafted or volunteered. A serviceman is not considered to have necessarily abandoned his homestead for tax purposes when he rents it. Such a member of the armed forces may be eligible for a homestead tax exemption although he has never previously been granted one.[496] However, a claim of permanent residence may be negated by the fact that military personnel have retained their legal residence or domicile in another state by utilizing certain provisions of the Soldiers and Sailors Civil Relief Act.[497]

6. Legal or Natural Dependents. A person who has legal or equitable title to real estate but does not maintain his permanent residence thereon may nevertheless be entitled to a homestead tax exemption for such real estate if his legal or natural dependents maintain their permanent residence there.

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490. [1975] FLA. ATT'Y GEN. ANN. REP. 277. FLA. CONST. art. VII, §1(b) (1968) states that mobile homes shall be subject to a license tax, but shall not be subject to ad valorem taxes. FLA. STAT. §193.075 (1977), however, allows a mobile home without a current license plate to be taxed as real property (i.e., subject to ad valorem taxes). When a mobile home is attached to the owner's real property, it becomes part of the real estate (as do houses and other improvements) and may be said to have lost its identity as a mobile home. Through this interpretation it appears that it is possible to tax mobile homes without violating the constitution.

491. *See* [1969-1970] FLA. ATT'Y GEN. BIENNIAL REP. 288 (owner of the home leased the land).

492. City of Jacksonville v. Bailey, 159 Fla. 11, 30 So. 2d 529 (1947); [1971] FLA. ATT'Y GEN. ANN. REP. 554 (owner committed to mental hospital).

493. *See* Poppell v. Padrick, 117 So. 2d 435 (Fla. 2d D.C.A. 1959) (under FLA. STAT. §196.061 (1977), this case would have been decided differently because the property was rented on January 1).

494. Crosby & Miller, *supra* note 1, at 370.

495. [1974] FLA. ATT'Y GEN. ANN. REP. 156.

496. [1971] FLA. ATT'Y GEN. ANN. REP. 87.

497. [1974] FLA. ATT'Y GEN. ANN. REP. 182.

No appellate cases have been reported which consider the definition of "legally or naturally dependent." An attorney general opinion, however, indicates that a person to whom the owner is under a legal duty to support is a legal dependent.[498] Further, a person related by blood may be a natural dependent if such person has a reasonable expectation or claim for support and is in fact dependent for support because of disability from age or non-age factors, or physical or mental incapacity together with lack of property means.[499] Another opinion states that a moral obligation to support coupled with actual support may create a natural dependent,[500] even though no blood relation exists.

Crosby and Miller concluded that the words "legally or naturally dependent" are but a synonym for members of a family at law or a family in fact.[501] Thus, cases defining families at law or in fact for the homestead forced sale exemption may be helpful in the concept of legal or natural dependents.[502]

7. Exempt from Taxation, Except Assessments for Special Benefits. The homestead tax exemption excepts the first $5,000 of the assessed valuation of the real estate from taxation except assessments for special benefits.[503] This implies that the full valuation of the property may be assessed for special benefits. However, this statement is misleading to the extent that it connotes that the value of a particular parcel of property is directly proportional to the amount of the assessment of the special benefit. Ad valorem taxes are imposed on real property according to its value; in contrast, assessments for special benefits are imposed upon property in proportion to benefits conferred upon property — *i.e.*, the increased value of the property.[504] For example, an assess-

498. Crosby & Miller, *supra* note 1, at 364.

499. Of course the property owner must be a family head to qualify for the forced sale exemption but not for the tax exemption.

500. [1939-1940] FLA. ATT'Y GEN. BIENNIAL REP. 438, 445-446.

501. *Id.* at 446.

502. [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 262, 263.

503. *See* Whisnant v. Stringfellow, 50 So. 2d 885, 885 (Fla. 1951), *quoting* Klemm v. Davenport, 100 Fla. 627, 631, 129 So. 904, 907 (1930): "A 'tax' is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A 'special assessment' is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax, but it is inherently different and governed by entirely different principles."

"It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefited, is not governed by uniformity, and may be determined legislatively or judicially."

504. Taxing plans have been held to be ad valorem taxes rather than assessments for special benefits in the following instances: St. Lucie County — Ft. Pierce Fire Prevention & Control Dist. v. Higgs, 141 So. 2d 744 (Fla. 1962) (plan to raise money annually for the maintenance and operation of fire prevention and control district); City of Ft. Lauderdale v. Carter, 71 So. 2d 260 (Fla. 1954) (plan to levy taxes against property according to its value to defray costs of garbage collection); Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951) (plan for construction and maintenance of county health unit); State v. Henderson, 137 Fla. 666, 188 So. 351 (1939) (plan to levy a school district tax or a special tax for public schools). *See*

ment for the paving of roads that is measured by the assessed value of the property is a tax assessment,[505] while an assessment for the paving of roads that is a fixed amount apportioned on a front footage basis is an assessment for special benefits.[506] In many cases there is a fine line between a tax to be used for special purposes and an assessment for special benefits conferred upon certain land.[507] If the assessment is a tax, the homestead tax exemption applies; if it is an assessment for special benefits, the contrary is true.

Special improvement districts may be created by law with powers to tax for special purposes. A tax by such a district is not an assessment for special benefits absent proof that all the property subject to the assessment actually benefitted from the improvements in proportion to the assessment.[508]

8. Prior Contractual Obligations. Article I, section 10 of the United States Constitution prohibits any state from passing a law which impairs the obligation of a contract. It is clear that the Florida homestead tax exemption is unconstitutional and inoperative to the extent that the granting of the exemption impairs a contractual obligation. An example will illuminate how the exemption could impair a contract. A state bond may have been issued by a taxing jurisdiction, or a similar debt incurred, whereby the taxing jurisdiction is contractually bound to repay the obligation by imposing taxes upon all the real property in its jurisdiction. If, for instance, this obligation were incurred prior to the effective date of the first homestead tax exemption, then the exemption would impair the obligation to impose taxes on *all* the realty and thus the exemption would be inoperative.[509]

An opposite result occurs if the obligation were incurred after the effective date of the tax exemption. For then anyone who furnishes credit to a governmental debtor in return for its pledge of tax revenues from all property subject to taxation has constructive knowledge that homestead property is exempt from providing tax revenue and that the character of the property may change annually.[510] Thus, the effective dates of the present constitution and all amendments to the 1885 constitution are relevant.[511]

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also [1968-1969] FLA. ATT'Y GEN. BIENNIAL REP. 203 (plan to raise funds for sewer and water district); [1957-1958] FLA. ATT'Y GEN. BIENNIAL REP. 365 (plan for construction and maintenance of hospital); [1949-1950] FLA. ATT'Y GEN. BIENNIAL REP. 418 (funds for mosquito control district).

505. Fisher v. Board of County Comm'rs, 84 So. 2d 572 (Fla. 1956).

506. Carr v. City of Kissimmee, 80 Fla. 754, 86 So. 701 (1920).

507. [1967-1968] FLA. ATT'Y GEN. BIENNIAL REP. 299.

508. Fisher v. Board of County Comm'rs, 84 So. 2d 572 (Fla. 1956). However, under the 1885 constitution as amended in 1934, the term "special assessments for benefits" was construed to mean that the district rather than the land must have benefited from the improvements. State v. Dreka, 135 Fla. 463, 185 So. 616 (1938).

509. State v. Port of Palm Beach Dist., 121 Fla. 746, 164 So. 851 (1936).

510. For example, vacant land may be assessed for taxes to fulfill a contractual obligation incurred in 1971 by a taxing jurisdiction, *i.e.*, a municipality. On January 1, 1975, such land may have become a homestead for homestead tax purposes and thus is exempt from taxes to pay this obligation. This change of facts is not a law passed by a state which impairs a contractual obligation and thus it does not violate U.S. CONST. art. I, §10.

511. For the effective dates, see notes 517-520 *infra* and accompanying text.

For the federal contract clause to override the effect of the Florida homestead tax exemption, certain facts must exist. First, a debt must have been incurred by a tax jurisdiction that resulted in a contract obligating the tax jurisdiction to impose a tax on all taxable property as security for the debt. Second, the debt and the contractual obligation must have arisen prior to the effective dates of the amendments and 1968 constitution. Finally, the property that is to be subject to taxation must have been within the taxing jurisdiction when the debt's obligation occurred.[512] If these conditions are satisfied, the homestead exemption will not apply to decrease the taxable base for such taxes.

Certain judgments or certificates that arise after the effective dates are treated the same as the underlying obligation. Thus, a judgment obtained on a bond issued prior to the effective dates[513] and a judgment obtained on a renewed note executed after the effective dates when the original note was executed prior to the effective dates[514] are treated as if the judgment arose before the effective date. Also, refunding obligations or bonds that are issued to replace bonds and interest that have matured prior to the effective dates[515] and tax participation certificates that are issued in exchange for old evidences of indebtedness, which were incurred prior to the effective dates,[516] are treated in the same manner as obligations that arose prior to the effective date. Therefore, homesteads may be taxed on the full assessed value to satisfy such obligations in the form of judgments, bonds and certificates.

The effective dates for the homestead tax exemption amendments to the 1885 constitution are November 6, 1934, and January 1, 1939. The first homestead tax exemption was granted to the head of a family if he was also a citizen and a resident of Florida.[517] The 1938 amendment extended the homestead tax exemption to persons who were not citizens or heads of families, and who possessed merely a beneficial title in equity.[518] Thus, if a governmental unit

512. [1953-1954] FLA. ATT'Y GEN. BIENNIAL REP. 312.

513. The judgment could also have been recovered prior to the effective dates. Groves v. Board of Pub. Instruc., 109 F.2d 522 (5th Cir. 1940).

514. Board of Pub. Instruc. v. State, 145 Fla. 482, 199 So. 760 (1941).

515. State v. Town of Gulfport, 138 Fla. 505, 189 So. 703 (1939).

516. State v. City of Tarpon Springs, 138 Fla. 649, 190 So. 19 (1939).

517. FLA. CONST. art. 10, §7 (1885, *amended* 1934), provided: "There shall be exempted from all taxation, other than special assessments for benefits, to every head of a family who is a citizen of and resides in the State of Florida, the homestead as defined in Article X of the Constitution of the State of Florida up to the valuation of $5,000.00; provided, however, that the title to said homestead may be vested in such head of a family or in his lawful wife residing upon such homestead or in both."

518. FLA. CONST. art. 10, §7 (1885, *amended* 1938) provided: "Every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on said home and contiguous real property, as defined in Article X, Section 1, of the Constitution, for the year 1939 and thereafter. . . . Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon as their respective interests shall appear, but no such exemption of more than five thousand dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption allowed

incurred a debt that was secured by tax revenues from all property subject to taxes in 1937, then a citizen who is the head of the family and holds legal title to real property would be entitled to a homestead tax exemption when a tax was levied to repay the 1937 debt, since this exemption existed prior to 1937. On the other hand, a person who is not a citizen nor the head of the family and has beneficial or equitable title to real property is not entitled to his homestead tax exemption for purposes of this tax, since the right to the exemptions arose after the obligation was incurred in 1937.

In Sarasota, 1964 is an important year, because from then until January 7, 1968, the first $2,000 of the assessed value of homestead was subject to taxation for school purposes only.[519] An obligation that was incurred during this period to build schools in Sarasota and that is to be repaid from tax revenues is a contractual obligation that will not be impaired by the 1968 constitution's deletion of the Sarasota proviso.

January 7, 1969, is the effective date of the 1968 constitution that extended homestead tax exemptions to "owners" of condominiums and cooperative apartments. At that time, the constitution also authorized an increased exemption of up to $10,000 for owners who are sixty-five or older or are totally and permanently disabled.[520]

9. Up to the Assessed Valuation of $5,000. All property must be assessed at 100 percent of its true cash value in order to render the tax burden uniform and equal.[521] If an owner qualifies for the homestead exemption, the first $5,000 of the full assessed value of his property shall be exempt from taxation. The 1939 amendment to the 1885 constitution specifically limited the amount of property to be assessed for purposes of the homestead tax exemption. It referred to the assessed valuation of the home and contiguous property as de-

any person exceed the proportionate assessed valuation based on the interest owned by such person. . . ."

519. FLA. CONST. art 10, §7 (1885, *amended* 1964) read in part (at the end of the first sentence): "[P]rovided that in Sarasota County the first two thousand dollars of the assessed valuation of such property shall be taxable for school purposes only and the exemption shall apply to the next five thousand dollars for school purposes only of assessed valuation."

520. See notes 533-541 *infra*. FLA. STAT. §196.031 (1977) provides an aggregate exemption of $10,000 for certain persons from "taxes levied by the governing bodies of school districts, counties, municipalities, and special districts." From 1969-1973, this exemption only applied to persons 65 years or older for taxes levied by district school boards for current school operating purposes, and from 1969-1974 this exemption was also extended to persons totally and permanently disabled.

FLA. STAT. §196.032 (1977) creates a local government additional homestead exemption trust fund that will provide funds to qualified counties in amounts equal to the revenues lost by the additional exemptions under FLA. STAT. §196.031 (1977). The Attorney General of Florida has ruled that FLA. STAT. §196.032 (1977) "does not compel a municipal obligor to substitute appropriated replacement funds for the levy of property taxes previously pledged to the payment of bonds the obligation of which would be impaired by such substitution." [1974] FLA. ATT'Y GEN. ANN. REP. 423.

521. Dade County v. Salter, 194 So. 2d 587 (Fla. 1966); Cosen Inv. Co. v. Overstreet, 154 Fla. 416, 17 So. 2d 788 (1944). *See also* [1957-1958] FLA. ATT'Y GEN. BIENNIAL REP. 339. *But see* Southern Bell Tel. & Tel. Co. v. County of Dade, 275 So. 2d 4 (Fla. 1973), *citing* Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) (if it is impossible to secure full value and uniformity, the latter prevails).

fined by the forced sale exemption. When the constitution was revised in 1968, the acreage limitation for a homestead for the forced sale exemption was apparently not considered essential for the homestead tax exemption. Thus, the acreage limits were omitted and the present constitution refers only to the assessed valuation of the real estate on which the owner or the owner's legal or natural dependents make their permanent residence. The prior phrase "home and contiguous property" should be synonymous to the description in the new constitution of real estate upon which a permanent residence is maintained. Under this interpretation, contiguity is implicit.[522]

10. Nature of Title to the Tax Homestead. Although the owner of the property must have the legal or equitable title to the real estate, he may hold title in numerous ways. The owner may be a tenant by the entireties, a joint tenant, or a tenant in common. The owner may even hold title to an interest in a duplex.[523] If a partnership holds title to the property, a general partner would have sufficient equitable title to the partnership realty to qualify for a homestead tax exemption.[524] Whether or not each such tenant can claim a homestead tax exemption and in what amount is a different question.[525]

11. The Maximum Number and Amounts of Exemptions. The constitution provides: "Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit."[526] An individual who owns two pieces of real estate is only entitled to one homestead tax exemption even though he maintains his permanent residence on one parcel and his legal or natural dependents maintain their permanent residence on the other.[527] However, if a husband and wife each own land, individually or as tenants by the entireties, each may qualify for a homestead tax exemption if each maintains his or her permanent residence on the respective parcels and each spouse is considered a separate family unit.[528]

Under the 1885 constitution, a maximum exemption of $5,000 was allowed for one dwelling house.[529] One dwelling house could be a single family residence, a duplex or a large condominium of thousands of families.[530] Accord-

522. [1971] FLA. ATT'Y GEN. ANN. REP. 167. *See also* [1973] FLA. ATT'Y GEN. ANN. REP. 546.

523. [1969-1970] FLA. ATT'Y GEN. BIENNIAL REP. 255. The real estate may also be held as a condominium and in some cases as a cooperative apartment. In both cases, the owner is deemed to have sufficient title to qualify for the exemption by statute. See notes 532-533 *infra* and accompanying text. Condominium owners must comply with Chapter 718, FLA. STAT. to qualify. *See* FLA. STAT. §196.041 (1977). FLA. CONST. art. VII, §6(a) (1968) governs the manner in which real estate may be held to qualify for a tax exemption in the case of a cooperative apartment.

524. [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 642. The general partner's interest in the property is subject to the rights of partnership creditors and other partners. A limited partner's interest does not qualify since it is considered personalty.

525. See notes 526-534 *infra* and accompanying text.

526. FLA. CONST. art. VII, §6(b) (1968).

527. *See* [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 555, 556; Clark, *supra* note 458, at 276.

528. [1975] FLA. ATT'Y GEN. ANN. REP. 252. But compare this opinion with [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 555, 556.

529. FLA. CONST. art. X, §7 (1885, *amended* 1938).

530. Overstreet v. Tubin, 53 So. 2d 913 (Fla. 1951). The reason for this constitutional limitation was to prevent loss of revenues.

ingly, one exemption of $5,000 was required to be apportioned equally among the occupants entitled to the exemption in the dwelling house. In contrast, the new constitution allows an exemption for any one residential unit.[531] By substituting "residential unit" for "dwelling house" the inequities created by apportioning the exemption have been eliminated. Now each owner of a one half interest in a duplex can qualify for the maximum $5,000 homestead tax exemption,[532] as can each owner of a condominium.

Notwithstanding the new constitutional provision, the maximum $5,000 homestead tax exemption will not always be granted, because: "No exemption shall exceed . . . the value of the real estate assessable to the owner."[533] For example, if five persons each owned a one-fifth interest in a parcel of property valued at $25,000 and each of the five lived in a separate house or an individual trailer attached to the land, each might qualify for a $5,000 homestead tax exemption.[534] If all five lived in one house, however, the real estate assessable to each would be $5,000 but the exemption allowed each would only be $1,000, assuming the house were considered only one residential unit.

In the case of a tenant-stockholder or a member of a cooperative apartment corporation, no exemption shall exceed "the value of the proportion which his interest in the corporation bears to the assessed value of the property."[535] It is now possible for an exemption up to the value of $5,000 to be allowed on each cooperative apartment,[536] and on each condominium parcel.

12. Increased Exemption of $10,000. By constitutional mandate, the legislature has the power to increase the maximum exemption allowed to $10,000 of the assessed value of the real estate if the owner has reached age sixty-five or is totally and permanently disabled.[537] Section 196.031 of the Florida Statutes provides such an exemption when taxes are levied by school districts, counties, municipalities and special districts. Thus, the additional exemption now applies to ad valorem taxes levied by all local taxing authorities,[538] whereas before 1974, the additional exemption was available only when taxes were levied by district school boards for current school operating purposes.[539] Of course, the additional exemption will not apply when taxes are required to be levied to meet certain contractual obligations.[540]

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531. FLA. STAT. §196.031(1) (1975) should be conformed to reflect this change.

532. [1969-1970] FLA. ATT'Y GEN. BIENNIAL REP. 255.

533. FLA. CONST. art. VII, §6(b) (1968).

534. *See* [1971] FLA. ATT'Y GEN. ANN. REP. 376; [1971] FLA. ATT'Y GEN. ANN. REP. 65.

535. FLA. CONST. art. VII, §6(b) (1968).

536. FLA. STAT. §196.031(2) (1977): "'[C]ooperative apartment corporation' means a corporation, whether for profit or not for profit, organized for the purpose of owning, maintaining and operating an apartment building or apartment buildings to be occupied by its stockholders or members; and 'tenant-stockholder or member' means an individual who is entitled, solely by reason of his ownership of stock or membership in a cooperative apartment corporation, to occupy for dwelling purposes an apartment in a building owned by such corporation."

537. FLA. CONST. art. VII, §6(c) (1968).

538. The state cannot levy ad valorem taxes. FLA. CONST. art. VII, §1(a) (1968).

539. The amended version of the 1973 statutes, §196.031(3) is now codified at FLA. STAT. §196.031(3)(a) (1977).

540. [1974] FLA. ATT'Y GEN. ANN. REP. 549.

If a person has qualified for the "basic" homestead tax exemption of $5,000 then the total exemption will be increased up to $10,000 of the assessed valuation if he is sixty-five or older and has been a permanent resident of Florida for five consecutive years prior to claiming the additional exemption.[541] An affidavit stating that the applicant claiming the additional exemption has been a permanent Florida resident for the five years preceding the date of the application shall be prima facie proof of such residence.[542] The applicant must have reached the age of sixty-five by January 1 to qualify.[543] If the property is owned as a tenancy by the entireties only one of the owners must be sixty-five or older to qualify.[544]

An additional exemption of an aggregate maximum of $10,000 is also available to some Florida residents who are totally and permanently disabled.[545] First, one must qualify for the tax exemption of property worth $500 that is available to bona fide residents who are totally and permanently disabled.[546] "Totally and permanently disabled persons" means those persons who are currently certified by two licensed physicians of this state who are professionally unrelated or by the veterans' administration to be totally and permanently disabled.[547] If a person qualifies for the $500 exemption as a totally and permanently disabled person under section 196.202 of the Florida Statutes, he is entitled to an additional exemption of $4,500 of the assessed value of his real estate if he qualifies for the basic homestead tax exemption and has been a Florida resident for the past five years.

In no event shall the $500 tax exemption of property to widows, blind persons, or totally and permanently disabled persons *and* the homestead tax exemption exceed $10,000.[548] A person may qualify for the additional exemption amounting to $10,000 either because he is sixty-five years of age or older or because he is permanently or totally disabled; but only one aggregate exemption of $10,000 will be allowed.[549] This implies that a sixty-five-year-old widow who qualifies for a $500 tax exemption on property *A* because she is a widow, and who qualifies for a $10,000 exemption on her tax homestead property *B* because she is sixty-five is only entitled to the latter or to a combination not exceeding an exemption of $10,000. Whether this result was intended by the legislature is not clear.

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541. FLA. STAT. §196.031(3)(a) (1977).
542. *Id.*
543. [1971] FLA. ATT'Y GEN. ANN. REP. 524.
544. [1971] FLA. ATT'Y GEN. ANN. REP. 298.
545. FLA. STAT. §196.031(3)(b) (1977).
546. FLA. STAT. §196.202 (1977). This exemption is not limited to real property. The statute is authorized by FLA. CONST. art. VII, §3(b) (1968) which grants a tax exemption to widows, blind persons, and persons who are permanently and totally disabled of "property to the value fixed by general law not less than five hundred dollars." *See also* FLA. STAT. §196.081 (1977) dealing with the totally and permanently disabled.
547. FLA. STAT. §196.012(10) (1977).
548. FLA. STAT. §196.031(3)(c) (1977).
549. *Id.*

Other Exemptions

Ex-servicemen who have been honorably discharged with service-connected total disability may be entitled to a tax exemption on 100 percent of the value of real estate used and owned as a homestead by virtue of two different statutes.[550] To qualify under Section 196.081 Florida Statutes a claimant must obtain a certificate from the Veterans' Administration stating that the ex-serviceman is totally and permanently disabled due to certain injuries.[551] To qualify under section 196.091 an ex-serviceman confined to a wheelchair must have a certificate from the government or the Veterans' Administration, stating that he is receiving or has received special pecuniary assistance due to disability requiring specially adapted housing and that he is required to use a wheelchair for his transportation.[552]

The production of the acquired certificate to the property appraiser of the county where the property is located shall be prima facie evidence of entitlement to the exemption.[553] If a veteran and his wife own property as an estate by the entirety and he predeceases his wife, then "the exemption from taxation shall carry over to the benefit of the veteran's wife, provided, however, that she continues to reside on said real estate and use it as her domicile or until such time as she remarries or sells or otherwise disposes of the property."[554]

All real estate used and owned as a homestead by a quadriplegic, hemiplegic, or other totally disabled person is exempt from taxes.[555] If real estate is held jointly by a husband and wife and one spouse is so disabled the homestead is completely exempt from taxation.[556] To qualify for the exemption, the handicapped person should obtain a certificate of such disability from two licensed doctors of Florida. The production of this certificate to the property appraiser shall be prima facie evidence of the fact that he is entitled to the

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550. FLA. STAT. §§196.081, .091 (1977). Although the term "homestead" is not defined in either statute, presumably it refers to the real estate upon which the ex-serviceman maintains a permanent residence.

551. FLA. STAT. §196.081 (1977) states that it must be certified that the ex-servicemen is totally and permanently disabled: "due to total blindness, or from the amputation of both arms or both legs, or both hands or both feet, or the combination of a hand and a foot, or from paraplegia, oseochondtritis resulting in permanent loss of the use of both legs, or permanent paralysis of both legs and lower parts of the body, or from hemiplegia, or has permanent paralysis of one leg and one arm on either side of the body, resulting from injury to the spinal cord, skeletal structure, or brain, or from disease of the spinal cord not resulting from any form of syphilis. . . ."

552. FLA. STAT. §196.091(1) (1977).

553. FLA. STAT. §§196.081(2), .091(2) (1977).

554. FLA. STAT. §196.081(3) (1977). The substance of FLA. STAT. §196.091(3) (1977) is the same as the quoted material. If the wife owned other property, she could qualify for the widow's $500 tax exemption under FLA. STAT. §196.202 (1977). [1973] FLA. ATT'Y GEN. ANN. REP. 546, 554. As to the constitutionality of this provision under federal standards, *see* Kahn v. Shevin, 416 U.S. 351 (1974).

555. FLA. STAT. §196.101(1) (1977).

556. [1971] FLA. ATT'Y GEN. ANN. REP. 165.

exemption,[557] and such exemption shall continue for the benefit of the disabled person's wife until she remarries or disposes of the property.[558]

Relevant Tax Procedure

The legislature has prescribed the manner in which an owner of real estate may establish his right to the homestead tax exemption. The Florida supreme court has ruled that this procedure satisfies the due process requirements of both the federal and state constitutions.[559] The procedure shall be described below chronologically.

January 1, year 1. All real property shall be assessed according to its value as of January 1.[560] Technically the subsequent destruction of the property after January 1 has no effect on the assessed value placed upon the property on tax day.[561] Improvements or portions thereof that are not "substantially completed" on January 1 are considered as having no assessable value.[562]

On January 1 of the year in which taxes are assessed, a lien for all taxes, penalties, and interest shall attach to the property that has been assessed for that tax.[563] The lien is inchoate until the amount of the tax has actually been levied upon the property – at that time the lien relates back to January 1.[564] The lien for taxes is superior to all liens for special assessments,[565] other liens,[566] and federal tax liens.[567] The priority of liens for penalties and interest is determined by the equitable principle of "first in time, first in right."[568]

557. FLA. STAT. §196.101(2) (1977). Property appraiser is the new constitutional title for those who were previously entitled tax assessors.

558. See note 512 *supra* and accompanying text.

559. Horne v. Markham, 288 So. 2d 196 (Fla. 1973).

560. FLA. STAT. §192.042(1) (1977).

561. [1972] FLA. ATT'Y GEN. ANN. REP. 433 (hurricane on June 20). Tax officials lack authority to cancel the obligation to pay taxes.

562. "Substantially completed" has been defined to mean that the improvement or some self-sufficient unit within it, such as an apartment, can be used for the purpose for which it was constructed. *See* Forte Towers East, Inc. v. Blake, 275 So. 2d 39 (Fla. 3d D.C.A. 1973) *and* FLA. STAT. §192.042(1) (1977). For example, common elements of a condominium may be "substantially completed" and assessable even though the individual condominium parcels are not. Manufacturers Nat'l Corp. v. Blake, 287 So. 2d 129 (Fla. 3d D.C.A. 1973). It has been held that the single most telling indication of completion is occupancy. Markham v. Kaufman, 284 So. 2d 416 (Fla. 4th D.C.A. 1973); Culbertson v. Seacoast Towers East, Inc., 232 So. 2d 753 (Fla. 3d D.C.A.), *cert. discharged*, 236 So. 2d 761 (Fla. 1970). If there is any doubt as to whether the improvements are "substantially completed," the question is usually resolved in favor of the taxpayer. Sherwood Park, Ltd. v. Meeks, 234 So. 2d 702 (Fla. 4th D.C.A. 1970), *aff'd*, 244 So. 2d 129 (Fla. 1971). However, once an assessment has been made, it is clothed with a presumption of correctness and validity. Manufacturers Nat'l Corp. v. Blake, 287 So. 2d 129 (Fla. 3d D.C.A. 1973).

563. FLA. STAT. §§192.053, 197.056(1) (1977).

564. Gelb v. Aronovitz, 98 So. 2d 375 (Fla. 2d D.C.A. 1957).

565. Rorick v. Reconstruction Fin. Corp., 144 Fla. 539, 198 So. 494 (1940).

566. FLA. STAT. §197.056(1) (1977).

567. I.R.C. §6323(b)(6). Real property taxes are superior to previously filed federal tax liens, if the property tax liens are entitled to priority under local law over earlier interests secured by the real property.

568. [1974] FLA. ATT'Y GEN. ANN. REP. 567, 568.

The lien for taxes continues in full force and effect until it is discharged by payment or is barred by the statute of limitations.[569]

The lien for taxes does not attach to subsequently acquired property of the taxpayers.[570] But the tax lien imposed upon the realty is effective not only against the owner on the tax day but also against subsequent purchasers, mortgagees, and lienholders.[571] The amount of the lien will be the amount of taxes due, *i.e.*, the rate times the taxable base that is the assessed value of the property minus the homestead tax exemption. Failure to pay the ad valorem tax on the homestead may result in the forced sale of the homestead.

February 5, year 1. If a person were granted a homestead tax exemption for the immediately preceding year and has not filed an application for the exemption for the current year by February 1, then the county property appraiser shall send such person substantially the following notice as soon as practicable after February 5:[572]

Notice to Taxpayers Entitled
to Homestead Exemption

Records in this office indicate that you have not filed an application for homestead exemption for the current year.
If you wish to claim such exemption, please fill out the enclosed form and file it with your property appraiser, on or before March 1, 19—.
Failure to do so shall constitute a waiver of said exemption for the year 19—.

(Property Appraiser)
———— County, Florida[573]

March 1, year 1. The form that the taxpayer must fill out and file on or before March 1[574] and that should accompany the above notice is substantially as follows:[575]

Property Appraiser of ———— County, Florida:
I hereby make application for an exemption from all taxation up to the valuation of $5,000 [$10,000, if applicable][576] on the following described property:

569. FLA. STAT. §192.053 (1977). Unless a tax certificate has been sold or taxes have been levied a tax lien expires five years after the date the tax is assessed or becomes delinquent, whichever is later. FLA. STAT. §95.091(1) (1977).

570. City of Tampa v. Commercial Bldg. Co., 54 F.2d 1057 (5th Cir. 1932).

571. The lien attaches to the property. FLA. STAT. §192.053 (1977).

572. The statutes are somewhat conflicting on this date. FLA. STAT. §194.032(7) (1977) states that: "[o]nce an original application for tax exemption has been granted, in each succeeding year the property appraiser shall mail to the applicant on or before February 1, a renewal application. . . ." This statute refers to exemptions in general, whereas FLA. STAT. §196.111(1) (1977) refers to homestead tax exemption specifically and is the more recent expression of the legislature on this subject.

573. FLA. STAT. §196.111(1) (1977).

574. FLA. STAT. §196.131 (1977).

575. FLA. STAT. §196.121 (1977).

576. The statutory form should be amended to recognize that the exemption may be a maximum of $10,000. FLA. STAT. §196.031 (1977).

The title to said property is in ———————— (name all owners and their proportionate interest) and my interest or title in this property is as follows: ————————————. (If title is not in applicant or is held jointly with others, give relationship of the owner or joint owner, to applicant) ————————————.

I reside on the above property and in good faith make the same my permanent home and do hereby declare that I am a bona fide citizen of the State of Florida.[577]

The statements contained and agreed to herein are true and made in good faith.

Applicant ————————————

Subscribed and sworn to me this ——— day of ——— 19—.

March 1 is the new deadline to file for a homestead tax exemption for each year.[578] When the deadline was April 1, the Florida supreme court ruled that the deadline was neither arbitrary nor unreasonable in light of the property appraiser's duty to complete the tax roll by July 1.[579] This same reasoning should apply to the new deadline. If March 1 should fall on a Saturday, Sunday or legal holiday so that it is impossible to file the application then, the application date must be extended uniformly throughout the state to allow applications to be filed on the next day that is neither a Saturday, Sunday, nor a legal holiday.[580]

Normally the owner of the property will file the application. However, this may not always be possible. For instance, when a property owner dies between January 1 and March 1 without having filed for his homestead tax exemption, his spouse or personal representative may file for him. If the property qualifies as a homestead for purposes of devise and descent under Florida Constitution, article X, section four, then the property is not part of the probate estate and the spouse or heirs to the homestead should apply. If the real property is part of the estate, the personal representative should apply.[581] If a person who is entitled to the exemption is unable to file a claim because he is serving in any branch of the armed forces of the United States, he may file his claim "through his or her next of kin or through any other person he may duly authorize in writing to file such claim."[582]

Generally, failure to file an application for the exemption on or before March 1 constitutes a waiver of the exemption for that year. In contrast to the homestead exemption from forced sale, there is no absolute right to a homestead tax exemption[583] and no public policy against annual waiver. In the case

577. Citizenship is not a requirement for qualifying for the homestead tax exemption and this phrase should be deleted from the statutory form.

578. This requirement in FLA. STAT. §196.131 (1977) became effective July 1, 1975. Prior to this the deadline was April 1 of each year.

579. Horne v. Markham, 288 So. 2d 196 (Fla. 1973). The July 1st deadline is imposed under FLA. STAT. §194.011(1) (1977).

580. *See* [1973] FLA. ATT'Y GEN. ANN. REP. 423 (with reference to April 1 deadline).

581. [1973] FLA. ATT'Y GEN. ANN. REP. 245.

582. FLA. STAT. §196.071 (1977).

583. Horne v. Markham, 288 So. 2d 196 (Fla. 1973). At one time it was doubted whether a homestead exemption could be denied for the failure to file a written request. *See* City of Jacksonville v. Bailey, 159 Fla. 11, 30 So. 2d 529 (1947).

of the homestead tax exemption it is possible for there to be a legal excuse or justification for a failure to file,[584] and thus, no waiver.

When the taxpayer files an application for a homestead tax exemption, the property appraiser shall give him a receipt signed by the appraiser or a duly appointed deputy. Such receipt shall contain an identification of the property covered by the application and the date the application was received. The possession of the receipt shall constitute conclusive proof that the application was timely filed.[585] If an applicant "knowingly gives false information for the purpose of claiming homestead exemption," he shall be guilty of a second degree misdemeanor.[586]

1. Approval and Disapproval of the Application. Prior to the first Monday in May of the year in issue, the property appraiser in each county shall consider all applications for tax exemptions that have been filed in their respective offices.[587] The taxpayer may appear before the property appraiser if he desires. If the appraiser determines by investigation that the applicant is entitled to the homestead tax exemption, he should mark the application approved and the exemption granted, shall file the application in the permanent records and shall make the necessary entries upon the tax rolls to allow the exemptions.

July 1, year 1. If, however, the appraiser finds that the applicant is not entitled to the exemption then he should write a notice of disapproval in triplicate form.[588] The appraiser should serve the copy of the notice upon the applicant by personal delivery or by registered mail to the address given in the application by July 1.[589] Upon the original and duplicate copy, the property appraiser shall note the manner in which the first copy was served upon the applicant. The appraiser files the original with the clerk of the board of tax adjustments and files the other copy in the permanent records of his office. The original notice of disapproval which is filed with the clerk of the board of tax adjustment constitutes an appeal by the applicant from the appraiser's decision to disapprove the application for the exemption.

2. The Board of Tax Adjustment. The board of tax adjustment will meet to hear complaints relating to homestead tax exemptions on or before the thirtieth day after the department of revenue has approved all or any part of the assessment rolls.[590] The sessions of the board continue until all petitions, complaints, appeals, and disputes are heard.[591] If all or part of the assessment roll has been disapproved,[592] the board will reconvene to hear all petitions,

584. *See* [1956-1957] FLA. ATT'Y GEN. BIENNIAL REP. 449 (if taxpayer's condition prevents him from filing or directing another to file his application); [1947-1948] FLA. ATT'Y GEN. BIENNIAL REP. 287 (insane person is legally incapable of waiver).

585. FLA. STAT. §196.131(1) (1977).

586. FLA. STAT. §196.131(2) (1977). The punishment is provided in FLA. STAT. §§774.082 or 775.083 (1977).

587. FLA. STAT. §196.151 (1977).

588. *Id.*

589. FLA. STAT. §194.032(7) (1977).

590. FLA. STAT. §194.032(1)(b) (1977).

591. FLA. STAT. §194.032(10) (1977).

592. The roll may have been disapproved by the department of revenue (FLA. STAT.

complaints, appeals and disputes filed and arising from the finally approved roll or part.[593]

The taxpayer may appear before the board of tax adjustments; however, his failure to appear or to file any other papers other than his application for exemption shall not constitute a bar or defense to the proceedings.[594] The taxpayer may not be required to appear before an advisory board or agency created by the county as a prerequisite to appearing before the board of tax adjustment.[595] The petitioners and the property appraiser may be represented by an attorney and may present testimony and other evidence.[596] The petitioner, the property appraiser, and all witnesses may be required to testify under oath.[597]

The clerk of the governing body of the county shall notify the petitioner of the time he is scheduled to appear at least five calender days prior to the day he is scheduled to appear.[598] If a petitioner is required to wait for more than four hours from the scheduled time, he has the option of informing the chairman of the meeting that he intends to leave. If "he is not heard immediately, his administrative remedies will be deemed to be exhausted. . . ."[599] The petitioner may then seek whatever judicial remedies he feels are appropriate.

The board shall review the application and consider all evidence including that which was presented to the property appraiser on behalf of the applicant's claim. If the board determines that the claimant is entitled to the homestead tax exemption, the board shall reverse the property appraiser's decision and shall grant the exemption. If not, it shall affirm the decision of the property appraiser.[600] In either case the board shall issue a written decision within twenty calendar days of the last day that the board is in session.[601] The decision must also provide sufficient information for the department of revenue to conduct its review.[602] The decision has no precedential value in the following year if the taxpayer again applies for a homestead tax exemption, because the doctrine of res judicate does not apply to the Board of Tax Adjustment and the Department of Revenue.[603]

3. Circuit Court's Jurisdiction. If the board of tax adjustment refuses to grant a homestead tax exemption, the applicant has fifteen days from the date

§193.114(5), (6) (1977)) or by the assessment administration review commission or the supreme court (FLA. STAT. §195.098 (1977)).

593. FLA. STAT. §194.032(10) (1977).

594. FLA. STAT. §196.151 (1977).

595. FLA. STAT. §194.032(8) (1977).

596. FLA. STAT. §194.032(3) (1977).

597. *Id.* The chairman of the board of tax adjustments shall administer the oath.

598. FLA. STAT. §194.032(2) (1977).

599. *Id.*

600. FLA. STAT. §196.151 (1977).

601. FLA. STAT. §194.032(5) (1977). However, if the petitioner withdraws his complaint or the property appraiser acknowledges that the petition is correct, the board need not render a written decision.

602. *Id.* "A verbatim record of the proceedings shall be made and proof of any documentary evidence presented shall be preserved and made available to the department of revenue if requested." FLA. STAT. §194.032(3) (1977).

603. [1974] FLA. ATT'Y GEN. ANN. REP. 156.

of the board's refusal to file a proceeding against the property appraiser for a declaratory judgment[604] or other appropriate action in the circuit court of the county in which the homestead is situated.[605] Also, a taxpayer can bring a mandamus action to compel the property appraiser to grant a homestead tax exemption[606] or he can seek an injunction against the appraiser to prevent the collection of taxes on homestead exempt property.[607]

November 1, year 1. Taxes are due and payable on November 1 of each year. However, if the tax collector has not received the assessment roll by then, the taxes shall be due as soon as he receives the roll and gives notice to the taxpayers by publication.[608] Taxes will be discounted if paid before March.[609]

April 1, year 2. All unpaid property taxes become delinquent on April 1 of the year following the year in which the taxes were assessed.[610] All property owners shall be held to know that taxes are due and payable annually. It is the duty of each owner to ascertain the amounts of all current (and delinquent) taxes and to pay them by April 1 of the year following the year in which the taxes were assessed.[611] Interest shall accrue on delinquent real property taxes at the annual rate of eighteen percent from April 1 until the date a certificate is sold.[612] The property appraiser has the power and duty to collect delinquent taxes by a sale of the tax liens on real property.[613] On or before June 1 of each year, the tax collector shall advertise for four weeks and sell tax certificates on all real property with taxes due.[614] Delinquent taxes may be paid or redeemed prior to the actual sale of a tax certificate by paying all the "taxes, costs, advertising charges and interest."[615]

If there is a sale of a tax certificate, however, the price of the certificate shall be the amount of the unpaid tax, interest, and the cost and charges.[616] Those interested in purchasing the certificate shall bid on the interest rate that will be applied to the unpaid taxes. The person who bids the lowest rate is the ultimate purchaser.[617] The holder or purchaser of the certificate has a lien

604. *See* FLA. STAT. §196.151 (1977).

605. *Id.*

606. *See, e.g.*, Gautier v. State, 127 So. 2d 683 (Fla. 3d D.C.A. 1961).

607. *See* Moffet v. Ashby, 139 So. 2d 133 (Fla. 1962).

608. FLA. STAT. §197.012 (1977).

609. Discounts for early payment "shall be at the rate of 4 percent in the month of November and at any time within 30 days after the mailing of the original tax notice; 3 percent in the month of December; 2 percent in the following month of January; and 1 percent in the following month of February. The taxes paid in March shall be without discount." *Id.*

610. FLA. STAT. §197.016 (1977).

611. FLA. STAT. §197.056 (1977).

612. FLA. STAT. §197.016 (1977).

613. FLA. STAT. §197.012 (1977).

614. FLA. STAT. §197.062 (1977). Apparently publication for four weeks can be accomplished in less than 28 days under this statute. *See* Watson v. Beacon Operating Co., 114 Fla. 773, 154 So. 866 (1934).

615. FLA. STAT. §197.016 (1977). The minimum charge for redeeming taxes prior to the sale of a tax certificate is three percent regardless of when the taxes are redeemed. FLA. STAT. §197.062 (1977).

616. FLA. STAT. §§196.016, .116 (1977).

617. FLA. STAT. §197.016 (1977).

upon the property for the taxes.[618] The real property owner can redeem the certificate by paying the holder of the tax certificate the amount the holder paid and the interest that has accrued at the bidded rate. If the real property owner does not redeem the certificate within two years from the date of the sale (or within ten years if the certificate was purchased under the Murphy Act)[619] than the certificate holder may apply for a tax deed.[620]

4. Validity of the Tax Sale. Tax deeds are valid even if errors have been made by tax officials or are present in the tax certificate. In fact, acts of "omission or commission on the part of any assessor [appraiser] tax collector, board of county commissioners, clerk of the circuit court, county comptroller, or their deputies or assistants, or newspaper in which any advertisement of sale may be published"[621] may be corrected at any time by the person responsible for them and shall be construed as valid ab initio. All sales or conveyances of real property for nonpayment of taxes shall be valid unless it is proved that: "(a) The property was not subject to taxation; . . . or (c) The real property had been redeemed before the execution and delivery of a deed based upon a certificate issued for nonpayment of taxes."[622]

Section 196.161 of the Florida Statutes provides a procedure whereby a tax lien will attach to Florida real property upon which a homestead tax exemption was granted, when the claimant dies and allegations are made that he was not a resident of Florida. When a person has been granted a homestead tax exemption for any of the ten years prior to his death and his estate is being probated in another state under an allegation that he was a resident of that state, then the property appraiser may record a notice of tax lien upon any real property situated in Florida.[623]

> [T]he property shall be subject to the payment of all taxes exempt thereunder [Florida Constitution, Article VII, section six] plus six percent interest per annum unless the circuit court having jurisdiction over the ancillary administration in this state determines that the decedent was a bona fide resident during the year or years an exemption was allowed.[624]

If the court determines that the decedent was a bona fide resident then the lien shall not be filed, or if it has been filed, it shall be cancelled. A problem may arise if the decedent was not a bona fide resident but his legal or natural dependents maintained their permanent residence upon the Florida real prop-

618. *See* FLA. STAT. §197.012 (1977) (refers to sale of tax liens); FLA. STAT. §197.056(2) (1977) (refers to lien created by sale of a tax certificate).

619. FLA. STAT. §197.426 (1977).

620. FLA. STAT. §197.241 (1977). *See generally* 2 R. BOYER, *supra* note 138, at §31.

621. FLA. STAT. §197.056(1) (1977).

622. *Id.*

623. FLA. STAT. §196.161(1) (1977). The property appraiser shall record a notice of tax lien within three years of the death of the taxpayer and with "knowledge as to said fact." The statute is unclear as to whether a property appraiser must have knowledge of the person's death or if the probate is out of state and as to whether an appraiser can file a notice after three yers if he did not have knowledge of the death or probate within the three year time.

624. *Id.*

erty. In that case there would be no constitutional impediment to granting the homestead tax exemption and thus a statute that attempts to revoke such an exemption may be unconstitutional to that extent.

CONCLUSION

Although the homestead chameleon has undergone extensive superficial change since the 1948 *Our Legal Chameleon* article, its basic form and character remain constant. The four basic "species" remain separate and readily distinguishable: homestead realty forced sale exemption, homestead personalty forced sale exemption, homestead residence tax exclusion, and homestead personalty tax exclusion. The latter two are the least objectionable. These exclusions are governed by what is generally a pragmatic, predictable body of law.

However, one particular species, the homestead realty forced sale exemption, continues to be an increasingly inequitable creature. Crosby and Miller noted that the Florida courts have "restrained him [the chameleon] from growing into a dragon."[625] However, one wonders if that statement remains entirely accurate. Current Florida law exempts the entire homestead realty from forced sale for payment of most debts. There is no dollar value limit to the exemption. Thus the law favors persons who own homestead realty; the extent of the favor increasing with the value of the homestead. Query whether a homestead valued in excess of $250,000 should be immune from the claim of a pauper creditor. The inequity is exacerbated further by the fact that individual home ownership is a declining phenomenon in today's urban society. Some of the objectionable qualities of the forced sale exemption have been legislatively or constitutionally eliminated. These reforms include the extension of homestead protection to condominiums and cooperative apartments and equalization of the treatment afforded both sexes. Nevertheless, the forced sale exemption has outlived its useful life. The time has come for Florida to follow the lead of other states and adopt a dollar limit forced sale exemption that applies to a broader class of persons than the shrinking homeowner class.

625. Crosby & Miller, *supra* note 1, at 389.