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There's No Place Like Home(stead) in Florida - Should it Stay that Way?

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Donna Litman Seiden*

TABLE OF CONTENTS

I. SUMMARY OF PRESENT LAW AND HISTORICAL PERSPECTIVE.	803
A. <i>Summary of Present Homestead Exemption Law</i>	803
1. Exemption Provisions	804
a. <i>Qualification Requirements and Limitations</i>	804
i. <i>Ownership Requirements</i>	804
ii. <i>Residency/Use Requirements and Acreage Limitations</i>	808
b. <i>Scope of Exemption and Exceptions</i>	809
2. Transfer Provisions	818
a. <i>Inter Vivos Alienation</i>	818
b. <i>Devise Restrictions</i>	819
c. <i>Inurement of Owner's Exemption Upon Owner's Death</i>	821
B. <i>History of Present Homestead Exemption Law</i>	823
1. Exemption Provisions	824
a. <i>Qualification Requirements and Limitations</i>	824
i. <i>Florida Constitution of 1868</i>	824
ii. <i>Florida Constitution of 1885</i>	825
iii. <i>Florida Constitution of 1968</i>	825
iv. <i>1984 Amendment to Florida Constitution of 1968</i>	826
b. <i>Scope of Exemption and Exceptions</i>	826

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i.	<i>Florida Constitution of 1868</i>	826
ii.	<i>Florida Constitution of 1885</i>	827
iii.	<i>Florida Constitution of 1968</i>	827
2.	Transfer Provisions	828
a.	<i>Inter Vivos Alienation</i>	828
i.	<i>Florida Constitution of 1868</i>	828
ii.	<i>Florida Constitution of 1885</i>	828
iii.	<i>Florida Constitution of 1968</i>	829
b.	<i>Devise upon Death</i>	829
i.	<i>Florida Constitution of 1868</i>	829
ii.	<i>Florida Constitution of 1885</i>	830
iii.	<i>Florida Constitution of 1968</i>	831
iv.	<i>1972 Amendment to Florida Constitution of 1968</i>	832
c.	<i>Inurement of Exemption</i>	833
i.	<i>Florida Constitution of 1868</i>	833
ii.	<i>Florida Constitution of 1885</i>	833
iii.	<i>Florida Constitution of 1968</i>	834
II.	ANALYSIS OF NEED FOR REFORM	835
A.	<i>Exemption Provisions</i>	835
1.	Qualification Requirements and Limitations	836
a.	<i>Limitation on Value</i>	836
b.	<i>Residency, Use and Acreage Requirements and Limitations</i>	843
i.	<i>Urban Homesteads</i>	843
ii.	<i>Rural Homesteads</i>	844
iii.	<i>Multiple Homesteads</i>	845
c.	<i>Type of Qualifying Interest</i>	846
i.	<i>Single Family Homes and Farms</i>	847
ii.	<i>Condominiums</i>	847
iii.	<i>Homes with Subdivision Recreational Facilities</i>	850
iv.	<i>Mobile Homes</i>	850
v.	<i>Cooperatives</i>	852
vi.	<i>Floating Homes</i>	854
vii.	<i>Future Interests</i>	855
viii.	<i>Conclusion Regarding Extension of Exemption</i>	856
2.	Scope of Exemption and Exceptions	856
a.	<i>Tort Creditors</i>	857

b.	<i>Alimony Maintenance or Support</i>	
	Creditors	858
c.	<i>Other Creditors</i>	860
d.	<i>Judgment Creditors When Homestead</i> <i>is Sold</i>	865
e.	<i>Creditors with Dischargeable Debts</i> <i>Under Bankruptcy</i>	867
B.	<i>Transfer Provisions</i>	869
1.	<i>Inter Vivos Provisions</i>	871
2.	<i>Devise Provisions</i>	874
3.	<i>Inurement of Exemption</i>	881
III.	CONCLUSION	883
	APPENDIX A	887

I. SUMMARY OF PRESENT LAW AND HISTORICAL PERSPECTIVE

A. *Summary of Present Homestead Exemption Law*

Florida's homestead law contains a unique combination of provisions providing an owner with significant exemptions from creditors and restrictions on transfer. This law is contained primarily within the Florida Constitution. These provisions affect the owner and the owner's spouse during their lifetimes. They also affect the owner's descendants and heirs after the owner's death.

The provisions relating to the exemption have several components.¹ The first relates to what qualifies as a homestead. The qualification requirements include ownership requirements, a residential use requirement, and an acreage limitation. The second relates to the scope of the exemption, whereby most liens cannot attach to the homestead or force its sale, with limited exemptions provided under constitutional, federal and judicial law.

The provisions relating to transfer apply to *inter vivos* transactions and to testamentary dispositions. The transfer restrictions relate to the right to give, sell, mortgage, or otherwise alienate the homestead during lifetime, and the right to devise it by will, as well as the right to benefit from the owner's exemption at his or her death.

This article will explore the exemption provisions and the transfer provisions in depth. This article will consider the present law, its history,

1. See FLA. CONST. art X, § 4.

exemptions in other states, and potential areas and recommendations for constitutional or other reform.

1. Exemption Provisions

The present exemption contains the following qualification requirements and limitations: ownership requirements, a residential/use requirement and an acreage limitation. Article X, section 4(a) of the Florida Constitution exempts:

the following property owned by a natural person:

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

.....

a. Qualification Requirements and Limitations

The qualification requirements relate to who may own the homestead and what interest may be owned (the ownership requirements), how the property may be used (the residential/use requirement) and how much acreage the homestead may encompass (the acreage limitation). There is no limit on the value of the property that can qualify as a homestead.²

i. Ownership Requirements

First, any natural person may own the homestead interest. A corporation cannot claim the exemption for property that it owns.³ The owner need not be married or have a family. If the owner has a family, the owner need not be the head of that family.

Second, the interest owned must be an interest in an estate in land located in the State of Florida.⁴ The homestead interest may be the fee

2. *See id.*

3. *See In re Duque*, 33 B.R. 201, 202 (Bankr. S.D. Fla. 1983). *But see Manda v. Sinclair*, 278 F.2d 629 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960) (shareholder could claim exemption for equitable interest in homestead owned by corporation).

4. *Coleman v. Williams*, 200 So. 207, 207 (Fla. 1941) (exemption "may attach to any estate in land . . . whether it is a freehold or less estate"); *Menendez v. Rodriguez*, 143 So. 223, 226 (Fla. 1932) (Whitfield, J., concurring).

simple interest of the sole owner, the interest of a tenant in common⁵ or the interest of a joint tenant with right of survivorship.⁶ The homestead may be owned as a tenancy by the entirety.⁷ It may be an equitable interest owned via a purchase money resulting trust⁸ or a constructive trust. It may

5. *Hill v. First Nat'l Bank*, 75 So. 614 (Fla. 1917) (son's undivided one-third interest in property owned as a tenant in common qualified as homestead upon his death so that his interest passed to his mother free of his creditors); *Milton v. Milton*, 58 So. 718 (Fla. 1912) (son's undivided one-fourth interest in property inherited from mother qualified as son's homestead, immediately after her death, because son occupied it within a reasonable time under the circumstances after her death). Each tenant's interest should be tested separately to see if it qualifies as homestead. *Grant v. Credithrift of America, Inc.*, 402 So. 2d 486 (Fla. 1st Dist. Ct. App. 1981) (former husband's interest was subject to sale, but former wife claimed her interest as homestead). If one tenant has the exclusive right to possess the property, a sale of the other tenant's interest would be subject to that right. *Barnett Bank v. Osborne*, 349 So. 2d 223 (Fla. 4th Dist. Ct. App. 1977), *cert. denied*, 365 So. 2d 709 (Fla. 1978).

If homestead property is owned as tenants in common or joint tenants with right of survivorship, the property may be partitioned at a tenant's request. If neither is entitled to exclusive possession of the property and the property cannot be divided in a manner that preserves the homestead, a sale may be required to protect the owners' beneficial enjoyment of the property. *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978) (a partition sale is not a forced sale prohibited by the constitution).

6. A joint tenancy with right of survivorship may qualify for the exemption for forced sale but may not be subject to the restriction on devise. *See Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d Dist. Ct. App. 1984) (husband's interest in property owned as joint tenants with right of survivorship with sister, sister's daughter, and sister's husband was not subject to restriction on devise, even though husband and wife resided on property and wife survived husband). In *Ostyn*, the right of survivorship was acquired prior to the marriage. *Id.* at 1137.

7. *See Wilson v. Florida Nat'l Bank & Trust Co.*, 64 So. 2d 309 (Fla. 1953).

8. A purchase money resulting trust arises when one person purchases property and has the title placed in another person's name without intending to make a gift to the title holder. RESTATEMENT (SECOND) OF TRUSTS § 443 (1957). *See Bessemer Properties, Inc. v. Gamble*, 27 So. 2d 832 (Fla. 1946) (husband purchased land in wife's name and constructed home on it and paid for insurance, upkeep and taxes). In *Bessemer*, the court stated that the husband's "contributions to his wife's separate property gave him an equitable interest on the basis of which he could claim his homestead exemption. It was not essential that he hold legal title to the land." *Id.* at 833. *See also Beall v. Pinckney*, 150 F.2d 467 (5th Cir. 1945) (husband can claim his equitable interest in a home titled in his wife's name as his homestead when he used his own funds to purchase it in his wife's name).

In these cases, the head of the family argued that he was the equitable owner because the legal owner was not the head of the family and could not qualify for the exemption. *Gamble*, 27 So. 2d at 833; *Beall*, 150 F.2d at 470. Under today's constitutions, where family hardship is not required, this argument could be used if the legal owner did not reside on the property but the "equitable owner" did.

be a beneficial interest held by the settlor of a revocable trust.⁹ The homestead interest also may be a life estate held by a surviving spouse, but it cannot be a future interest, until the interest becomes possessory.¹⁰ For example, a remainder interest cannot qualify as a homestead interest until the life estate terminates.¹¹ The homestead interest may be an interest in a duplex house¹² or a condominium.¹³ It may be an ownership interest in a mobile home and in land to which the mobile home is attached.

Leasehold interests generally do not qualify as a sufficient estate in land.¹⁴ Cooperatives do not qualify for the constitutional exemption,

9. *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th Dist. Ct. App. 1981) (devise restrictions applied to homestead owned by grantor, as trustee of revocable trust, where grantor was lifetime beneficiary and retained "all equitable right, title, possession and interest" in homestead); *Johns v. Bowden*, 66 So. 155 (Fla. 1914) (decedent who could not directly devise homestead could not indirectly devise homestead through provisions of revocable trust he created and under which he had the right to occupy and use the homestead during his lifetime).

10. *Aetna Ins. Co. v. LaGasse*, 223 So. 2d 727 (Fla. 1969). In *LaGasse*, when the father died, his wife received a life estate in his homestead and his daughter received the vested remainder. The father's homestead exemption inured to both of them to protect them from his creditors. The daughter resided with mother on the property, but daughter could not qualify for homestead exemption on her remainder interest even though she was head of the family. *Id.* at 728. The "surviving mother had the right of occupancy and use essential to a homestead claim . . ." *Id.* at 729. See also *Anamaet v. Martin-Senour Co.*, 114 So. 2d 23 (Fla. 2d Dist. Ct. App. 1959).

11. See *LaGasse*, 223 So. 2d at 728.

12. See *In re Kuver*, 70 B.R. 190 (Bankr. S.D. Fla. 1986). In *Kuver*, a duplex was homestead even though a portion was rented out. The land and improvements were owned in fee simple. The duplex was capable of being divided by a vertical or horizontal line but could not be divided for purposes of sale under existing zoning laws. The duplex was considered comparable to condominium ownership. *Id.* at 192-93

13. See *In re Estate of Hill*, 552 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1989) (condominium was homestead, but devise of homestead was not prohibited because decedent was not survived by a spouse or minor child).

14. See *In re Tenorio*, 107 B.R. 787 (Bankr. S.D. Fla. 1989) (where year to year lease of condominium did not satisfy ownership requirement nor was it a permanent place residence, and thus could only qualify for the personalty exemption); see also *Freedom Properties v. Alderman*, 589 So. 2d 424 (Fla. 2d Dist. Ct. App. 1991) (resident's contractual license to occupy given room in retirement center was continuing contract under Florida Statutes chapter 651 but was not legal or equitable interest for claiming exemption for purposes of taxing any portion of real property containing center). There is some question whether leasehold improvements made by the lessee on leased property could qualify as a sufficient real estate interest for the lessee. See *Anderson Mill & Lumber Co. v. Clements*, 134 So. 588 (Fla. 1931). In *Clements*, a portion of land owned and used by a father-in-law as a homestead was treated as abandoned and not exempt when the father allowed the son-in-law to build a home on that portion of the land. The son-in-law had lawful possession of the

because the tenant of the cooperative apartment has no proprietary interest in his or her apartment, the apartment building, or the underlying land.¹⁵ Mobile homes on leased land also should not qualify for the *constitutional* exemption. The Legislature has attempted to create a statutory exemption when the mobile home owner has the lawful right to possess the land.¹⁶ The fact that property is taxed as real estate for property tax purposes is not determinative.¹⁷ Furthermore, the fact that property qualifies for the homestead tax exemption is not determinative, because some of the

land and resided there, yet a creditor of the father-in-law was able to place a lien against that portion of the land. That portion of the land was not considered part of the father-in-law's homestead. It is unclear whether the son-in-law tried to claim it as his homestead, but the court did not treat that portion of the land as the son-in-law's exempt homestead. *Id.* at 590. But see Harold B. Crosby & George J. Miller, *Our Legal Chameleon, The Florida Homestead Exemption: I-III*, 2 U. FLA. L. REV. 12, 64 (1949), which states:

Since the Supreme Court of Florida has committed itself to the principle that the homestead provisions apply to any interest that the head of a family residing in Florida may have in a dwelling, it is reasonable to infer that leasehold interests for less than one year may be subject to the homestead laws

Id. (footnote omitted).

15. In *Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978), the supreme court held that the shareholder of a cooperative apartment who died January 2, 1975, survived by his wife, could devise his shares because they were not homestead property. *Id.* at 709. The court noted that the corporation held title to the land on which the cooperative apartment building was constructed and leased the shareholder his individual cooperative apartment unit. The court noted that the "purchaser of a cooperative apartment unit does not hold any type of proprietary interest in either the apartment itself or the apartment building containing the apartment unit, or the land upon which the building is situated." *Id.* This opinion also noted that a cooperative unit may be subject to property taxes and qualify for a homestead tax exemption. *Id.* at 710-11. However, the Florida Constitution provides that for purposes of the homestead tax exemption, legal or equitable title to real estate "may be held . . . 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." FLA. CONST. art. VII, § 6.

A cooperative is a "form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property." FLA. STAT. § 719.103(9) (Supp. 1992). A cooperative parcel is "the shares or other evidence of *ownership* in a cooperative *representing an undivided share in the assets of the association*, together with the lease or other muniment of title or possession." *Id.* § 719.103(11) (emphasis added); *see also id.* § 719.105(1)(b). A unit is "a part of the cooperative property which is subject to exclusive use and possession" and may be "improvements, land, or land and improvements together." *Id.* § 719.103(15).

16. FLA. STAT. §§ 222.02, 222.05 (1991); *see infra* text accompanying notes 232-37.

17. *See* FLA. STAT. § 719.114 (1991) (real estate taxes assessed against individual cooperative parcels rather than cooperative property as a whole).

requirements for the homestead tax exemption differ from the requirements for the homestead creditor exemption.¹⁸

ii. *Residency/Use Requirements and Acreage Limitations*

Third, the homestead must be the permanent place of residence of the owner or his or her family.¹⁹ This requirement applies expressly to homesteads within a municipality and, by implication, to homesteads outside a municipality. The permanent residency requirement cannot be satisfied unless the owner or family member residing in the homestead is a citizen or has a permanent visa.²⁰ Once residency is established, the exemption remains until the property is abandoned.²¹ A temporary absence from the homestead is not an abandonment.²² Intent to permanently reside in the homestead, rather than physical presence is determinative.²³ As a result, a contract to sell does not necessarily result in an abandonment of the homestead.²⁴ There is some question whether one person who owns two homes can claim more than one homestead exemption if one is used as his

18. Compare FLA. CONST. art. VII, § 6 with *id.* art. X, § 4. The homestead tax exemption is beyond the scope of this article.

19. *Cooke v. Uransky*, 412 So. 2d 340 (Fla. 1982) (Canadian citizen or family needed permanent visa and to register as resident alien to be able to establish permanent residence in Florida).

20. *See id.*; see also *Raheb v. DiBattisto*, 513 So. 2d 717 (Fla. 3d Dist. Ct. App. 1987) (holding that foreign nationals of Iran with no permanent resident alien status in the United States could not establish homestead in Florida).

21. *Marsh v. Hartley*, 109 So. 2d 34, 38 (Fla. 2d Dist. Ct. App. 1959).

22. *E.g.*, *Collins v. Collins*, 7 So. 2d 443 (Fla. 1942) (temporary rental of homestead during tourist season was not abandonment, when owners were temporarily absent but intended to return); *United States Fidelity & Guar. Co. v. Marshall*, 4 So. 2d 337 (Fla. 1941) (homestead not abandoned even though owner and family temporarily lived in non-homestead farm during several seasons).

23. *Engel v. Engel*, 97 So. 2d 140, 142 (Fla. 2d Dist. Ct. App. 1957) (“[P]ermanency does not mean . . . that there must be an avowed and conclusive intent to forever remain in a given place of abode, eternally or even ‘until death do us part.’ The only proper concept of permanency . . . means the presence of the intention to reside at that particular place for an indefinite period of time.”).

24. *In re Estate of Skuro*, 487 So. 2d 1065 (Fla. 1986) (homestead was not abandoned when owner resided there at time of his owner’s death, even though owner had entered into a contract to sell the homestead because the sale had not been consummated at the time of his death; thus, devise of homestead was restricted because of minor children); *Brown v. Lewis*, 520 F. Supp. 1114 (M.D. Fla. 1981); *Beensen v. Burgess*, 218 So. 2d 517 (Fla. 4th Dist. Ct. App. 1969). For a discussion of these two cases, see *infra* text accompanying notes 283-84.

or her personal residence and another is used as the residence of his or her family.²⁵

The exemption can extend to up to one-half an acre within a municipality (an urban homestead) and up to 160 acres in unincorporated areas (a rural homestead). The acreage must be contiguous to the acreage containing the residence.²⁶ The urban homestead is limited to residential use; it does not extend to a business home. The urban homestead can be used for a residence as well as a farm, or business, or for other purposes,²⁷ so long as the acreage is contiguous to the residence. Once a rural homestead has been established it will not be subject to the more restrictive urban acreage limitations if the property thereafter is incorporated into a municipality unless the owner consents.²⁸ In addition, a homestead owner can purchase additional acreage contiguous to the homestead of up to the maximum acreage and exempt it from existing judgments against the owner.²⁹

b. Scope of Exemption and Exceptions

The scope of the exemption is extensive. The homestead is exempt from liens and forced sale, with several exceptions provided by the Florida Constitution and the judiciary as well as by federal law. Article X, section 4(a) of the Florida Constitution provides:

There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for

25. See Donna Litman Seiden, *An Update on the Legal Chameleon: Florida's Homestead Exemption and Restrictions*, 40 U. FLA. L. REV. 919, 930-31 (1988). The constitution exempts a homestead that is either the owner's residence or his or her family's residence.

26. Acreage is considered contiguous even if various parcels are separated by streets or easements.

27. *Armour & Co. v. Hulvey*, 74 So. 212 (Fla. 1917) (rural homestead not limited to residence, subsidiary building, and business house—six acres of land, including buildings and property used as preparatory school for students and cadets was exempt homestead). The rural homestead may include growing crops. See *Adams v. Adams*, 28 So. 2d 254 (Fla. 1946) (relating to devise and descent of homestead). *But see* *Gentile Bros., Inc. v. Bryan*, 133 So. 630 (Fla. 1931) (relating to mortgage on citrus crops).

28. Similarly, once a homestead qualifies as a rural homestead, it will not be limited by the urban use restrictions, unless the land is incorporated into a municipality and the owner consents to the reduction.

29. See *Quigley v. Kennedy & Ely Ins., Inc.*, 207 So. 2d 431, 433 (Fla.), *cert. denied*, 210 So. 2d 869 (Fla. 1968).

the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person. . . .

The homestead is protected from most debts because they cannot become liens upon the property. In addition, the homestead is protected from forced sale through foreclosure of a lien or other court process, except for certain liens and obligations. If the owner voluntarily sells the homestead, the net proceeds from the sale will retain their exempt status so long as the seller intends to reinvest the proceeds in another homestead within a reasonable time, keeps the funds separate, and actually reinvests them.³⁰ The same rule applies to insurance proceeds from a casualty, such as fire damage to the homestead, or proceeds from an involuntary conver-

30. Orange Brevard Plumbing & Heating 'Co. v. LaCroix, 137 So. 2d 201, 205-06 (Fla. 1962). In *LaCroix*, the court held that proceeds of a voluntary sale of a homestead are exempt

if and only if, the vendor shows, by a preponderance of the evidence an abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time. Moreover, only so much of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus over and above that amount should be treated as general assets of the debtor. We further hold that in order to satisfy the requirements of the exemption the funds must not be commingled with other monies of the vendor but must be kept separate and apart and held for the sole purpose of acquiring another home. The proceeds of the sale are not exempt if they are not reinvested in another homestead in a reasonable time or if they are held for the general purposes of the vendor.

Id. at 206. See also *In re McDonald*, 100 B.R. 598 (Bankr. S.D. Fla. 1989) (portion of proceeds from sale of first home that were not reinvested in purchase of less expensive second home were not exempt, even though seller separately invested them, for the one year period after the sale, because court found facts did not support seller's contention that the second home was temporary purchase until he could find more expensive home in future); *McGuire v. Manufactures & Traders Trust Co.*, 37 B.R. 365 (Bankr. M.D. Fla. 1984) (debtor, through his widow, was unable to prove any intent on the part of the debtor to purchase or build a new residence to replace the sale of the old residence, nor was she able to prove the proceeds were segregated for this purpose); *Havee v. Rodriguez*, 24 B.R. 12 (Bankr. S.D. Fla. 1982) (proceeds from sale of first home so commingled with income and funds from corporate loans that purchase of some home not treated as made from exempt proceeds from first home; therefore, second home not continuation of first homestead); *Sun First Nat'l Bank v. Gieger*, 402 So. 2d 428 (Fla. 5th Dist. Ct. App. 1981) (purchase money mortgage received by seller from sale of homestead could qualify as exempt non-cash proceeds to extent sellers intended to reinvest new homestead proceeds).

sion of the homestead.³¹ If the sale of a homestead is forced to satisfy a valid lien, the excess proceeds would be exempt;³² however, if the proceeds are not reinvested within a reasonable time they should lose their exempt status by analogy to the rule for a voluntary sale.

Some creditors have priority over the exemption. These creditors have liens or claims that are superior to the exemption. In some cases the express provisions of the Florida Constitution create the priority. In other cases, the superior nature of the claim or lien is a product of judicial doctrine, a Florida court's equitable powers, or federal law.

The homestead is not exempt from a lien for an obligation contracted to purchase, improve, or repair it.³³ If a buyer wants to retain the full benefit of the exemption, the buyer must pay the seller the full purchase price for his or her homestead. Otherwise, the seller can force the sale of the homestead.³⁴ Similarly, the owner must pay for the costs he or she incurs to repair the homestead or to add to or improve it. The owner also must pay for labor provided to the home and yard or field.³⁵ Construction costs, including labor and materials, may be supported by a construction lien,³⁶ or in some cases, an equitable lien, on the homestead.³⁷

31. *See* *Kohn v. Coats*, 138 So. 760 (Fla. 1931) (insurance proceeds for homestead destroyed by fire were exempt); *see also* *Hill v. First Nat'l Bank*, 84 So. 190 (Fla. 1920) (amounts recovered as damages resulting from unlawful levy and sale of exempt homestead were exempt).

32. *Scull v. Beatty*, 9 So. 4 (Fla. 1891) (excess proceeds from foreclosure of mortgage homestead after owner's death were payable to decedent's children and were exempt from decedent's creditors).

33. *Platt v. Platt*, 39 So. 536 (Fla. 1905) (holding that one partner's agreement to assume the payment of certain partnership indebtedness when he purchased the homestead property was an obligation contracted for the purchase of the homestead).

34. *See* *Arko Enters., Inc. v. Wood*, 185 So. 2d 734 (Fla. 1st Dist. Ct. App. 1966) (seller had vendor's lien for purchase price under contract to sell).

35. Although an urban homestead can include a farm, the homestead may be protected against debts incurred in connection with that farm, unless those debts fit within one of the exceptions, such as for "house, field or other labor." *Lamb v. Ralston Purina Co.*, 21 So. 2d 127, 132 (Fla. 1945) (homestead owned by wife was small farm where she resided and engaged in business of raising and selling poultry and eggs could not be liened to for debt for chicken feed and insecticide because bill for feed and insecticide was not "for house, field or other labor.").

36. FLA. STAT. §§ 713.001-713.37 (1991 & Supp. 1992); *see also* *Wood v. Wilson*, 84 So. 2d 32 (Fla. 1955) ("absent special or peculiar equities justifying the imposition of an equitable lien as typified by the case of *Jones v. Carpenter*, [106 So. 127 (Fla. 1925)] an action to enforce a materialman's or mechanic's lien must be brought within the period of limitation stipulated in the applicable statute.").

Further, the homestead is not exempt from a lien for taxes or assessments on the homestead. Accordingly, the owner must pay the property taxes assessed against the homestead by the county or other state municipality to protect his or her homestead. This includes assessments, such as special assessments for roads or other improvements that benefit the home and the neighborhood in which the homestead is located.

A Florida homestead is not exempt from a federal tax lien.³⁸ Thus, the owner must pay his or her federal tax liability; otherwise, the federal government can obtain a tax lien against the homestead. Although a lien can attach to a homestead for a federal estate tax, Florida law places the burden of paying the federal estate tax on beneficiaries other than persons receiving an interest in the homestead.³⁹

The owner can mortgage his or her homestead, provided that if the owner is married, the spouse joins in the mortgage.⁴⁰ If the owner defaults on a valid mortgage, the mortgage holder can force the sale of the homestead. Thus, a creditor can protect itself when extending credit to a homestead owner by obtaining a valid consensual lien on the homestead, before extending credit.⁴¹

37. Florida Statutes section 713.30 provides that "nothing contained in part I of this chapter [chapter 713—Construction Lien Law] shall be construed to prevent any lienor or assignee under any contract from maintaining an action thereon at law in like manner as if he had no lien for the security of his debt." FLA. STAT. § 713.30 (1991) (emphasis added). See also *Wood v. Wilson*, 84 So. 2d 32 (Fla. 1955) and ch. 17097-326, § 32, 1935 Fla. Laws 718, 744, which contained comparable language to that quoted from Florida Statutes section 731.30 (1991).

38. See *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert denied*, 372 U.S. 913 (1963) (homestead subject to tax liens for owner's liability for federal income taxes); see also *United States v. Rodgers*, 461 U.S. 677 (1983) (regarding federal liens against Texas homestead).

39. FLA. STAT. § 733.817(1)(d) (Supp. 1992); see also *Smith v. Unkefer*, 515 So. 2d 757 (Fla. 2d Dist. Ct. App. 1987) (court apportioned tax on property in which decedent retained life estate as his homestead, because remainder interest was transferred by *inter vivos* deed and life estate that qualified for exemption terminated on decedent's death).

40. A spouse must join in the mortgage; however in some cases, the spouse may be estopped from contesting the validity of joinder. See *New York Life Ins. v. Oates*, 192 So. 637 (Fla. 1939) (deciding when law required mortgage to be duly executed). To assure proper joinder, the mortgagee should see the spouse execute the mortgage. *Palm Beach Sav. & Loan Ass'n v. Fishbein*, 619 So. 2d 267 (Fla. 1993) (wife's failure to join in mortgage rendered mortgage invalid, and bank did not have right to rely on wife's signature, forged by husband). Under present law, a mortgage does not require two witnesses. *Moxley v. Wickes Corp.*, 356 So. 2d 785 (Fla. 1978).

41. A waiver of the exemption in a note is not enforceable; a valid mortgage is required. *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956).

A homestead is not exempt from pre-existing liens.⁴² A lien can attach to property before it attains its homestead status.⁴³ When the owner qualifies for the exemption, that pre-existing lien has priority over the exemption.⁴⁴ In some cases, the owner can avoid that lien in a bankruptcy proceeding.⁴⁵ By contrast, if a person acquires homestead property when he or she is subject to a judgment, the homestead exemption is superior so that the lien cannot attach.⁴⁶

A pre-existing lien also can arise from a provision in a declaration of restrictions or declaration of condominium applicable to the property. For example, these liens may arise for nonpayment of an assessment for a recreational lease for a subdivision⁴⁷ or an assessment for maintenance for a condominium.

Generally, the homestead exemption is liberally construed and the exceptions are narrowly construed. Nevertheless, the exemption laws will not be interpreted or applied "to make them instruments of fraud or unjust impositions upon the rights of creditors."⁴⁸ Accordingly, equity will protect a creditor by granting the creditor an equitable lien upon the property, which limits the effect of the exemption.⁴⁹ Equitable liens are imposed under very limited circumstances. These liens are imposed when embezzled funds are used to satisfy an obligation that could create a valid

42. *See, e.g.*, *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980); *Giddens v. McFarlan*, 10 So. 2d 807 (Fla. 1943).

43. *Lyon v. Arnold*, 46 F.2d 451 (5th Cir. 1931) (lien attached to property prior to the time it was occupied).

44. *Pasco v. Harley*, 75 So. 30 (Fla. 1917) (lien attached to property when unmarried owner was not head of family and constituted an interest in property that was not considered to be owned by him, when he married and because head of family exemption was superior to lien).

45. 11 U.S.C. § 522(f) (1988); *Owen v. Owen*, 111 S. Ct. 1833 (1991); *see also* *Hershey v. Linzer*, 50 B.R. 329 (Bankr. S.D. Fla. 1985) (judicial lien that attached to property in 1982 when debtor was not head of family was avoidable by debtor because it impaired his homestead exemption in 1983 when he was head of family).

46. *Quigley v. Kennedy & Ely Ins., Inc.*, 207 So. 2d 431 (Fla.), *cert. denied*, 210 So. 2d 869 (Fla. 1968) (judgment did not become lien on additional acreage acquired contiguous to existing homestead property); *see also In re Krueger*, 90 B.R. 553 (Bankr. S.D. Fla. 1988).

47. *Bessemer*, 381 So. 2d at 1348 (lien created under recreational lease for subdivision was part of affirmative covenant created when owners accepted their deed to their lot in subdivision, related back to time when declaration of restrictions were filed and attached prior to time owners acquired their homestead interest in property).

48. *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 450 (Fla. 1943).

49. *Fishbein*, 619 So. 2d at 270; *see also* *Sonneman v. Tuszynski*, 191 So. 18 (Fla. 1939) (court granted equitable lien on homestead for moneys advanced and for labor and services).

lien against the homestead property. For example, an equitable lien would be imposed when funds are wrongfully obtain and used to purchase or improve⁵⁰ the homestead, to satisfy certain tax obligations, or to pay off an existing valid mortgage.⁵¹ If a person wrongfully obtained title to property, that transfer can be set aside⁵² or a constructive trust imposed under equitable principles.⁵³ Imposition of a constructive trust deprives the

50. See *Jahn v. Purvis*, 199 So. 340 (Fla. 1940). In *Purvis*, the surviving widow with dower interest "sold" the entire property to a purchaser for valuable consideration. The "purchaser" paid the purchase price and made substantial improvements which enhanced the value of the property. *Id.* at 344. This was known to the decedent's children, the true owners, and the court imposed an equitable lien for the value of the improvements. *Id.* at 342-43. The children did not receive the purchase price and they were liable for its repayment and no lien was impressed upon the land for that amount. *Id.* See also *La Mar v. Lechliders*, 185 So. 833 (Fla. 1939) (equitable lien imposed to support agreement that Lechliders would pay for cost of addition to be added to the La Mar's homestead for Lechliders' use and that existing mortgage on homestead would be assigned to Lechliders rather than satisfied with funds from Lechliders); *Jones v. Carpenter*, 106 So. 127 (Fla. 1925) (equitable lien imposed on homestead in favor of trustee in bankruptcy for corporation, when corporate funds were used to improve homestead of president of corporation).

51. See *Fishbein*, 619 So. 2d at 270. In *Fishbein*, the court imposed an equitable lien on homestead property for moneys advanced, to the extent the loan proceeds were used to satisfy valid mortgages or taxes. *Id.* at 270-71. The husband obtained the loan by forging his wife's signature on the mortgage. *Id.* at 268. The mortgage was invalid and the lender did not receive a lien for all of the funds advanced (only approximately \$930,000 of the \$1,200,000 loan was used to satisfy three existing mortgages and taxes). *Id.* See also *In re Fischer*, 129 B.R. 285 (Bankr. M.D. Fla. 1991) (debtor's homestead was subject to equitable lien in favor of former husband for funds he contributed to prevent foreclosure of property when it was their marital home); *Craven v. Hartley*, 135 So. 899 (Fla. 1931) (equitable lien granted against homestead for funds borrowed to satisfy existing mortgage on homestead).

In *Friedman v. Luengo*, 104 B.R. 489, 491 (Bankr. S.D. Fla. 1989), the bankruptcy court imposed an equitable lien under the authority of Florida law in favor of the bankruptcy trustee for funds improperly withdrawn from corporate the account to satisfy the mortgage. See *Ryskind v. Robinson*, 302 So. 2d 427 (Fla. 4th Dist. Ct. App. 1974).

52. *Regero v. Daugherty*, 69 So. 2d 178, 181 (Fla. 1953) ("conveyance may be subject to attack by homestead beneficiaries unless it is free from fraud, deceit, undue influence or duress . . ."); see also *Reed v. Fain*, 145 So. 2d 858 (Fla. 1961) (deed to son, with retained life estate in parents, void because father lacked capacity to execute deed at time of execution of deed; in addition, adult children contested invalid creation of tenancy by entirety of homestead property; case was decided when parent could not devise homestead if survived by adult children); *Graessle v. Schultz*, 90 So. 2d 37 (Fla. 1956) (daughter from first marriage claimed that mother's transfer of homestead to mother plus second husband, as tenancy by the entirety, was obtained through false representations; however, daughter failed to meet burden of proof).

53. See *Wadlington v. Edwards*, 92 So. 2d 629 (Fla. 1957). In *Edwards*, the wife would have been entitled to a constructive trust being imposed on the homestead in the husband's

owner of equitable ownership and thus negates any exemption claim the owner otherwise might have.⁵⁴ The exemption cannot attach to bare legal title.

There is some question whether the courts have the latitude to craft a remedy, other than an equitable lien or a constructive trust to prevent such fraud or abuse of the exemption.⁵⁵ In egregious cases, bankruptcy courts have denied a claim for exemption.⁵⁶

In addition, the federal Bankruptcy Code provides that certain creditors can reach exempt property, regardless of a state law exemption.⁵⁷ At present, these creditors are limited to those with certain claims for taxes, alimony, maintenance, or support, including child support, and certain claims for fiduciary fraud or willful injury caused by a debtor to an insured financial institution, such as a federally insured savings and loan association.⁵⁸

In general, the attachment of a valid lien grants the holder the right to

name when her funds were used to purchase the homestead, and the husband took title in his name against her will and without her consent; however, she was barred by laches, having waited over 20 years after her husband's death to assert her claim. *Id.* at 631.

54. *Havee v. Rodriguez*, 24 B.R. 12 (Bankr. S.D. Fla. 1982). In *Rodriguez*, the court imposed a constructive trust on the home owned by Rodriguez in favor of a corporation, when he raised his position as director and officer to benefit himself by having the corporation transfer the home to him at the corporation's expense. *Id.* at 14. The court then imposed an equitable lien on the home in favor of debtor's successor, the bankruptcy trustee, for funds debtor contributed to corporation to purchase home. *Id.* See also *First Fin. Planning Corp. of S. Fla., Inc. v. Gherman*, 103 B.R. 326 (Bankr. S.D. Fla. 1986) (constructive trust imposed on three residences owned by debtor's wife, child and in-law where residences were purchased with funds embezzled by debtor).

55. Compare *Gepfrich v. Gepfrich*, 582 So. 2d 743 (Fla. 4th Dist. Ct. App. 1991) (court forced debtor to sell homestead in order to satisfy alimony) with *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992) (regarding no RICO forfeiture of homestead).

56. See *In re Gherman*, 101 B.R. 369 (Bankr. S.D. Fla. 1989); see also *Govaert v. Primack*, 89 B.R. 954, 958 n.5 (Fla. 1988). In the majority opinion, Chief Justice Britton stated the following:

There are holdings by both Florida and federal courts subjecting homesteads to creditors' claims. . . . After practicing 40 years with these holdings, I humbly suggest that when the conduct of the debtor so offends the sensibility of a court that it cannot accept the exemption, that court presumes an exception to the constitutional provision that is completely contrary to its plain language. Because the factual permutations are infinite and the sensibility levels of courts nearly so, I do not see the emergence of a definitive rule anytime soon.

57. 11 U.S.C. § 522(c)(1), (3) (Supp. III 1991); 11 U.S.C. § 523(a)(1), (3), (4), (5) (1988 & Supp. III 1991).

58. 11 U.S.C. § 522(c) (Supp. III 1991).

force a sale of the homestead. In some cases, the property consists of homestead and nonhomestead interests and the asserted lien is against the nonhomestead interest. For example, the exempt homestead may be a life estate. A lien can attach to the remainder interest, and the remainder interest is subject to levy.⁵⁹ If the lienholder forces the sale of the remainder interest, while the life estate is possessory, the sale of that interest would be subject to the life estate. Most creditors, however, wait to force a sale until the remainder interest becomes possessory.⁶⁰

Similarly, a lien can attach to an interest of a co-tenant if it does not qualify for homestead. The lienholder can force a sale of that interest;⁶¹ however, a partition of the property can not be forced on the homestead interest if the owner of the homestead interest has the exclusive right to possession, unless the property can be divided in a manner that would preserve the homestead interest.⁶²

In the case of a marital dissolution, the applicable state court can award ownership of the marital home or exclusive possession⁶³ or require its sale.⁶⁴ The courts exercise this power, notwithstanding the homestead exemption. In some cases, ownership is awarded based on special equities⁶⁵ and proceeds may be allocated as alimony.⁶⁶ Sometimes, the court awards one spouse a lien against the other's interest in the homestead in order to secure payment of a property settlement or other amount.⁶⁷

59. *Aetna Ins. Co. v. LaGasse*, 223 So. 2d 727, 728 (Fla. 1969), *rev'g* 213 So. 2d 454 (2d Dist. Ct. App. 1968).

60. *Id.* (judgment against LaGasse attached as lien to the remainder interest she received when her father died, and lienholder levied on property after mother died). *But see Anemaet v. Martin-Senour Co.*, 114 So. 2d 23 (Fla. 3d Dist. Ct. App. 1959) (execution on remainder interest attempted while life tenant was alive).

61. *But see Daniels v. Katz*, 237 So. 2d 58 (Fla. 3d Dist. Ct. App. 1970) (holding that mortgage lien created by former husband with respect to his undivided interest was not enforceable while former wife had exclusive possession and her interest qualified as homestead and where mortgagee was attorney with knowledge of these facts).

62. *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978).

63. *McDonald v. McDonald*, 368 So. 2d 1283, 1284 (Fla. 1979) (“[t]he court has inherent authority to award exclusive possession of a jointly owned marital home to the party having custody of children . . .”).

64. *Kuvin v. Kuvin*, 442 So. 2d 203 (Fla. 1983) (court affirmed order directing sale of marital home and division of proceeds, part of which was payable as alimony).

65. *See, e.g., Landay v. Landay*, 429 So. 2d 1197 (Fla. 1983) (tenancy by entirety converted to tenancy in common upon dissolution; however, wife was entitled to more than one-half because of special equity in other half).

66. *Kuvin*, 442 So. 2d at 203.

67. *See Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

No other persons or valid creditors can obtain a lien against the homestead or force the sale of the homestead to satisfy a debt. This is true whether the debt arises out of a contract, a tort,⁶⁸ or any other wrongdoing. The exemption is superior to a claim for alimony or child support,⁶⁹ although dicta in old cases suggest otherwise.⁷⁰ There is one recent, questionable case where a former husband was directed to sell his home to satisfy an alimony obligation because the court would not allow him to use the homestead exemption as an instrument to defraud his former wife.⁷¹ The constitutional exemption is so broad that the Florida government cannot use the Florida RICO Act to seize the owner's homestead if the homestead is used for illegal activities.⁷² An equitable lien or Florida RICO action could result, however, if that person used illegally obtained funds to purchase the homestead.⁷³ In these instances, forfeiture under the federal RICO Act is a separate matter.

68. *Olesky v. Nicholas*, 82 So. 2d 510 (Fla. 1955) (judgment for malicious prosecution not lien against homestead); *see Downing v. State*, 593 So. 2d 607 (Fla. 5th Dist. Ct. App. 1992) (court could not require owner of homestead to execute mortgage on homestead to secure obligation for restitution for damage caused by burning trash).

69. *See Graham v. Azar*, 204 So. 2d 193 (Fla. 1967) (\$1000 of personal property exempt from claim for child support); *see also Isaacson v. Isaacson*, 504 So. 2d 1309 (Fla. 1st Dist. Ct. App. 1987) (refusing to grant a former spouse an equitable lien for alimony arrearage in excess of \$15,000 because of absence of fraud or other egregious conduct on the part of the former husband who resided in former marital home with new wife).

70. *E.g., Anderson v. Anderson*, 44 So. 2d 652, 655 (Fla. 1950) (dicta that even if the father had been head of a family "his interest in the homestead would still have been subject to sale for the purpose of providing support money for his children.").

71. *See Gepfrich v. Gepfrich*, 582 So. 2d 743 (Fla. 4th Dist. Ct. App. 1991). *But see Butterworth v. Caggiano*, 605 So. 2d 56, 60 n.5 (Fla. 1992) (noting that "[v]irtually all of the relevant [fraud exception] cases involve situations that fell within one of the three stated exceptions to the homestead provision.").

72. *Caggiano*, 605 So. 2d at 57. In *Caggiano*, an owner's homestead was protected from forfeiture and sale under the Florida Racketeer Influenced and Corrupt Organization Act, chapter 895, Florida Statutes, even though three bookmaking incidents occurred at his home.

Forfeiture under the Federal RICO Act is a separate matter. It would appear that a person's homestead could be subject to forfeiture and forced sale under the Federal RICO Act, 18 U.S.C. §§ 1961-68 (1988) by analogy to the federal tax lien cases and 18 U.S.C. § 1963(a) (1988), which provides that a violator "shall forfeit to the United States, irrespective of any provision of state law . . ." certain interests and property. *See United States v. Martenson*, 780 F. Supp. 492 (N.D. Ill. 1991) (RICO forfeiture of Minnesota homestead); *supra* note 38 (regarding federal tax liens).

73. In *Caggiano*, the court noted that "no illicit proceeds were used to purchase, acquire, or improve Caggiano's property." *Id.* at 61 n.5.

2. Transfer Provisions

The transfer provisions affect transfers made during the owner's lifetime as well as upon his or her death. The *inter vivos* provisions restrict the owner's right to transfer any interest in the homestead while married. The transfer provisions also affect the owner's right to devise the homestead upon death, if married or survived by a minor child. Upon death, the exemption inures to certain persons, so that in some cases the homestead descends or is devised, exempt from the deceased owner's creditors.

a. *Inter Vivos Alienation*

The constitution restricts a married owner's right to alienate his or her homestead. Article X, section 4(c) of the Florida Constitution provides in part:

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 be deed transfer the title to an estate by the entirety with the spouse. If the owner of spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Thus, if the owner of a homestead is married, he or she cannot sell, give, mortgage or otherwise alienate any interest in the homestead without the spouse's consent. One exception to this rule is that the owner may convey title to the owner and his or her spouse as tenants by the entirety, without the spouse joining in the conveyance. In addition, the Legislature authorizes a conveyance from one spouse to another without the joinder of the grantee spouse; and the constitutionality of this statute has been upheld on other grounds.⁷⁴

74. Florida Statutes section 689.11(1) currently 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." *See also* Williams v. Foerster, 335 So. 2d 810 (Fla. 1976) (upholding constitutionality of Florida Statutes section 689.11 (1975), holding deed from husband as tenant by the entirety to wife was not invalid because the wife did not join but was invalid because it was not properly witnessed and husband lacked intent to convey when he executed it); *see also* Jameson v. Jameson, 387 So. 2d 351 (Fla. 1980) (deed from husband to husband and wife as tenants by the entirety was valid even though wife did not join). The court in *Jameson* stated,

In our opinion the provision ['joined by the spouse'] is more logically and reasonably interpreted if the joinder requirement is applied only to the alienation

The homestead provisions do not guarantee the spouse the right to reside on the homestead while the owner is alive. The joinder requirement merely protects the future right that a surviving spouse has to receive an interest in the homestead. If the spouse survives, then the surviving spouse would be assured the right to reside in the homestead via a life estate or fee simple interest.

If the owner is married, there is some question as to whether the legal requirement for joinder can be waived if the owner's spouse has waived homestead rights in another document, such as an antenuptial agreement. The constitution does not restrict the right of a parent with a minor child to alienate homestead. The only protection a minor has occurs indirectly if the minor's parent is married and the spouse refuses to join in an alienation.

b. Devise Restrictions

There are some restrictions on an owner's right to devise the homestead. These provisions affect whether the owner has the right to devise the property, or whether the homestead descends by statutory mandate. Article X, section 4(c) of the Florida Constitution provides in part:

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.

If the owner is survived by a minor child, the owner cannot devise the homestead.⁷⁵ This restriction applies whether the owner is married or not. The owner cannot devise the homestead in trust for the benefit of the

clause. In our view, a requirement of spousal joinder when that spouse is the grantee was not intended by the constitutional drafters, and is neither rational nor necessary to protect the homestead heirs.

Id. at 354. Another theory that has been raised for this conclusion is that when "the non-owning spouse is a party to the transaction (grantee) the spouse has effectively 'joined' in the transfer by acquiescence and participation, although no formal execution was made." *Id.* at 353 (quoting *Star Project Commentary* submitted to 1978 Constitution Revision Commission).

75. This includes an afterborn or posthumous child. FLA. STAT. § 732.106 (1991); *Shone v. Bellmore*, 78 So. 605 (Fla. 1918). It also includes an adopted child. *See* FLA. STAT. § 732.108(1) (1991); *Church v. Lee*, 136 So. 242 (Fla. 1931). It also should include a child born out of wedlock when that child is considered the child of the owner under section 732.108(2). *See* FLA. STAT. § 732.108(2) (1991).

minor.⁷⁶

If the owner is married but has no minor children, the owner can devise the homestead to the surviving spouse. The devise cannot be of a life estate; it must be of a fee simple interest.⁷⁷ The devise may be accomplished by a specific or residuary devise to the surviving spouse.⁷⁸ The owner cannot devise the homestead to anyone other than the surviving spouse, unless the surviving spouse has waived his or her homestead rights.⁷⁹

If the owner has no spouse or minor child, the owner is free to devise the homestead to whomever he or she pleases. This is true even if the owner has adult children, who might inherit the property if he or she did not devise it.

The constitution does not provide who will receive the homestead. If the owner cannot devise the property,⁸⁰ does not devise it properly or can but chooses not to devise it, the Florida Probate Code determines the homestead's descent. Under the present Florida Probate Code, the following applies:

1. If there is a surviving spouse and descendants, the homestead descends, with a life estate to the spouse and the vested remainder to the descendants, per stirpes.⁸¹
2. If there is a spouse but no descendants, the homestead descends to the spouse.⁸²
3. If there are descendants, but no spouse, the homestead descends to the owner's descendants, per stirpes.⁸³
4. If there are no descendants and no spouse, the homestead

76. See *Beck v. Wylie*, 60 So. 2d 190 (Fla. 1952) (devise in trust for adult child was invalid when constitution prohibited devise if owner were survived by minor or adult children).

77. *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981).

78. See *Estate of Murphy*, 340 So. 2d 107 (Fla. 1976).

79. See *City Nat'l Bank v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991) ("[W]hen a decedent is survived by no minor children and the surviving spouse has waived homestead rights, there is no constitutional restriction on devising homestead property."); *Hartwell v. Blasingame*, 584 So. 2d 6 (Fla. 1991) (waiver of wife was binding on husband's children).

80. FLA. STAT. § 732.4015 (Supp. 1992).

81. FLA. STAT. § 732.401 (1991). This statute has been declared to be constitutional. The predecessor statute was declared constitutional when the existence of children, adult or minor, prohibited devise. See FLA. STAT. § 731.27 (1941); see also *Nesmith v. Nesmith*, 21 So. 2d 789 (Fla. 1945).

82. FLA. STAT. §§ 732.401, 732.102(a) (1991).

83. *Id.* §§ 732.401, 732.103(1), 732.104.

descends to the nearest heirs under the intestacy statute.⁸⁴

If the spouse waives his or her homestead rights, the spouse is not treated as surviving,⁸⁵ so that the third or fourth rule applies.

The restrictions on devise do not apply to a homestead interest held as a tenant by the entirety or a joint tenant with right of survivorship.⁸⁶ This is because the tenant does not have any devisable interest in the homestead. When one spouse dies, the tenancy by the entirety passes to the surviving spouse by operation of law. When a joint tenant dies, the joint tenancy by right of survivorship passes to the surviving tenant or tenants. Many spouses choose to own their home in a tenancy by the entirety. This effectively avoids the surviving spouse receiving only a life estate, even if the first spouse to die is survived by a minor child. The minor child is not protected even when the surviving spouse is not the other parent of the minor child. The restrictions also do not apply to life estates or certain interests in irrevocable trusts.⁸⁷ The restrictions do apply to beneficial interests in a revocable trust.⁸⁸

c. Inurement of Owner's Exemption Upon Owner's Death

The Florida Constitution also determines who receives the owner's exemption when he or she dies. This affects whether the persons to whom the homestead is devised or descends will receive the homestead free from the claims of the deceased owner's creditors. The Florida Constitution provides that the exemption "shall inure to the surviving spouse or heirs of the owner."⁸⁹ A person's heirs are defined under the intestacy statutes.⁹⁰ The exemption inures to the heirs, even if they were not dependent on the

84. *Id.* § 732.103.

85. *Tescher*, 578 So. 2d at 703.

86. FLA. STAT. § 732.401(2) (1991).

87. *See infra* note 141 and accompanying text.

88. *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th Dist. Ct. App. 1981); *Johns v. Bowden*, 66 So. 155, 159 (Fla. 1914) (grantor retained life estate in trust and power to direct trustee to convey homestead during life; court held trust provision "in the nature of a testamentary disposition . . . forbidden by law when the testator leaves a wife or a child"). Section 732.4015 of the Florida Statutes, has been amended to allow the grantor of a revocable trust to dispose of his or her equitable interest in homestead to his or her spouse, through a disposition in the trust, if there are no minor children. *See* FLA. STAT. § 732.4015 (Supp. 1992). The constitutionality of this statute has not been tested.

89. FLA. CONST. art. X, § 4(b).

90. *Public Health Trust v. Lopez*, 531 So. 2d 946, 951 n.6 (Fla. 1988).

homestead owner.⁹¹

The exemption does not necessarily inure to the benefit of the same persons who receive the homestead. If it does, inurement of the exemption is significant. If the same persons do not receive both, the inurement of the exemption is meaningless.

The owner's exemption and the homestead may converge in the same persons under the following circumstances:

1. If the owner is married and has no children or other descendants and the surviving spouse has not waived his or her homestead rights, then the surviving spouse will receive the homestead and the exemption.⁹²

2. If the owner is married and has only adult children and the surviving spouse has not waived his or her homestead rights, either the surviving spouse will receive the entire homestead by devise or will receive a life estate, with all of the owner's descendants, per stirpes, receiving vested remainder interests. The exemption will inure to the benefit of the surviving spouse and the descendants.

3. If the owner is not married, but is survived by at least one minor child, all of the owner's descendants, per stirpes, will receive the homestead and the exemption. If the owner is married, but the surviving spouse waived his or her homestead rights, the same result will occur.

4. If the owner is not married (or is married but the surviving spouse waived his or her homestead rights) and has no minor children, the following applies:

a. If the property is devised to the owner's living children, with grandchildren or other descendants receiving an interest only if his or her parent predeceased the owner, the exemption will inure to those devisees, because they qualify as heirs.⁹³

91. *Id.* at 949.

92. The spouse will receive the homestead by devise or descent. If the homestead is owned as tenancy by the entirety, the spouse receives the property free and clear of the other's creditors (other than those creditors with valid liens) because the property is entirety property.

93. *HCA Gulf Coast Hosp. v. Estate of Downing*, 594 So. 2d 774, 776 (Fla. 1st Dist. Ct. App. 1991) ("[t]he benefit of the homestead forced sale exemption inures to a spendthrift beneficiary who would be otherwise entitled to claim homestead protection had title passed directly to her by devise or intestacy."); *Bartelt v. Bartelt*, 579 So. 2d 282, 283 (Fla. 3d Dist. Ct. App. 1991) (footnote omitted) ("[w]hen the decedent's homestead is devised to his son—a member of the class of persons who are the decedent's 'heirs'—the constitutional

b. If the property is devised to other individuals who would not be heirs, they will receive the homestead, but not the exemption. This means that before the non-heirs receive the homestead, it should be subject to administration (and claims of creditors) in the hands of the decedent's personal representative.⁹⁴ A post-death sale by the heirs will not subject the proceeds to claims of creditors of the decedent.⁹⁵ A sale directed by the will with a devise of the proceeds may.⁹⁶

B. *History of Present Homestead Exemption Law*

The exemption is over 200 years old. The first constitution for the State of Florida, the Florida Constitution of 1868, provided the basic framework for the present exemption. Some of the exemption components and the transfer provisions were amended in 1885,⁹⁷ 1968, 1972 and 1984. The 1968 revision was effective January 7, 1969, the 1972 amendment January 2, 1973, and the 1984 amendment January 8, 1985. The appendix contained the complete text of the respective homestead exemption provisions in the Florida Constitutions of 1868, 1885, and 1968, as well as the 1972 and 1984 amendments. The additions and changes in each subsequent text are underlined. An historical summary of these changes with respect to the exemption components (the qualification requirements

exemption from forced sale by the decedent's creditors found in Article X, Section 4(b) of the Florida Constitution, inures to that son."'). *But see In re Estate of Hill*, 552 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1989) (exemption does not inure to devisees—life estate in homestead was devised to stepdaughter, with proceeds upon sale distributed to stepdaughter and son).

94. *But see* Fla. Stat. § 733.608 (1991) (providing that: "All real and personal property of the decedent, *except the homestead* . . . shall be assets in the hands of the personal representative: (1) For the payment of devises, debts, family allowance, estate and inheritance taxes, claims, charges, and expenses of administration.") (emphasis added).

95. *Adams v. Clark*, 37 So. 734 (Fla. 1904); *see also* *Tudhope v Rudkin*, 595 So. 2d 312 (Fla. 2d Dist. Ct. App. 1992) (sale of homestead by guardian of decedent's minor children was made after homestead descended to them and exemption from decedent's creditors inured to them, so that decedent's creditors could not reach proceeds in hands of guardian).

96. *See* *Estate of Price v. West Fla. Hosp., Inc.*, 513 So. 2d 767 (Fla. 1st Dist. Ct. App. 1987) (direction in will to sell home and divide proceeds between adult children was treated as devise of non-exempt proceeds, so that proceeds were subject to claims of creditors). Some also argue that if there is no spouse or minor child, a direction in the will to pay expenses from the residuary may result in a residuary devise of the homestead being subject to claims, even if the homestead is devised to an heir to whom the exemption inures.

97. For an extensive discussion of the homestead issues under the 1885 Constitution through 1949, *see* *Crosby & Miller*, *supra* note 14.

and limitations and the scope of the exemption, including exceptions) and the transfer provisions (*inter vivos*, devise and survival of the exemption) follows.

1. Exemption Provisions

a. Qualification Requirements and Limitations

i. Florida Constitution of 1868

The Florida Constitution of 1868 established the homestead exemption with restrictive ownership and residency requirements. The exemption also was subject to acreage limitations substantially similar to the present law. Only the *head of a family* residing in Florida could qualify for the exemption, if he or she owned an interest in an estate in land. The homestead must have been the *owner's* permanent residence.

The owner could be the head of a family at law or a family in fact.⁹⁸ The homestead included any improvements on the real estate of up to 160 acres in an unincorporated town or city or up to one-half an acre within an incorporated town or city. The rural homestead was required, by interpretation, to be the owner's permanent residence, although there was no restriction on the use of the other acreage. The urban homestead in a town or city was limited to the residence and *business house* of the owner. The exemption was not limited by a dollar amount.

The provisions for up to 160 acres paralleled the federal homestead law, under which a head of a family could purchase 160 acres of land for a nominal fee, if they settled and cultivated the land and lived on it for five years. The federal homestead law protected the owner from pre-existing debts; whereas the Florida Constitution could exempt debts incurred before or after the homestead was acquired.

98. *Holden v. Gardner*, 420 So. 2d 1082 (Fla. 1982). In *Holden*, the court stated: In determining whether a person is the head of a family, Florida courts have long used a test which requires a showing of either: (1) a legal duty to support which arises out of a family relationship, or (2) continuing communal living by at least two individuals under such circumstances that one is regarded as in charge. While the former requirement looks to a "family in law," the latter looks to a "family in fact," which arises out of a moral obligation to support. *Id.* at 1083 (citations omitted).

ii. *Florida Constitution of 1885*

In 1885, the qualification requirements were amended in one aspect. The constitution provided that the acreage requirement applicable to a homestead could not be reduced if the homestead was subsequently included within the limits of an incorporated city or town, unless the owner consented. Thus, once a homestead qualified for the exemption of up to 160 acres, it could not then be reduced to only one-half an acre or to only the residence and business home of the owner without the owner's consent.

iii. *Florida Constitution of 1968*

In 1968, the qualification requirements were amended with respect to the residency requirement and the urban use restriction. In addition, an acreage contiguity requirement was affirmatively stated in the constitution and the acreage nomenclature was changed from incorporated cities and towns to municipalities.

After the 1968 revision, a person still needed to be the head of a family in order to qualify for the exemption. The residency requirement for the urban homestead was expanded in part and reduced in part. The urban homestead could extend to the residency of the owner *or his or her family*, but no longer could include a business house. Thus, the head of a family who did not reside in Florida could own a homestead in Florida, if it were the residence of his or her family. Similarly, the head of a family residing in Florida with his or her family could establish a homestead. The courts had held that there could be only one head of one family, so that it was generally understood that one family could have only one homestead.⁹⁹

The residency requirement for the rural homestead was not stated but was inferred. The constitution limits the urban homestead to "the residence of the owner or his family;"¹⁰⁰ the implication being that the urban homestead includes, but is not limited to, that residence. In addition, residency is considered to be an inherent component of the term "homestead," which is used but not defined in the constitution.

99. There were no reported cases under which one person claimed to own two homes and to be the head of two different families, one residing in each home. See *First Fin. Planning Corp. of S. Fla., Inc. v. Gherman*, 103 B.R. 326 (Bankr. S.D. Fla. 1989) (although constructive trusts were imposed on three residences owned by wife or child or in-law of debtor, exemption would not have been granted to debtor, because funds used to purchase all three homesteads were embezzled); *In re Gherman*, 101 B.R. 369 (Bankr. S.D. Fla. 1989) (debtor's exemption for life estate denied).

100. FLA. CONST. art. X, § 4(a)(1) (amended 1984).

In 1968, the constitution also was amended to provide that the rural homestead applied to up to 160 acres of “contiguous land and improvements thereon” and the urban homestead was limited to one-half acre of “contiguous land.”¹⁰¹ Prior to 1968, there were some questions as to whether the acreage always had to be contiguous to qualify for the homestead exemption.¹⁰² The 1968 revision also reflected the changes in terminology from incorporated cities and towns to municipalities; however, the same acreage limitations were retained.¹⁰³

iv. 1984 Amendment to Florida Constitution of 1968

In 1984, the ownership requirement was significantly expanded. This amendment deleted the head of the family requirement. The ownership requirement was changed so that any “natural person” owning a homestead could qualify for the exemption.¹⁰⁴ This change expanded the exemption to single or married persons who do not head a family. Thus, a person who owns a home and resides there with his or her family can qualify for the exemption, even if he or she is not the head of the family. In addition, a person who is not married and has no family is entitled to the exemption for his or her residence.

b. Scope of Exemption and Exceptions

i. Florida Constitution of 1868

The Florida Constitution of 1868 contained some of the basic framework of the present scope of the exemption. It contained the exemption from forced sale, with some of the present exceptions. The original 1868 homestead provisions exempted the homestead “from forced sale under any *process of law*.”¹⁰⁵ It did not provide protection from lien attachment, but it did prevent forced sale by reason of such liens.

Some of the present exceptions were contained in the 1868 homestead

101. *Id.*

102. *Clark v. Cox*, 85 So. 173, 174 (1920) (“the question whether actual contiguity is required must be determined in each case on its peculiar facts.”). In *Cox*, the conveyance of a 100-foot strip across the homestead for use as a public railroad right of way did not deprive land on both sides of easement from constituting homestead. *Id.*

103. FLA. CONST. art. X, § 4(a)(1) (amended 1984).

104. *Id.*

105. FLA. CONST. of 1868, art. IX, § 1.

provisions.¹⁰⁶ The homestead was exempt from forced sale for taxes. It was exempt from the payment of obligations contracted for the purchase of the homestead or for the erection of improvements thereon. It also was exempt for house, field, or other labor performed on the homestead premises.

ii. *Florida Constitution of 1885*

In 1885, the scope of the exemption, and the exceptions from the exemption were expanded. The exemption protected the homestead from forced sale under *process of any court*.¹⁰⁷ In addition, the exemption provided that *no judgment, decree or execution was a lien upon the exempted property*, unless the debt was specifically excepted from the exemption.¹⁰⁸

The exceptions were expanded to include *assessments*, as well as taxes.¹⁰⁹ There was some question as to whether the homestead was exempt from liens for any other state, county or municipal tax liability that did not relate to the homestead. Further, the homestead was not exempt from forced sale for obligations contracted to erect or *repair* improvements on the real estate. Thus, the exceptions covered taxes, assessments, obligations contracted to purchase the property or erect or repair improvements, as well as for house, field, and labor. In all other respects, the homestead was protected from liens and forced sale. In 1962, the Fifth Circuit confirmed that federal tax liens also were an exception, so that a Florida homestead could be liened and a sale forced to pay a federal tax obligation.¹¹⁰

iii. *Florida Constitution of 1968*

In 1968, the exceptions were revised in minor detail; otherwise, the full scope of the exemption was retained.¹¹¹ The homestead remained exempt

106. *Id.*

107. *See* FLA. CONST. of 1885, art. X, § 1 (\$1000 personalty exemption); *West Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 212 (1918) (the court interpreted meaning of phrase “process of any court” with respect to \$1000 personalty exemption, to apply “not only to formal and technical process, but to any judicial proceedings, of law or in equity, which seek the appropriation of the property to the payment of debts.”).

108. FLA. CONST. of 1885, art. X, § 1.

109. *Id.*

110. *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962).

111. FLA. CONST. art. X, § 4(a) (amended 1984).

from forced sale under process of any court and was protected from any judgment, decree or execution becoming a lien on the homestead, except for certain superior debts. The exceptions were reorganized so that they were more parallel in construction. The exception for taxes and assessments was changed to “*taxes and assessments thereon.*”¹¹² This was significant to the extent that the exception was limited to property taxes and assessments on the homestead property and could not include other state taxes, such as state income taxes, that had no relationship to the homestead property. The last time the scope of the exemption or the exceptions were amended was in 1885.¹¹³

2. Transfer Provisions

The homestead transfer provisions of the homestead exemption affect a married owner’s ability to transfer the homestead during the owner’s lifetime. They also affect whether an owner who is married or has minor children can designate, by last will and testament, who will receive the homestead upon the owner’s death. These provisions also affect whether the exemption inures to the benefit of the persons who receive the homestead upon the owner’s death. The original constitutional provisions and the revisions and amendments reflect some of the changes in the rights of men and women with respect to property ownership, as well as other changes.

a. *Inter Vivos Alienation*

i. *Florida Constitution of 1868*

The Florida Constitution of 1868 did not contain any restrictions on the right of the head of a family to alienate any or all of his or her interest in the homestead during the owner’s lifetime.¹¹⁴ Generally, the head of the family was the man and the wife had a dower interest in the homestead. Dower rights applied to the homestead because it was real property.

ii. *Florida Constitution of 1885*

In 1885, the constitution was revised to provide that the homestead did not prevent the owner from alienating his or her homestead by deed or

112. *Id.*

113. See FLA. CONST. of 1885, art. X, § 1.

114. See FLA. CONST. of 1868, art. IX.

mortgage, provided that the owner duly executed the deed or mortgage.¹¹⁵ In addition, if the owner were married, the owner's husband or wife was required to *duly execute* the deed or mortgage.¹¹⁶

iii. *Florida Constitution of 1968*

In 1968, the *inter vivos* transfer provisions were revised.¹¹⁷ Gifts were added to the list of permitted alienation, so that the owner could alienate his or her homestead by mortgage, sale, or gift. This eliminated any judicially imposed requirement of consideration. If the owner was married, the owner could not alienate the homestead unless the spouse joined. The requirement that an alienation be duly executed was deleted; thus, a contract to sell a homestead and a mortgage is enforceable even if it is not witnessed.¹¹⁸ In addition, a provision was added so that an incompetent owner could alienate the homestead or an incompetent spouse could join as provided by law (whether judicial or statutory).

b. *Devise upon Death*

i. *Florida Constitution of 1868*

The Florida Constitution of 1868 contained no reference to the owner's right to dispose of the homestead by will, or any restrictions on that right.¹¹⁹ The courts inferred from the text of the constitution that the homestead descended to the owner's heirs and could not be devised.¹²⁰

115. A deed or mortgage was duly executed if it was executed in accordance with statutes requiring deeds and mortgages to be executed. *Oates v. New York Life Ins. Co.*, 152 So. 671 (Fla. 1934). At that time, due execution by a married couple required a mortgage to be signed by husband and wife under seal, in the presence of two witnesses, to be acknowledged by the wife that she executed the mortgage freely and voluntarily, to contain a certificate of the officer, and for delivery to occur. *Id.* at 673. See *Abercrombie v. Eidschun*, 66 So. 2d 875 (Fla. 1953) (contract to sell homestead required due execution—two witnesses); see also *Crosby & Miller*, *supra* note 14, at 63.

116. See *supra* note 115.

117. FLA. CONST. art. X, § 4(c) (amended 1972).

118. *Moxley v. Wickes Corp.*, 356 So. 2d 785 (Fla. 1985) (relating to mortgage); *Rosenthal v. Finger & Margolis, P.A.*, 460 So. 2d 993 (Fla. 4th Dist. Ct. App. 1984) (relating to contract to sell).

119. FLA. CONST. of 1868, art. IX.

120. *Wilson v. Fridenburg*, 19 Fla. 461 (1882) (holding that a husband could not devise homestead because devise would be incompatible with the constitutional provision accruing the exemption to his heirs).

Further, if the owner was a married man, his wife was protected by dower.¹²¹

ii. *Florida Constitution of 1885*

In 1885, the Florida Constitution was revised to provide that nothing in the homestead provisions prevented the head of a family from disposing of his or her homestead by will if the "holder be without children."¹²² By implication, when the holder had children, he or she was prohibited from disposing of his or her homestead by will.¹²³ If there were a child or children, the homestead descended to his or her heirs, subject to a claim of dower if survived by a wife. If there were no children, the owner could devise the homestead; but if the owner were a married man, that devise would be subject to the widow's right to dower.¹²⁴ In 1899, a statute was enacted prohibiting the head of the family who was survived by a wife from devising the homestead.¹²⁵ The wife was entitled to dower or a child's share.¹²⁶ By contrast, if the wife was the head of the family, she could devise it if she chose and could disinherit her husband from receiving the homestead.

In 1933, the descent provisions were changed when the head of the family was survived by a widow and lineal descendants. In that case, the wife received a life estate and the descendants the vested remainder.¹²⁷ Dower no longer applied to homestead, except for preexisting dower rights.¹²⁸ If the wife was the head of the family, her husband was not entitled to a life estate; instead he was entitled to a child's share.¹²⁹ Further, if there were no descendants, a wife/head of the family could disinherit her husband from the homestead, but a husband/head of the family could not disinherit his wife. The courts never decided whether this violated the United States Constitution or the Florida Constitution.

121. *Id.* at 467.

122. FLA. CONST. of 1885, art. X, § 4.

123. *Palmer v. Palmer*, 35 So. 983 (Fla. 1904).

124. *Purnell v. Reed*, 13 So. 874, 876 (Fla. 1893).

125. Ch. 4730-69, § 1, 1899 Fla. Laws 119, 119-20; *see also* FLA. STAT. § 731.05 (1933) (regarding the prohibition on devise).

126. GENERAL STATUTES OF STATE OF FLORIDA, Devolution by Dower, ch. 3, § 2308 (1872).

127. FLA. STAT. § 731.05 (1931).

128. FLA. STAT. § 731.34 (1933).

129. *Id.* § 731.23(1).

iii. *Florida Constitution of 1968*

In 1968, the constitution affirmatively prohibited devise in certain circumstances.¹³⁰ The constitution provided that the homestead could not be devised if the owner were survived by a spouse or minor child. This represented two substantial departures from the prior law. First, surviving husbands and wives were both protected. Thus, if the wife were the head of the family, she could not devise her homestead if her husband survived her.

Second, only the existence of minor children prohibited the head of a family from devising the homestead. If the family head was survived by children, all of whom were adults, but no spouse, the owner could devise the homestead freely, even if those children comprised the family of which the owner was the head.

Although the constitution was revised in 1968, the Florida probate law continued to prohibit devise if the head of the family was survived by any lineal descendant, whether or not a minor.¹³¹ In 1971, this statute was declared unconstitutional to the extent it prohibited devise when the owner was survived by an adult child, but not a spouse or a minor child.¹³²

The constitutional distinction between a surviving minor child and an adult child creates an unusual aspect to the prohibition on devise, because minority is a temporary condition. Further, the constitution does not guarantee the minor the right to reside in the homestead. The existence of a minor prohibits devise,¹³³ but the Florida Probate Code does not necessarily provide the minor with a residence during his or her minority. If the owner is survived by a spouse and a minor child, the surviving spouse receives a life estate in the homestead.¹³⁴ If that spouse is also the minor's parent or guardian, the minor child can reside with the surviving spouse. Otherwise, the minor will reside with his or her surviving parent or guardian. If there is no surviving spouse, the minor child will receive a present, possessory interest in the homestead. If there are other surviving children or descendants, the minor child must share ownership with the other children and descendants. Thus, if there are other children, the minor is not provided exclusive possession of the homestead. Further, the minor will reside there only if his or her surviving parent can live there too.

130. FLA. CONST. art. X, § 4(c).

131. FLA. STAT. § 731.05(1) (1931).

132. *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971).

133. FLA. CONST. art. X, § 4(c).

134. FLA. STAT. § 732.401 (1991).

iv. 1972 Amendment to Florida Constitution of 1968

In 1972, the Florida Constitution of 1968 was amended to allow the owner to devise to his or her spouse if there was no minor child.¹³⁵ This devise may be accomplished by a specific devise or a residuary devise to the spouse;¹³⁶ however, the devise must be of a fee interest.¹³⁷ Clearly, a specific devise of the owner's entire interest to the surviving spouse will be effective if there are no minor children, even if the owner only owns an undivided one-half interest.¹³⁸ It is questionable whether a devise to the spouse of an undivided one-half interest in the homestead will qualify if the owner is the sole owner of the entire property.¹³⁹

The restriction on devise applies if the homestead is owned by a revocable trust created by the owner.¹⁴⁰ The restriction should not apply to the beneficial interest owned by a beneficiary of an irrevocable trust, even if the beneficiary was the settlor of the trust, so long as the transfer into the trust was a valid inter vivos transfer and the beneficiary had no power to

135. FLA. CONST. art. X, § 4(c).

136. Estate of Murphy, 340 So. 2d 107 (Fla. 1976).

137. *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981).

138. See *In re Estate of Donovan v. Hendrickson*, 550 So. 2d 37 (Fla. 2d Dist. Ct. App. 1989) (devise to wife of decedent's entire undivided one-half interest as a tenant in common was valid—devise was through residuary clause and revocable trust).

139. In *In re Estate of Ritz v. Ritz*, 385 So. 2d 1102 (Fla. 5th Dist. Ct. App. 1980), the court approved a devise of homestead by a husband of a life estate in his homestead to his wife and a power to sell. The wife was entitled to 80% of the proceeds upon sale during her life or upon her death. The other 20% of the proceeds was payable to two sons of his. The supreme court overruled *Ritz* in *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981).

In two cases after *Finch*, the district court of appeal ruled that the devise to the surviving spouse and another as tenants in common was invalid in its entirety, so that the wife received a life estate and the remainder vested in the lineal descendants, per stirpes. *Jewett v. Sun Bank*, 509 So. 2d 1256 (Fla. 2d Dist. Ct. App. 1987) (devise to wife and adult son); *Iandoli v. Iandoli*, 504 So. 2d 426 (Fla. 4th Dist. Ct. App.), *review denied*, 513 So. 2d 1061 (Fla. 1987) (devise to wife and adult daughter).

It is arguable that the devise to the spouse should qualify, even if it is less than a fee, and only the devise to the nonspouse should fail. This result is unwieldy; so that few testators would choose this option if they understood the result. For example, a devise of a one-half interest to the spouse would result in the spouse owing one-half outright and a life estate in the other half if there were lineal descendants.

140. *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th Dist. Ct. App. 1981); *Johns v. Bowden*, 66 So. 155 (Fla. 1914); see also FLA. STAT. § 732.4015(2) (Supp. 1992) (defining a devise to include "a disposition by trust of that portion of the trust estate which, if titled in the name of the settlor of the trust, would be the settlor's homestead.").

dispose of the homestead interest upon his or her death.¹⁴¹

The devise restrictions do not apply if the homestead is owned by both spouses, as tenants by the entirety, even if there is a minor child.¹⁴² It also does not apply if the homestead is co-owned with another as joint tenants with right of survivorship and the joint tenancy was created before the owner married or had a child.¹⁴³ Similarly, the restrictions do not apply to a life estate. If the homestead is co-owned as tenants in common, the restrictions on devise apply to each owner's undivided interest.

In addition, if the spouse waives his or her homestead rights, the owner is not treated as survived by a spouse. Thus, the owner can devise the homestead to any one he or she chooses, so long as the owner is not survived by a minor child.

c. Inurement of Exemption

i. Florida Constitution of 1868

The Florida Constitution of 1868 contained some of the basic framework of the provisions for the survival of the exemption. The first constitution provided that the exemption from forced sale for the owner's debts would "accrue to the heirs of the party having enjoyed or taken the benefit of such exemption."¹⁴⁴ Under the laws of descent, the homestead would descend to the owner's heirs. The owner's exemption also would accrue to those heirs. Thus, the heirs received the homestead free of any threat of a forced sale. However, this did not mean that the heirs could continue to own the homestead free from the reach of their own creditors. An heir would be entitled to his or her own homestead exemption only if that heir was the head of the family residing in Florida and the property became that heir's residence.

ii. Florida Constitution of 1885

In 1885, the constitution expanded the group that could benefit from the owner's exemption. The constitution was revised so that the exemption would "inure" to the surviving widow and heirs of the party entitled to the

141. The retention of other rights by the grantor/beneficiary of an irrevocable trust may be treated comparable to outright ownership in certain cases, so as to preclude disinheritance of a surviving spouse or minor child.

142. See *Wilson v. Florida Nat'l Bank & Trust Co.*, 64 So. 2d 309 (Fla. 1953).

143. See *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d Dist. Ct. App. 1984).

144. FLA. CONST. of 1868, art. IX, § 3 (1868).

exemption.¹⁴⁵ This guaranteed the surviving widow the benefit of her husband's exemption from the reach of his creditors. In the special case where the wife was the head of the family, the exemption would not inure to her surviving husband as an heir.

iii. *Florida Constitution of 1968*

The Florida Constitution of 1968 treats surviving husbands and wives similarly. After this revision, the exemption inures "to the surviving spouse or heirs of the owner."¹⁴⁶ It is unclear why the disjunctive "or" was used. The term "heir" is sufficient to include a surviving spouse. In addition, sometimes the homestead descends to the surviving spouse and descendants. The exemption should inure to the benefit of all of these new owners, so that the life estate and vested remainder interests can receive the benefit of the exemption from the decedent's creditors.

When the Florida Constitution was amended in 1984 to extend the exemption from the head of the family to all natural persons,¹⁴⁷ the provision regarding inurement was not changed. Nevertheless, the amendment changed the scope of the inurement provision. The effect of the amendment is that more residences can qualify as homesteads, and thus more exemptions can inure to more heirs.¹⁴⁸

In 1968, Florida Supreme Court interpreted the term "heirs" to mean those persons who would inherit the property if the owner died intestate.¹⁴⁹ After the 1968 amendment, a parent living alone can qualify for the exemption without being the head of a family. That parent can devise the homestead to his or her adult children and they will receive the homestead property and the exemption. Thus, adult children can qualify as heirs, regardless of whether the owner has an obligation to support them or his or her adult children and they would receive the homestead and the exemption. Thus, adult children would qualify as heirs, regardless of whether the owner had an obligation to support them or was in fact supporting them.¹⁵⁰ Further, the exemption accrues even if the heirs have no intention of using the decedent's homestead as their own. This results more frequently now that

145. FLA. CONST. of 1885, art. X, § 2.

146. FLA. CONST. art. X, § 4(b).

147. *Id.* § 4(a) (amended 1984).

148. *Id.*

149. *Public Health Trust v. Lopez*, 531 So. 2d 946, 950 n.6 (Fla. 1988).

150. This was true under the prior law also. Dependence was not a prerequisite to inurement. *See, e.g., Cumberland & Liberty Mills v. Keggin*, 190 So. 492 (Fla. 1939); *Miller v. Finegan*, 7 So. 140 (Fla. 1890).

potentially more homestead exemptions can inure to more heirs of deceased homeowners.

II. ANALYSIS OF NEED FOR REFORM

This portion of the article will explore the need for reform with respect to the exemption provisions and the transfer provisions.

A. *Exemption Provisions*

The constitution was amended in 1984 to expand the class of persons who could qualify for the homestead exemption to any natural person.¹⁵¹ This expansion resolved many of the inequities arising from the outdated concepts of each family having one head and only the head of the family being entitled to the homestead exemption.

The homestead exemption is important to married couples as well as single individuals (whether divorced, widowed or never married). In some cases, it is more important to the single individual. A married couple can choose to own their property as tenants by the entirety. A tenancy by entirety property is subject only to debts for which both spouses are liable, regardless of whether it qualifies as a homestead. When the tenancy by entirety property is a homestead, the property gets added protection because it is not liable for most joint debts. The homestead is liable only for those joint debts that are superior to the exemption, such as debts relating to the purchase, repair, or improvement of the homestead or taxes thereon.

The qualification requirements and limitations of the homestead exemption will be addressed first. Particular emphasis will be given to whether the homestead exemption should be extended to cover interests that do not qualify as a present estate in land, such as cooperatives and vested remainders. Next, the scope of the exemptions and the breadth of the exceptions will then be considered, with discussion of potential areas in which the present exemption may be abused. Then, the transfer provisions will be considered, with emphasis on who should be protected by the exemption, and when and how they should be protected.

This article also will explore the appropriate method to implement such reform. In some cases, a constitutional amendment will be needed. In other cases, the solution may be implemented by statute or judicial decision, or by revision of another area of the law, such as the fraudulent transfer law.

151. FLA. CONST. art. X, § 4(a).

Constitutional reform should be the exception rather than the rule. Constitutional provisions should bear the test of time. If the Florida homestead provisions are to be reformed, there should be a significant showing of need for reform in addition to a showing of changed circumstances or unequal or unfair treatment that merits reform. In addition, it is important to focus on the purpose of the exemption when considering reform: to assure that an owner's home is a shelter, free from the reach of his or her creditors, and that home can provide shelter for the homeowner's family during the owner's lifetime or upon his or her death.

1. Qualification Requirements and Limitations.

The qualification requirements of the homestead exemption relate to who can own a homestead and how it can be used, as well as what interest in land qualifies for the exemption and how much land can qualify for it. At present, there is no value limit on the exemption. First, the issue of whether there should be a value limit will be addressed. Then, the provisions relating to who can own a homestead and what residency or use restrictions apply, as well as what limitations should apply to the exemption, will be considered together. This is because the residency requirement and the acreage limitations are intertwined. Then, the issue of what types of ownership interest should qualify for the exemption will be discussed.

a. *Limitation on Value*

One of the calls for reform that sounds from time to time is the need for the exemption to be limited by a maximum dollar value.¹⁵² The homestead exemption has not been subject to a value limit since its enactment in 1868. The fact that the exemption has been extended to single owners and other natural persons is not reason enough to impose a dollar limitation. Occasionally, a case reaches the newspapers in which a person with significant creditors purchases an expensive homestead for a price in excess of \$1,000,000 and qualifies for the exemption.¹⁵³ This exemption, in and of itself, does not shield that person from the reach of creditors.

152. Crosby & Miller, *supra* note 14, at 47. This suggestion was not adopted by the Constitution Revision Commission in 1977-78. The Background Papers state that "Florida has evidenced a strong desire to protect the homestead exemption instead of the dollar value exemption granted by most states." *Background Papers, Constitution Revision Commission 1977-78*, at 3 (copy on file at the Nova Law Review office).

153. See Larry Rohter, *Rich Debtors Find Shelter in Florida*, N.Y. TIMES, July 25, 1993, § 1, at 1, 26.

If creditors' funds were wrongfully used to benefit the homestead, the creditor can reach the homestead, and in some cases, the entire exemption may be denied. If that homestead owner has other assets, those assets can be reached by the creditors unless those assets qualify for another type of exemption. If the owner sells his or her homestead, the proceeds can be reached unless the owner intends to reinvest the proceeds, segregates them, and does reinvest them in another homestead within a reasonable period of time. Thus, the creditors have other remedies. If the owner of the homestead keeps the homestead and files a petition in bankruptcy, the owner can obtain a discharge from liability to some of these creditors. In that case, it is the discharge, rather than the homestead exemption, that protects the debtor/homeowner.¹⁵⁴

The Bankruptcy/UCC Committee of The Florida Bar conducted a limited study in 1992 to determine if there was a pattern of abuse in the use of the forty-seven different exemptions available to debtors in Florida.¹⁵⁵ One of the eight exemptions claimed most often was the homestead exemption. One-third of the 400 debtors surveyed in the Southern, Middle and Northern Districts of Florida claimed a homestead exemption. The average homestead exemption was \$40,000 in the Northern and Middle Districts combined and \$72,000 in the Southern District. The highest homestead exemption claimed was \$115,000 in the Northern and Middle Districts and \$300,000 in the Southern District. This limited survey did not reflect a pattern of abuse in claiming exemptions. If there is a pattern of abuse, one alternative would be to limit the total exemptions a debtor can claim. There would be no maximum value for the homestead exemption, but the value of the homestead exemption claimed could limit the total value of other exemptions that a debtor could claim. If this alternative is appropriate, it would be advisable to amend the constitution to authorize the Legislature to enact legislation limiting the maximum value availability of other exemptions that can be claimed, taking into account the value of the homestead exemption being claimed by that person. One exemption that Florida cannot control is the federal exemption provided to benefits in a qualified retirement covered by ERISA, such as a pension, profit-sharing, or stock bonus plan.¹⁵⁶ The amount of this exemption is not limited by

154. See 11 U.S.C. § 524(a)(1) (Supp. 1993)

155. *A Survey of Bankruptcy Exemptions in Florida*, report of The Bankruptcy/UCC Committee of THE FLORIDA BAR, presented and approved on January 9, 1992 (copy on file at the *Nova Law Review* office).

156. See *Patterson v. Shumate*, 112 S. Ct. 2242 (1992); see also FLA. STAT. § 222.21 (1991).

ERISA, although there are built-in limitations on deductible employer contributions and benefits.

It also is noteworthy that some of these high profile debtors have been unable to claim the exemption when they used stolen funds to purchase the exemption,¹⁵⁷ when the homestead was owned by a corporation,¹⁵⁸ or when the purchase of the homestead could be avoided.¹⁵⁹

A survey of other states may provide some insight into the issue of whether a maximum value should be imposed on the homestead exemption. There is no uniformity among the states; although, there are common patterns. Ninety percent of all of the states (forty-five of fifty states) provide a homestead exemption in a nonbankruptcy context.¹⁶⁰ In bankruptcy, a debtor in every state but Delaware can claim a homestead exemption. Some debtors in bankruptcy have the option of choosing the federal homestead bankruptcy exemption; while others are limited to the state exemption.

Fifteen states (one-third of the forty-five) provide the homestead exemption in their state constitutions.¹⁶¹ The median exemption offered by the forty-five states in a nonbankruptcy context is \$30,000. Eight of these states provide an exemption that is limited by acreage but not value.¹⁶² The other thirty-seven impose a maximum value on the exemp-

157. *In re Gherman*, 101 B.R. 369, 371 (Bankr. S.D. Fla. 1989). The court also held that Henry Gherman had "abandoned his homestead when he secretly departed Miami on August 8, 1988 with suitcases containing \$4.4 million in embezzled funds in \$100 bills, fleeing those he had swindled, and headed for a country with no extradition treaty. *Id.*

158. *In re Duque*, 33 B.R. 201 (Bankr. S.D. Ala. 1983).

159. *See Myerson & Kuhn v. Brunswick Assocs.*, 121 B.R. 145, 158 (Bankr. S.D.N.Y. 1990) (noting that Kuhn's sale of his New York home and purchase of a new home in Florida might be a fraudulent transfer); *see also In re Warner*, 90 B.R. 532, 533 (Bankr. M.D. Fla. 1988) (noting that certain transfers, such as the debtor's purchase of a 400 acre farm, the transfer of 320 of those acres to the debtor's wife or son, and the subsequent transfer of the "homestead" property to a tenancy by the entirety could be avoided if deemed fraudulent).

160. Connecticut, Delaware, New Jersey, Pennsylvania, and Rhode Island are the five states that fail to provide a homestead exemption in a nonbankruptcy context.

161. Alabama, Arkansas, Florida, Kansas, Michigan, Minnesota, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming.

162. Arkansas, Florida, Iowa, Kansas, Minnesota, Oklahoma, South Dakota, and Texas. All of these are constitutional exemptions, except for Iowa's and South Dakota's, which are statutory. Arkansas' exemption contains a \$2500 limit for 160 rural acres or one urban acre; however, the exemption is unlimited for a reduced acreage of 80 rural acres or one-quarter urban acre. Iowa's exemption is unlimited; however, it provides that if the homestead's value is less than \$500, it can be enlarged in excess of one-half city acre or 40 acres outside the

tion, ranging from a high of \$200,000 to a low of \$3500. Most of these states do not impose acreage limitations.¹⁶³ Nine of these thirty-seven homestead exemptions are provided by state constitution.¹⁶⁴ One problem with having a constitutional exemption with a maximum value is that it is difficult to change the value if it becomes outdated. In some cases, the constitutional limits have been raised by statute.¹⁶⁵ In two states, the constitution authorizes the exemption but does not set the limit; instead, these constitutions provide that the legislature will establish the appropriate value limitation.¹⁶⁶

Twenty-eight other states provide a homestead exemption with a maximum value by statute. Massachusetts offers the highest exemption, \$200,000 for an owner age sixty-two or older or disabled.¹⁶⁷ Any other owner in Massachusetts is entitled to a \$100,000 exemption.¹⁶⁸ The Massachusetts homestead exemption is a statutory exemption. In 1977, the exemption was \$30,000 for a householder with a family;¹⁶⁹ in 1979, the exemption was \$50,000 for an owner with a family;¹⁷⁰ in 1989, the exemption was \$150,000 for a person age sixty-five or disabled and

city to \$500 in value. Oklahoma's exemption contains a \$5000 limit for one urban acre if the urban homestead is used for residential and business purposes; otherwise, the exemption for an urban homestead is unlimited in value for one-quarter acre. Each of these states impose an acreage limitation on the exemption, with the maximum acreage for a rural homestead ranging from 80 to 200 acres and the maximum acreage for an urban homestead ranging from one-quarter to one acre. The limit is one-quarter acre in Arkansas and Florida; one-half acre in Iowa, Kansas and Minnesota; and one acre in South Dakota and Texas.

163. Most of the 38 states with maximum exemption values do not impose an acreage limitations in addition to the value limitation. Five states do: Louisiana, Michigan, Mississippi, Nebraska and Oregon. Most of those states use 160 acres as the rural limit (Michigan uses 40 acres). Some also use the 160 acres as a limit for an urban homestead also (Louisiana and Mississippi); others limit the urban homestead to one lot (Michigan), two lots (Nebraska), or one block (Oregon).

164. Alabama, Michigan, North Carolina, South Carolina, Tennessee, Utah, Washington, West Virginia, and Wyoming. Three of these nine states use the constitutional limits (Michigan, \$3500; Tennessee, \$5000; and West Virginia, \$5000).

165. Three states have increased the constitutional limits by statute (Alabama from \$2000 to \$5000, North Carolina from \$1000 to \$10,000, and South Carolina from \$1000 to \$5000).

166. Washington, presently \$30,000 by statute, and Wyoming, presently \$10,000 by statute.

167. MASS. GEN. LAWS ANN. ch. 188, § 1A (West 1991).

168. *Id.* § 1.

169. MASS. GEN. LAWS ANN. ch. 791, § 1 (West 1977).

170. MASS. GEN. LAWS ANN. ch. 756, § 1 (West 1979).

\$100,000 for any other owner,¹⁷¹ and in 1991, the present limits and categories were adopted.¹⁷²

Arizona's exemption is \$100,000 for all debtors.¹⁷³ This amount is a statutory amount enacted in 1989. Nevada's exemption also is \$95,000, enacted by statute in 1989.¹⁷⁴ North Dakota's exemption is limited to \$80,000, pursuant to a statutory exemption enacted in 1979.¹⁷⁵ In 1977, it was \$60,000.¹⁷⁶ California has an exemption that ranges from \$100,000 for persons age sixty-five, or persons age fifty-five with a low income, or for disabled persons to \$75,000 for a family home, and \$50,000 for all others.¹⁷⁷ This is a statutory exemption that was amended in 1983, 1984, 1986, 1988, and 1990. In 1983, there were two California exemption limits; \$45,000 and \$30,000.¹⁷⁸

Other state exemptions range across the board; there are state exemptions limited to \$75,000,¹⁷⁹ \$60,000,¹⁸⁰ \$54,000,¹⁸¹ \$50,000,¹⁸² \$40,000,¹⁸³ \$30,000,¹⁸⁴ \$20,000,¹⁸⁵ \$15,000,¹⁸⁶ \$12,500,¹⁸⁷ \$10,000,¹⁸⁸ \$8000,¹⁸⁹ \$7500,¹⁹⁰ \$5500,¹⁹¹ \$5000,¹⁹² \$3500,¹⁹³ and

171. MASS. GEN. LAWS ANN. ch. 188, § 1 (West 1989) (amended 1991).

172. MASS. GEN. LAWS ANN. ch. 188, § 1 (West 1991).

173. ARIZ. REV. STAT. ANN. § 33-1101 (1989).

174. NEV. REV. STAT. § 115.010 (1989).

175. N.D. CENT. CODE § 47-18-01 (Supp. 1991).

176. N.D. CENT. CODE § 47-18-01 (1977) (amended 1979).

177. CAL. CIV. PROC. CODE § 704.730(a) (Deering Supp. 1993).

178. CAL. CIV. PROC. CODE § 704.730(a)(1)-(2) (Deering 1983) (amended 1990).

179. MISS. CODE ANN. § 85-3-21 (1972).

180. ME. REV. STAT. ANN. tit. 14, § 4422(1)(B) (West Supp. 1992) (this limit applies if the debtor is 60 years of age or older, or is physically or mentally disabled).

181. ALASKA STAT. § 09.38.010 (Supp. 1992).

182. IDAHO CODE § 55-1003 (Supp. 1992).

183. MONT. CODE ANN. § 70-32-104(1) (1991); WIS. STAT. ANN. § 815.20 (West Supp. 1992).

184. COLO. REV. STAT. § 38-41-201 (Supp. 1992); HAW. REV. STAT. § 651-92(a)(1) (1985) (this limitation applies to the head of a family or a person 65 years of age or older); VT. STAT. ANN. tit. 27, § 101 (1989); WASH. REV. CODE ANN. § 6.13.030 (West 1993).

185. HAW. REV. STAT. § 651-92(a)(2) (1985) (for any person not a head of a family or 65 years of age or older); N.M. STAT. ANN. § 42-10-9 (Michie Supp. 1992).

186. LA. REV. STAT. ANN. § 1(A) (West 1980 & Supp. 1993); OR. REV. STAT. § 23.240(1) (1991).

187. ME. REV. STAT. ANN. tit. 14, § 4422(1)(A) (West Supp. 1992).

188. NEB. REV. STAT. § 40-101 (1988); N.Y. CIV. PRAC. L & R. 5206 (McKinney 1980 & Supp. 1993); N.C. GEN. STAT. § 1C-1601(a)(1) (1991); WYO. STAT. § 1-20-101 (1977).

189. MO. ANN. STAT. § 513.475(1) (Vernon Supp. 1992); UTAH CODE ANN. § 78-23-3(1) (1992).

\$3000.¹⁹⁴ Most of these exemptions amounts were once lower. West Virginia's homestead exemption was originally \$1000; but in 1973, the West Virginia Constitution was amended to increase it to \$5000.¹⁹⁵

In states that allow the debtor to elect the federal bankruptcy homestead exemption, the amount exempt is \$7500; however, if the home is co-owned each owner can exempt up to \$7500.¹⁹⁶ Thus, a married couple co-owning a home can exempt up to \$15,000 of value. Each also has a \$400 wildcard so that the exemption can be increased to \$7900 or \$15,800.¹⁹⁷

Clearly, there is no uniform amount that is considered adequate to provide a debtor with an appropriate shelter. Further, an exemption limited by a dollar amount is usually not exempt from attachment of liens. In addition, the homestead is not exempt from forced sale if the net value of the home exceeds the maximum amount. Thus, an exemption limited by a dollar amount does not protect a homeowner from losing that home to creditors. *Instead, an exemption with a maximum value provides the homeowner with the equivalent of a housing allowance.* If the net value of an owner's home exceeds the maximum amount, the sale of the home can be forced, leaving the owner with net proceeds up to the exemption amount.

To limit the Florida homestead exemption by a dollar limit would substantially change the nature of the exemption. Presently, the exemption applies to the entire homestead estate, limited only by acreage. Florida's exemption has been limited by acreage, but not value, since 1868.¹⁹⁸ The framers of the original constitution considered a debtor's right to have a

190. ILL. ANN. STAT. ch. 110, para. 12-901 (Smith-Hurd 1982); IND. CODE ANN. § 34-2-28-1 (Burns 1986 & Supp. 1992).

191. MD. CODE ANN., CTS & JUD. PROC. § 11-504(b)(5) (1989). This limitation applies to debtors in bankruptcy. *See id.* §§ 11-504(b), 11-504(f) (1989).

192. ALA. CODE § 6-10-2 (Supp. 1992); GA. CODE ANN. § 44-13-100 (Michie 1982 & Supp. 1992); KY. REV. STAT. ANN. § 427.060 (Michie/Bobbs-Merrill 1992); N.H. REV. STAT. ANN. § 480:1 (1992); OHIO REV. CODE ANN. § 2329.66(A)(1) (Anderson 1991); S.C. CODE ANN. § 41-30 (Law. Co-op Supp. 1992); TENN. CODE ANN. § 26-2-301(a) (1980); VA. CODE ANN. § 34-4 (Michie 1990); W. VA. CONST. art. VI, § 48.

193. COLO. REV. STAT. § 13-54-102(1)(o)(I) (1987) (this limitation applies to a house trailer or trailer coach); MICH. COMP. LAWS § 600.6023(1)(h) (1991).

194. MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(5) (1989) (This limitation is used for nonbankruptcy purposes).

195. W. VA. CONST. art. VI, § 48.

196. 11 U.S.C. § 522(d)(1) (1988). The states that allow debtors to elect the federal bankruptcy homestead exemption are Connecticut, New Jersey, Pennsylvania, and Rhode Island.

197. *Id.* § 522(d)(5).

198. *See discussion supra* part I.B.1.a.i.

place to live and work so important as to protect it by constitution with no dollar limitation; whereas, the right to exempt personalty was limited to \$1000.¹⁹⁹

Florida is not alone in allowing an exemption with an acreage limitation but no value limitation. Arkansas, Iowa, Kansas, Minnesota, Oklahoma, South Dakota, and Texas also provide exemptions with limitations on acreage but not value.²⁰⁰

A maximum value should not be imposed on Florida's homestead exemption. Any maximum would be arbitrary.²⁰¹ In 1868, the head of any family who could afford to own and maintain a home of any value he or she chose, up to the permitted acreage and uses, had the right to live there free from the reach of most creditors.²⁰² The head of the family's creditors had the burden of finding other property or sources of income from which the debt could be satisfied. In 1984, this protection was extended to any natural person.²⁰³ There does not appear to be any compelling reason to change the nature of the exemption. Rather than imposing an arbitrary value limitation on the exemption, it would be more fruitful to address whether the scope of the exemption should be limited by expanding the types of debts that can become liens against a homestead and whether there are solutions available to prevent a debtor from abusing the exemption and its unlimited value.²⁰⁴ Before addressing the scope of the exemption, it would be useful to address the residency, use, and acreage requirements and limitations as well as what types of interest should qualify for the exemption.

199. FLA. CONST. of 1868, art. IX, § 1.

200. *See supra* note 163.

201. If a maximum value is to be imposed on the exemption, one model is for the constitution to authorize the Legislature to periodically establish the appropriate maximum. The maximum could be updated, then periodically by legislation. Another alternative would be for the constitution to impose the value, with a provision that the value would be adjusted periodically by reference to a cost of living index or other index that measures changes in the property values. A final alternative would be to establish a maximum value in the constitution. Based on past experience, this alternative would be the least effective. Consider the present constitutional exemption for personalty. This exemption is for \$1000 of personal property. FLA. CONST. art. X, § 4. This is the same amount that was in the constitution in 1868. FLA. CONST. of 1868, art. IX, § 1. Presently, this exemption is so insignificant that it would cost more money than the exemption is worth to litigate an issue involving that exemption. Yet in 1868, \$1000 could shelter a significant amount of furniture and personal property contained in an exempt homestead of any value.

202. *See* FLA. CONST. of 1868, art. IX, § 1.

203. FLA. CONST. art. X, § 4.

204. *See* discussion *supra* part II.A.2.

b. Residency, Use and Acreage Requirements and Limitations

The exemption, from its inception, has reflected that Florida's economy is both agrarian and urban based. It recognizes the existence of the family farm as well as the need for other families to reside and work in cities or towns. Thus, the constitution always has exempted 160 acres outside of a incorporated area or municipality and one-half an acre within.²⁰⁵

The original purpose of the exemption was to protect and shelter the family and allow the head of the family to use homestead for his or her livelihood if he or she desired. Another purpose was to prevent families from becoming homeless and a burden to the state. Thus, 160 acres were sufficient to provide the family with a home and a farm. Conversely, if the home were in a city or town, one-half an acre was sufficient to provide the family with a home and place for a business.

Since January 7, 1969, the exemption for an urban homestead has been limited to the residence of the owner or the owner's family.²⁰⁶ Prior to the 1968 revision, the urban homestead could include a business home.²⁰⁷ The rural homestead has no such express limits on use. This amendment raises questions regarding what use is permissible for an urban homestead and what use is required for a rural homestead.

i. Urban Homesteads

An urban homestead is limited to the residence of the owner or family and up to one-half an acre of contiguous land.²⁰⁸ If the property contains other buildings used for nonresidential purposes, that portion of the property can not qualify.

There is some question as to whether a portion of a home held for rent to others or a duplex unit for rent can qualify for the exemption. If property constitutes the owner's residence or the residence of the owner's family, then a temporary renting of a portion of that home will not result in loss of the exemption.²⁰⁹ If the portion rented is *de minimis*, then that rental also

205. FLA. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1885, art. X, § 1. Prior to the 1968 constitutional revision, the urban limitations applied to incorporated or unincorporated cities or towns rather than municipalities.

206. FLA. CONST. art. X, § 4(a)(1) (1984).

207. See FLA. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1885, art. X, § 1.

208. FLA. CONST. art. X, § 4(a)(1) (1984).

209. *Collins v. Collins*, 7 So. 2d 443 (Fla. 1942) (holding that owners' intent to return to residence after temporary rental during tourist season maintained the homestead exemption).

should be disregarded.

If a portion of the home is held for rent and the owner or family has no intent to reside there personally, then a portion of the homestead may be considered non-homestead property. If the property can be partitioned, the non-homestead portion can be sold via forced sale. If the property cannot be partitioned, the property should be treated the same as property owned by tenants in common, when neither tenant has the exclusive right to possess the homestead. The entire property should be sold, and the proceeds apportioned.²¹⁰ This should be the result, but there is case law allowing a person to exempt both the duplex unit in which he or she lives plus the unit rented for income when the rental unit cannot be sold separately under zoning laws.²¹¹

The courts should resolve the question of whether a unit that is held for the production of income, in the form of rent, can qualify as a homestead if the owner or family has no intent to occupy it as a residence. In addition, whether rental of one of the units once occupied as a residence by the owner or family constitutes an abandonment also should be resolved judicially. Until then, the issues involving the rental of a duplex or other homestead property should not be an appropriate issues for constitutional reform.

ii. *Rural Homesteads*

At present, there is no limitation on the use of the 160 acres contiguous to the residence on an a rural homestead. Most assume that the use will be agricultural or related to farming or ranching. The constitution has never expressed such a limitation and it is not a requirement at present. Most rural homesteads are used as farms or have limited acreage. Some are condominium units located outside a municipality. The cases do not reflect any attempted abuse of these provisions; although, the courts have exempted contiguous acreage that has been platted suitable for future sale as individual lots.²¹² Thus, it does not appear that there is a need to limit the rural

210. See *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978) (holding that the homestead exemption does not preclude the forced sale of property owned by tenants in common when the forced sale is the only method by which the two owners could obtain enjoyment of their one-half undivided interest in the property).

211. *In re Kuver*, 70 B.R. 190 (Bankr. S.D. Fla. 1986); see also *supra* note 12 and accompanying text.

212. *Buckels v. Tomer*, 78 So. 2d 861 (Fla. 1955) (including as homestead, in addition to a residence on an unplatted tract of land, 27 subdivision lots that were platted and in some cases separated by streets, but otherwise contiguous). However, it is possible that an individual who develops and owns a condominium parcel outside of a municipality and who

homestead to any particular use, so long as a portion of it is used as the residence of the owner or the owner's family.

The constitution limits the urban homestead to the residence of the owner or the owner's family.²¹³ There is no comparable limit on the rural homestead. Prior to the 1968 revision, the head of the family was required to reside on the homestead, whether it was urban or rural.²¹⁴ After the constitutional revision in 1968, this requirement was deleted.²¹⁵ The rural property still must be a "homestead" to qualify; thus, it must be a permanent place of residence. Presumably, the rural homestead and urban homestead are similar in that the homestead can be the residence of the owner or the owner's family, but it must be the residence of at least one of them. The rural and urban homesteads then differ because the rural homestead is not limited just to the residence. This result, that the rural homestead can be the residence of the owner or his or her family, is generally understood to be correct; but there is no definitive case law on point. If the constitution is amended for other reasons, it would be appropriate to expressly provide this expanded residency provision for a rural homestead. This amendment should be a technical rather than a substantive amendment.

iii. *Multiple Homesteads*

The constitution provides that a "homestead" owned by a natural person shall be exempt.²¹⁶ Prior to the 1968 revision, the owner was required to reside on the homestead.²¹⁷ The 1968 revision changed this so that the owner need not reside there if his or her family does.²¹⁸ This change was in the case of an urban homestead and is implied for rural homesteads. This raises the question of whether one owner can claim two homesteads, one for the owner's residence and a second if a different residence is used by his or her family. For example, this issue could arise if a husband owns his own home and is required to own and maintain another home for his former wife and their children.

lives in one of the units could claim the entire parcel, including the other units for sale, as a homestead. In most cases, the developer uses a corporation to avoid personal liability rather than rely upon the homestead exemption. *See also* *Armour & Co. v. Hulvey*, 74 So. 212 (Fla. 1917) (rural homestead included a preparatory school for students and cadets).

213. FLA. CONST. art. X, § 4(a)(1).

214. FLA. CONST. of 1885, art. X, § 1; *see also* FLA. CONST. of 1868, art. IX, § 1.

215. FLA. CONST. art. X, § 4(a).

216. *Id.* § 4(a)(1).

217. *See* FLA. CONST. of 1868, art. IX, § 1; *see also* FLA. CONST. of 1885, art. X, § 1.

218. FLA. CONST. art. X, § 4(a)(1).

It is arguable that the constitution's reference to "a homestead"²¹⁹ means that a person can claim only one homestead as exempt. Further, it is arguable that an urban homestead is limited to the owner's residence or the family's, but not both. If only one can be exempt, chapter 222 of the Florida Statutes would allow the owner to designate which was exempt if the owner is alive;²²⁰ however, the issue may arise after the owner's death. This issue has not yet been litigated on an appellate level, so that it may not be ripe for review. If the constitution is to be amended, this issue should be visited to determine if appropriate language should be added to limit the exemption to one homestead,²²¹ that being the owner's residence. If neither residence is used by the owner but both are used by different family members, then the owner should have the option of selecting which family residence is the exempt homestead.

c. Type of Qualifying Interest

There have been significant changes in home ownership since 1868. There also have been changes since the last constitutional revision in 1968. At one time, the choice was between owning a single family home or renting an apartment. At present, a person can choose to own a single family home in the country or in the city. A person can choose to own a single family home in a development with common areas for all owners and a homeowner's association. Some new developments are zero lot line homes. A person can choose to own a duplex or triplex and rent some of the units to other families. A person can choose to live in a condominium and own his or her unit, plus an undivided interest in common areas. These condominium units may be units in a high-rise structure or a low-rise structure or they may be townhouses.

A person can live in a cooperative apartment, renting the unit from a corporation or association in which the person is a shareholder or member. A person can own land and a mobile or modular home and live in that home on that land. A person can own a mobile or modular home situated on land that the person leases from another. A person can own a houseboat or any other type of boat or yacht and live on it at a dock that the person owns as a condominium unit (a "dockominium"). A person also can own

219. *Id.*

220. FLA. STAT. § 222.01 (1991).

221. The owner's permanent residence would qualify for the exemption. In the unusual case where neither was the owner's residence, then the owner could select which family residence was the exempt homestead.

and live on a boat kept in a rented boat slip.

Should the homestead exemption apply to all of these forms of ownership? Under present law, the issue is whether the applicable interest in any residence is an interest in an estate in land. If it is not, it only qualifies for a \$1000 constitutional exemption for personal property. To the extent that the interest does not qualify for the unlimited homestead exemption, the issue is whether it should. This section will consider the various forms of ownership in the context of the homestead exemption.

i. *Single Family Homes and Farms*

The present homestead exemption clearly applies to single family homes and farms. It also can apply to multiple family dwellings, with some limitations. If the multiple family dwelling is located within a municipality, the units that are not used as the residence of the owner or the owner's family should not qualify for the exemption.²²² Thus, the owner would own an exempt homestead as well as non-exempt property. Liens can attach to the non-exempt portion of the homestead, and it may be subject to forced sale. In such a case, the owner of the homestead within the multiple family dwelling is at risk that the property will be partitioned, if possible, or sold in its entirety to satisfy liens on the non-exempt portion. If the property is sold, the proceeds attributable to the exempt portion would qualify for the exemption; although the proceeds should lose their exemption if not reinvested within a reasonable period of time.²²³

ii. *Condominiums*

Ownership of an individual condominium unit used as the residence of the owner or the owner's family also qualifies. Ownership of a condominium includes ownership of an individual unit, which can include land, and ownership of an undivided interest in common areas.²²⁴ Condominium

222. See discussion *supra* part II.A.1.b.i (regarding the qualification of a duplex for the exemption). *But see In re Kuver*, 70 B.R. 190 (Bankr. S.D. Fla. 1986) (allowing homestead exemption for duplex, of which half was being rented out, because divided portion of duplex was not sellable under existing zoning laws).

223. This restriction is imposed on proceeds from a voluntary sale of a homestead. The proceeds can retain their exemption so long as the seller intends to reinvest them within a reasonable period of time after the sale, and does in fact reinvest them. See *supra* note 36.

224. A unit is defined as "a part of the condominium property which is subject to exclusive ownership" and "may be in improvements, land or land and improvements together." FLA. STAT. § 718.103(24) (Supp. 1992). A condominium parcel includes "a unit, together with an undivided share in the common elements which is appurtenant to the unit."

ownership is a unique form of ownership, that has been recognized as qualifying for the homestead exemption, when the unit is the residence of the owner or the owner's family.

If a condominium is located within a municipality, a potential issue is how the one-half acre of contiguous land limitation applies to a specific unit and its undivided interest in common areas. It is possible for the common elements to be located on more than one-half acre, so that the condominium owner has an undivided share in more than one-half an acre. The Florida Condominium Act provides that the undivided share in common elements is appurtenant to the unit and cannot be separated from it, nor can it be conveyed or encumbered except with a conveyance or encumbrance of the unit.²²⁵ Thus, a lien that cannot attach to the condominium unit because of the homestead exemption should not be able to attach to the appurtenant undivided share of common elements. This is true even if the common elements exceed the acreage limitation, because of the provisions of the Florida Condominium Act. The condominium act extends the constitutional protection to the common elements that exceed the permitted homestead acreage.

Common areas can include an area for parking, areas for recreation, (such as a pool, playground, or tennis, racquetball or basketball courts),²²⁶ and areas for personnel of the condominium association (such as manager, engineer, security, or valet). These areas are located on the entire tract of land comprising the condominium.²²⁷ What if these common areas are used for a commercial purpose that would prevent the unit from being exempt if the unit were used for that commercial purpose? Such use should not preclude the exemption from attaching to the condominium unit.

Id. § 718.103(11). The common elements are the "portions of the condominium property which are not included in the units." *Id.* § 718.103(7).

225. FLA. STAT. § 718.107 (1991).

226. See *White v. Posick*, 150 So. 2d 263, 265 (Fla. 2d Dist. Ct. App. 1963) ("the pool [in a one-story family dwelling house] and patio were conventional residential appurtenances—all well within the ambit of the constitution.").

227. If the condominium is located within a municipality, there may be a question as to how the one-half acre of contiguous land limitation applies to a specific unit, its undivided interest in common areas, and the condominium parcel of land. If the owner is treated as owning only a portion of the entire condominium parcel, then the interest can qualify if that portion is less than one-half acre. If that portion is computed based on the undivided percentage share the owner has in common areas, it will fit within the acreage limitations in most cases. Further, a question may be raised as to whether the use of common areas is residential. Does it matter if a common area is rented to a concession, such as a store that serves food or sells various sundry items?

Further, if the condominium unit qualified for the homestead exemption, the owner's undivided share in the common elements would be protected by the Florida Condominium Act—a lien that could not attach to the condominium unit could not attach to the owner's undivided share in the common elements.

The condominium or homeowner's association generally has the right to assess costs for maintaining common areas or recreational facilities. The Florida Condominium Act permits a lien to attach for unpaid assessments.²²⁸ Most declarations of restrictions and covenants also authorize the imposition of a lien for non-payment of these amounts. Can a lien for non-payment of obligations for recreational leases, regular maintenance obligations, and special assessments attach to the homestead property? There are several ways that such a lien can attach. A lien can attach for "house, field or other labor performed on the realty" or for an obligation "contracted for the purchase, improvement or repair thereof."²²⁹ In addition, a lien can attach to the unit prior to the time it attains its status as homestead, in which case it is considered a preexisting lien.

In the case of a recreational lease for a subdivision, the Supreme Court of Florida held that such a lien was part of an affirmative covenant created when the owners accepted their deed to their lot in the subdivision and that the lien related back to the time when the declaration of restrictions were filed.²³⁰ These liens were considered to have attached to the land prior to the time the owners acquired their homestead interest in the property and thus, were valid liens against their homestead. This reasoning also should apply to liens for unpaid condominium maintenance fees and special assessments. Thus, a condominium homestead may be subject to a pre-existing lien for unpaid maintenance and assessments. Further, a condominium homestead may be subject to liens for obligations relating to the purchase, repair, or improvement of that unit or for house, field, and other labor for that unit. It is unclear whether a condominium unit qualifies for the homestead exemption would be subject to its share of any liens relating to the house, field, and other labor performed for the condominium common areas.

228. FLA. STAT. § 718.116(5)(a) (Supp. 1992). Liens for unrelated condominium assessments relate back to April 1, 1992, or the creation of the condominium parcel, and includes a lien for interest and attorney's fees. *Id.*

229. FLA. CONST. art. X, § 4(a).

230. *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980).

iii. *Homes with Subdivision Recreational Facilities*

In some subdivisions or developments, single family homes also can include an ownership or leasehold interest in recreational facilities. These facilities usually are not contiguous to each lot in the subdivision. It has not yet been determined how the present contiguity requirement or the acreage limitations would apply to the homeowner's interest in these facilities. Under a strict construction of the constitution, common areas that are not contiguous to the homestead parcel should not qualify for the exemption. However, these areas could be protected in a manner similar to the way common areas in a condominium are protected.²³¹ For example, the declaration of restrictions could provide that an interest in these areas can be transferred only with a transfer of the parcel that it serves. If each parcel owner has an undivided share in the facilities, the transfer of a parcel could operate as a transfer of that undivided share. Further, an encumbrance of the parcel also would be secured by the parcel and that parcel's undivided share in the common elements. However, the undivided share cannot be transferred or encumbered by itself. In this way, if a parcel qualifies for the homestead exemption, the same protection would extend to the parcel's undivided share in the common facilities.

iv. *Mobile Homes*

An individual who owns land and resides in a mobile home permanently affixed to that land can qualify for the homestead exemption provided for realty under the constitution. There is some question whether an individual who owns and resides in a mobile home, but does not own the land upon which the mobile home is situated, can claim the homestead realty exemption for the mobile home and leasehold interest. The issue is whether the leasehold satisfies the constitutional definition of a homestead on realty.²³²

231. See discussion *supra* part II.A.1.c.ii.

232. A similar issue arises if a condominium parcel is leased rather than owned. The Background Papers for the Constitutional Revision Commission in 1977-78 reflect the following:

[W]hether the Revision Commission wishes to expand the umbrella of protection to include kinds of living situations which are becoming increasingly common in this day of high housing costs or whether the also increasing incidence of bankruptcy and skipping out on bad debts should encourage a conservative approach. Even where the mobile home is "affixed" to the property, there is no denying the relative ease with which the mobile home can be made mobile again when compared to standard housing. On the other hand, it is difficult to see a

In 1977, section 222.05 of the Florida Statutes was amended to provide that:

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.*

The purpose of this amendment was to extend the homestead exemption to a person who owned the mobile home and had the legal right to possess the land.²³³

This statute raises many questions. What is the meaning of "aforesaid"? Florida Statutes section 222.01 provides a procedure so that "any person residing in this state [who] desires to avail himself of the benefit of the provisions of the constitution and laws exempting property as a homestead from forced sale under any process of law" may make a statement designating and declaring real property or a mobile home as exempt.²³⁴ Is this the "aforesaid" exemption? Is a mobile home exempt from liens attaching to it or just from levy and forced sale? In addition, is a mobile home exempt from obligations contracted to purchase, repair, or improve the mobile home or for taxes or special assessments thereon? Is the leasehold interest exempt or just the mobile home? The statute only exempts the mobile home.

These issues are not constitutional issues; instead, they only relate to the statutory exemption granted to mobile homes on leased or lawfully possessed land. Chapter 222 of the Florida Statutes should be amended to

great difference where the mobile home owner also owns the land as well, as far as protection of the family's domicile is concerned. In fact F.S. 222.05 allows a person to set apart as homestead a dwelling house which is owned but maintained on land which is not. This is probably an area where it would be helpful to have empirical data on the number, length of residence, and financial history, of those who reside in mobile homes which they own but maintain upon the land of others.

Background Papers, Constitutional Revision Commission 1977-78, at 3 (copy on file at the Nova Law Review office).

233. See *Smith v. American Consumer Fin. Corp.*, 21 B.R. 345, 349 (Bankr. M.D. Fla. 1982) (noting that Florida Statutes, section 222.02 (1979), which it called the "real property exemption implementation statute . . . has only been amended once since its enactment in 1869, and that was to expand its coverage to include protection of mobile homes.").

234. FLA. STAT. § 222.01 (1991).

clarify that the statute exempts mobile homes from the attachment of liens and from forced sale in the same manner as the constitution exempts homestead realty. This statutory exemption should be subject to all the exceptions applicable to the constitutional amendment. The mobile home and leasehold interest also should be subject to any liens to which the lessor is entitled.²³⁵ At the same time, the statute could allow the owner to alienate or devise the mobile home and any leasehold interest, capable of being alienated or devised.²³⁶ In this way, the mobile home could be freely alienated during the owner's lifetime and devised at death without restriction.²³⁷

v. *Cooperatives*

At first blush, a cooperative appears similar to a condominium and thus, it seems logical to extend the exemption and transfer provisions to cooperative ownership. But cooperative ownership differs significantly from condominium ownership.

In a cooperative, a corporation owns the land and building or may lease the land under a long-term lease.²³⁸ The corporation has the power to sell, mortgage, or transfer the land and building. The corporation's articles of incorporation may restrict these rights or require some form of shareholder approval for transfer of corporate assets. The corporation may have members or shareholders who own shares of stock in the corporation. Interest as a member or shareholder does not grant the holder any interest in a specific unit in the corporate building, the right to partition the property, or the right to receive the unit he or she leased upon dissolution of the corporation. If the corporation is dissolved, each shareholder will receive an undivided interest in the land and the building, including all its units, subject to outstanding leases. If a resident shareholder wants to receive sole ownership of a residential unit plus an undivided interest in common areas, the land and building must be converted into a condominium.

235. See FLA. STAT. § 712.77 (Supp. 1992) (lien for unpaid rent on "goods, chattels, or personal property of such occupant"); see also *id.* § 723.084 (lien for storage).

236. If the right to alienate or devise is to be restricted by statute, the statute must meet the test mentioned in *Shriner Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990), as discussed *supra* in text accompanying notes 225-227.

237. The constitutional restrictions on devise do not apply to the \$1000 personal property exemption.

238. Chapter 719 of Florida Statutes provides for an unexpired term of at least 50 years. FLA. STAT. § 719.401 (1988).

Each shareholder usually will enter into a lease with the corporation for the exclusive right to possess a specific unit or will have some other "muni-ment of title" to an apartment unit. Restrictions usually are placed on a shareholder's right to transfer the lease and shares. A shareholder can use his or her shares as collateral for a loan without the corporation's consent, if a lender is willing to accept them.

Ownership of shares and a lease of a cooperative apartment unit differ from ownership of a mobile home and a lease of the land on which the mobile home is situated. In the case of a cooperative, a person does not own a unit he or she leases; instead, that person has lawful possession of the unit and the land on which it is situated. A corporation owns the land and building in which the unit is located. Although a cooperative parcel includes an undivided share of the assets of the corporation as an appurtenance to the unit, ownership of shares in that corporation does not grant the shareholder specific ownership in any corporate asset.²³⁹ The same result applies when the corporation is not-for-profit and has members instead of shareholders.

Thus, a shareholder/lessee has no proprietary ownership in any unit. Instead, the shareholder leases an apartment unit. By contrast, a mobile home owner owns the mobile home and leases only the land.²⁴⁰ This is a significant difference. In addition, the corporation may incur liabilities that can reach the entire building, including the individual units. If the exemption were extended to an owner's stock interest, the exemption would be subject to liabilities that indirectly affect the value of the shares.

If the exemption is extended to cooperatives, one question is whether the exemption would be limited to the owner's interest in the lease of the residential unit or would extend also to the ownership of shares of stock in the corporation. Even if the shares of stock or membership in the association qualified for the exemption, the land and building, including the residential unit, could be subject to liens for the debts and liabilities of the corporation and forced sale. The corporation could sell, mortgage, or

239. FLA. STAT. § 719.05(1)(b) (1991). *See also* FLA. STAT. § 711.43(2)(b) (1975) (the predecessor statute—replaced by chapter 719).

240. A mobile home park also may be owned as a cooperative. If the shareholder or member of the association owns his or her mobile home, that mobile home should qualify for the exemption. *See* FLA. STAT. § 222.05 (1991). The mobile home owner's lawful right to possess that land would be sufficient under that statute. Whether the mobile home owner's interest in the cooperative that owns the land that the mobile home owner leases is exempt is a different question that depends on the interpretation of section 222.05 of the Florida Statutes. *See id.* However, the constitutional exemption would not apply to the cooperative shares or membership.

otherwise alienate the land and building without the consent of the shareholder/lessees or the spouses of any married shareholder/lessees, unless the documents relating to the association provided otherwise, or Florida law regarding cooperatives is changed. Therefore, allowing a cooperative unit to qualify for the homestead exemption would not provide all the protection accorded the owner and family of a single family home or a condominium unit.

Granting homestead status to the shares of stock in a cooperative creates a full exemption, with only half of the impact. It is an incomplete exemption, not because of the limitations of the exemption but because of the corporate ownership of the land and building. Chapter 222 should be amended to extend the exemption accorded a mobile home to cooperatives, so that a person's membership or shares in the corporation, plus the lease or other muniment of title to the unit, could qualify for the exemption.²⁴¹

vi. *Floating Homes*

What then about floating homes—boats owned by individuals who own a dock slip attached to land as a condominium, and who lease the dockage? The boats are in the water. Is the fact that the owner's access to the boat and access to utilities is via a dock attached to land significant? Is the fact that the owner obtains ownership of the interest in the dock condominium through a deed significant, or that the dock is taxed as real property? The connection is tenuous. Even if a mobile home could qualify as a homestead under the constitution, a boat could not. Furthermore, the statute intended to exempt mobile homes, specifically defining a dwelling home to include a mobile home.²⁴² It is a stretch to interpret the term "dwelling home . . . on land" to include a boat in a dock slip attached to land.²⁴³

The constitutional homestead protection for realty does not extend to floating homes.²⁴⁴ Instead, the owner is limited to a \$1000 exemption for personalty. There does not appear to be a compelling need to extend the constitutional exemption to boat owners. A person who resides on Florida waters does not need to be guaranteed the same protection from creditors as

241. The issue of whether the shares should be subject to alienation or devise, and whether the lease could or should be subject to alienation or devise, also would need to be considered.

242. FLA. STAT. § 222.05 (1991).

243. Oregon exempts mobile homes and includes boats within the definition of a mobile home; however, this exemption is a statutory exemption limited by a dollar amount of \$15,000. OR. REV. STAT. § 23.164 (1983).

244. It is arguable that it could encompass the dock slippage, but not the boat.

one who resides on Florida land. A person who desires protection should purchase a home on land, whether it be a single family home, a multi-family dwelling, or a condominium. If a person cannot afford a permanent structure, an argument can be made for extending the exemption to a mobile home on land lawfully possessed by the owner, even if the mobile home can be removed from the land,²⁴⁵ but not to a boat on water even if it is kept in a dock.

vii. *Future Interests*

At present, the exemption does not extend to a nonpossessory future interest, such as a remainder interest. In *Aetna Insurance Co. v. La-Gasse*,²⁴⁶ the supreme court held that the holder of a vested remainder interest cannot qualify for the exemption while the life estate is in existence. The primary reason is that the holder of the remainder interest does not have a present interest in the property. The holder of the remainder interest cannot satisfy the residency requirement, because the remainder beneficiary cannot reside on that interest. Residing with the life tenant is insufficient.²⁴⁷

This rule can work to the detriment of a person who is dependent on the life tenant for shelter or was dependent on the decedent for such. For example, a child can lose his or her remainder interest to a creditor; whereas, the surviving spouse's life estate is protected from the spouse's creditors. This is unfair, particularly if the child were a minor when the first spouse died, because the constitutional prohibition on devise was designed to protect that minor. Unfortunately, the statutory remainder interest does not provide the minor adequate protection.

To the extent a descendant or other person receives a remainder interest

245. See e.g., ALA. CODE § 6-10-2 (1992); ARIZ. REV. STAT. ANN. § 33-1101 (1956); COLO. REV. STAT. ANN. § 13-54-102 (West 1987); IDAHO CODE § 55-1003 (1989); MO. ANN. STAT. § 513.430 (Vernon 1992); N.Y. CIV. PRAC. L. & R. 5206 (McKinney 1980); OR. REV. STAT. § 23.164 (1983); UTAH CODE ANN. § 78-23-3 (1990); WASH. REV. CODE ANN. § 613.030 (West 1987).

246. 223 So. 2d 727 (Fla. 1969).

247. *Id.*

The uniform view of the courts in similar situations, however, has been that consent by a life tenant to a remainderman's occupancy does not divest the life tenant of a paramount present interest. The record here presents no reasonable basis upon which any conveyance of a present interest to respondent [daughter] and owner of remainder interest can be found.

Id. at 729 (footnote omitted).

in property and resides there with the permission of the life tenant, that interest should qualify for the exemption. A constitutional amendment is required to effectuate this change.

viii. *Conclusion Regarding Extension of Exemption*

The constitutional homestead exemption should continue to apply only to an interest in an estate in land. Any extension of the exemption to mobile homes on land lawfully possessed, but not owned, or to cooperatives should be by legislative fiat.

The constitutional exemption should be extended to a remainder interest when the owner of that remainder interest resides with the life tenant on the property. Consideration should be given to: (1) creating an exemption for leasehold interests, to the extent those interests have value²⁴⁸ (whether it be limited or unlimited in value), and, (2) changing or increasing the \$1000 personalty exemption in the constitution. The personal exemption could be extended to apply to items of furniture and other household items reasonably necessary for use in the exempt homestead (with or without a value limit).

2. Scope of Exemption and Exceptions

Florida is a "creditor beware" state when it comes to homestead. The exemption is broad and the exceptions are narrow. A creditor cannot rely upon a homestead to satisfy its debt, unless the debt has some direct relationship to the homestead, (e.g., purchase, repair, improvement, or labor) or the debtor agrees to secure that debt with a mortgage (and if married, the spouse consents), or there are countervailing equitable considerations.²⁴⁹ In many cases, a potential creditor can protect itself by obtaining security. In other cases, a potential creditor can insure against the risk or may find protection under the homeowner's insurance coverage. Additionally, doctors, hospitals, and nursing homes may choose not to provide services

248. The leasehold could have value due to improvements to the leased property or the right to assign or sublease it. If the leasehold is exempt, then consideration needs to be given to whether a married lessee can assign the lease without joinder of the spouse and whether the landlord's right to evict would be affected by a spouse's rights. Also, an exception to the exemption would be needed for a landlord's lien. The exemption could be constitutional or statutorily granted.

249. *Palm Beach Sav. & Loan Ass'n v. Fishbein*, 619 So. 2d 267 (Fla. 1993) (mortgagee at risk when it failed to supervise mortgage execution and husband forged wife's signature, except to extent equitable lien granted for proceeds used to satisfy preexisting mortgages and taxes); *Bigelow v. Dunphe*, 197 So. 2d 328 (Fla. 1940) (creditor at risk when it receives a mortgage without spouse's joinder).

unless there is health insurance coverage, prepayment, or a guarantee of payment by another.

In determining whether the scope of the exemption should be limited or the exceptions expanded, it is helpful to consider which types of creditors cannot protect themselves against non-payment by a homeowner and whether they should have a claim superior to the exemption.

a. Tort Creditors

A tort creditor generally is not protected under homestead law. It is arguable that a person who was injured repairing or improving the homestead could receive a valid lien against the homestead because of a laborer's ability to place a mechanic's lien on the property for unpaid labor.²⁵⁰ Other tort creditors might not have such lien rights.

A tort creditor usually cannot anticipate the tort or the resulting injury and is at risk that the tortfeasor will not have sufficient, nonexempt assets to satisfy that liability. In some cases, a person can insure against an injury or loss that a tortfeasor might cause. Uninsured motorists coverage, health insurance, life insurance, and disability income insurance can insure against some of these risks. But the amount of the insurance coverage may be less than the tortfeasor's liability.

Should a Florida homestead be liable for debts arising in tort such as from the debtor's negligence or other torts? It seems inappropriate to subject a homestead to liability for ordinary negligence and tortious conduct unrelated to the homestead. It is possible that an exception should be made for liability arising out of the owner's gross negligence or willful misconduct. Maine is one of the few states that provides a specific homestead exception for "judgments based on torts involving other than ordinary negligence on the part of the debtor."²⁵¹ But what if the homestead is the residence of the owner's spouse or other family members? The exemption protects them too. Should their shelter be jeopardized by one wrongful act of the owner?

It is arguable that the homestead should be liable for any injuries, resulting from gross negligence or willful misconduct, directly connected to the homestead, but not for other tort liability. For example, if a person who was invited to the owner's home was injured because the owner was grossly negligent in maintaining the home and did so with willful disregard for the safety of others, that owner should not be able to hide behind the homestead

250. FLA. CONST. art. X, §4(a)

251. ME. REV. STAT. ANN. tit. 14, § 4422 (West 1991).

exemption to escape that liability. It does not seem necessary to create a specific exception for this purpose. First, it is unlikely that a homeowner will maintain a home in such condition because to do so would expose the homeowner and the homeowner's family to great risk of harm from that condition. Second, if the property is so dangerous, the property may not be exempt. The homeowner might abandon the homestead because of the danger. If the home were permanently abandoned, the exemption would be lost and a lien could attach to the property for that liability. If it was temporarily abandoned, the chance of the owner inviting persons to that home would be slim. A better solution would be to require a homeowner to maintain liability insurance for such purposes, rather than to limit the constitutional exemption. Third, to allow the owner to claim the exemption in egregious cases might result in a "fraud or unjust imposition on creditors," so that the homestead would not be exempt from tort liability.²⁵² Consequently, there is no compelling need to amend the exemption to provide a specific exception for tort liabilities.

b. Alimony Maintenance or Support Creditors

A spouse, former spouse, or child with a claim for alimony, maintenance, or support payments generally is not protected under Florida homestead law. These claims do not fall within the specific exceptions to the present exemption. Under limited circumstances, these claims can reach the homestead if the claims are secured by a mortgage, a pre-existing lien on the homestead, or an equitable lien. In addition, a court might prohibit the obligation claiming the exemption if to do so would operate as a fraud against the former spouse or child; but it is questionable whether such judicial action would withstand appeal.²⁵³ Otherwise, a judgment for alimony or support cannot become a valid lien against the homestead or force its sale.

252. The court could allow the exemption but impose an equitable lien for such liability; thereby overriding the exemption. See discussion *supra* in text accompanying notes 49-51.

253. Compare *Isaacson v. Isaacson*, 504 So. 2d 1309 (Fla. 1st Dist. Ct. App. 1987) with *Gepfrich v. Gepfrich*, 582 So. 2d 743 (Fla. 4th Dist. Ct. App. 1991). In *Gepfrich*, the former husband who was \$20,000 in arrears in alimony and had an income of \$4700 a month purchased a \$300,000 homestead, maintained it at a cost of over \$3000 a month, and lived there with a girlfriend who did not contribute to its maintenance. The trial court ordered him to sell his house to satisfy his alimony and the district court affirmed that order. The court held that he was "attempting to use the homestead exemption law as a [sic] instrument to defraud his former wife and to escape his honest debt to her." *Id.* at 744. The authority of this case is questionable.

Under prior law, several cases held that a person who failed to satisfy support obligations to family members could not be considered the head of that family. Accordingly, homestead status was denied and the former spouse or child was able to obtain a lien against the nonhomestead property in which the owner resided. The support obligation was not considered an exception to the exemption, but failure to pay support was considered a bar to qualification for the exemption. Under the present exemption, any natural person can qualify for a homestead exemption. Thus, failure to pay alimony or support normally will not preclude a claim for a homestead exemption. It is unclear whether this result was contemplated when the natural person amendment was proposed and approved.

At present, a person with a claim for alimony, support, or maintenance has a solution under bankruptcy law.²⁵⁴ If the debtor becomes insolvent, and a voluntary or involuntary petition in bankruptcy is filed, the homestead will not be exempt from this type of prebankruptcy debt.²⁵⁵ There is some question whether these creditors can reach the homestead in a proceeding under state court or must limit collection to the bankruptcy proceeding.

An argument can be made that a Florida homestead should not be exempt from liens for alimony and support obligations. But this should occur only as a last resort.²⁵⁶ The Bankruptcy Code provides that last resort. Thus, the federal bankruptcy laws provide a remedy for such debtors. This remedy should be tested judicially.²⁵⁷ If, and only if, the Bankruptcy Code does not provide these persons with an adequate remedy, then consideration should be given to amending the Florida Constitution in this regard. If bankruptcy law does not provide that remedy, consideration also should be given to the fact that the homestead exemption may provide

254. See 11 U.S.C. §§ 522(c)(1), 523 (a)(1). For a discussion of when a claim is for alimony, support, or maintenance, see Frank Nussbaum, *A Second Bite at the Apple for Dissolution Clients*, 67 FLA. B.J. 85 (No. 9 Oct. 1993).

255. 11 U.S.C. §§ 522(a)(1), 523(a)(5); see also *Feldman v. Grimes*, 46 B.R. 84 (Bankr. D. Md. 1985).

256. See *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985) (holding that as a last resort, a beneficiary's right to a distribution from a spendthrift trust could be subject to liability for payment of that beneficiary's alimony obligations).

257. The Bankruptcy Code has the effect of subordinating the exemption to certain debts. The United States Constitution authorizes federal laws regulating bankruptcies. Is 11 U.S.C. § 522(c) constitutional? It should be to the extent it allows a Florida homestead to be administered by a bankruptcy trustee and sold to satisfy these types of preferred debts. Further, it is constitutional for certain debts not to be dischargeable in bankruptcy. An additional question is whether the United States Constitution authorizes the Bankruptcy Code to subject an asset to liability in a state proceeding for a debt from which that asset is liable under state law.

shelter for persons that the owner is legally obligated to support, such as a new spouse or other children. Thus, at the present time, there is no compelling argument that a specific exception to the exemption should be created for alimony, maintenance, or support liabilities.

c. Other Creditors

Creditors who can reach nonexempt assets but cannot reach exempt assets are at risk that a debtor will convert nonexempt assets to exempt assets. A person who uses a nonexempt asset to purchase a homestead in Florida is converting the nonexempt asset into an exempt asset. A person who uses a nonexempt asset to satisfy a mortgage on a homestead can increase the net value of the exempt asset. Similarly, a homestead owner can purchase additional acreage contiguous to the homestead and additional acreage will become part of the exempt homestead. Under present law, absent unusual circumstances, a creditor cannot have the purchase or satisfaction set aside, or obtain a lien superior to the exemption.

Florida had a fraudulent transfer statute from 1923 to 1988.²⁵⁸ When this law was in effect, the federal circuit court of appeals held that the use of nonexempt funds to purchase an equitable interest in a homestead was not fraudulent as to creditors. The court stated in *Beall v. Pinckney*,²⁵⁹ that “the intention to do what the Constitution not only permits but provides, is not an intention to hinder and defraud creditors within the meaning of the Florida Statutes [section 726.01 regarding fraudulent transfers].”²⁶⁰

This statute did not reach the transfer by a debtor of property that qualified as the debtor’s homestead to another, because the creditors had no right to reach the homestead before the transfer was made.²⁶¹ This statute

258. FLA. STAT. § 726.01 (1987) (repealed 1988). This statute voided gifts, sales, and transfers made with “the intent to delay, hinder or defraud creditors.”

259. 150 F.2d 467 (5th Cir. 1945).

260. *Id.* at 471 (referring to section 726.01 of the statutes regarding fraudulent transfers).

261. *Rigby v. Middlebrooks*, 135 So. 563, 564 (Fla. 1931) (“as to exempt creditors there are no creditors within the meaning of statutes prohibiting the conveyance of property in fraud of creditors, and as homesteads are exempt from execution, a creditor acquires no rights in regard thereto.”); *see also* *Murphy v. Farquhar*, 22 So. 681, 683 (Fla. 1897) (creditor who could not receive homestead if husband had not conveyed it to his wife, cannot contest conveyance because “attempted transfer . . . cannot give to any unexcepted judgment against him any other, further or greater right in or to such homestead than it had before such attempt had been made.”); *Saint-Gaudens v. Bull*, 74 So. 2d 693 (Fla. 1954) (conveyance by mother of her homestead to daughter was not made to defraud mother’s creditor); *Grass v. Great American Bank*, 414 So. 2d 561, 562 (Fla. 3d Dist. Ct. App. 1982) (“Alfred Grass’s

also did not reach conversion of nonexempt assets to exempt assets, because the intention to claim an exemption was not an intention to delay, hinder, or defraud creditors. This statute, however, was broad enough to reach a gratuitous transfer of a nonexempt asset by a debtor, even if the transferee could claim the property as an exempt homestead.

In 1988, Florida adopted the Uniform Fraudulent Transfer Act.²⁶² Under this act, a transfer can be fraudulent as to a particular creditor if it is made before or after a claim arose with the "actual intent to hinder, delay, or defraud any creditor of the debtor."²⁶³ Effective October 1, 1993, a new statute was enacted to grant relief to a creditor when a debtor fraudulently converts nonexempt assets into products or proceeds that are exempt by law.²⁶⁴ For this purpose, the conversion is fraudulent if it is made "with the intent to hinder, delay or defraud the creditor." This statute can apply to a creditor whether the "claim to the asset arose before or after the conversion."²⁶⁵ This statute raises several questions. One question is whether a homestead purchased from nonexempt funds can be "proceeds" of these funds. This would be an unusual interpretation of the term "proceeds." If it could be interpreted that way, another question is whether the purchase of a homestead can be made with the intent to hinder, delay, or defraud a creditor. Based on the predecessor statute, the mere conversion

subsequent conveyance of his interest in the homestead cannot be fraud upon Great American Bank since the property was beyond the reach of Great American Bank due to its homestead character, which was clearly established prior to entry of any judgment against Mr. Grass."); *Freehling v. McDonald*, 16 B.R. 618 (Bankr. S.D. Fla. 1981) (gratuitous transfer of undivided one-half interest in debtor's homestead was not fraudulent conveyance under Florida Statutes, chapter 726, section 01 because at time of conveyance it was debtor's homestead; whereas, later conveyance of other one-half interest was a fraudulent conveyance because it was made when property was no longer debtor's homestead because debtor was no longer head of a family and had moved from property and rented it). *But see* *Roemelmeyer v. Vidana* 19 B.R. 787, 788 (Bankr. S.D. Fla. 1982) (gift to daughter of homestead owned by parents as tenancy by the entirety avoidable, where daughter sold home two weeks later in prearranged sale and gift was made to prevent levy on nonexempt homestead proceeds).

262. FLA. STAT. ch. 726 (1988). In *United States v. Romano*, 757 F. Supp. 1331, 1335 (M.D. Fla. 1989), the court noted that the Uniform Fraudulent Transfer Act adopted by Florida "does not displace the principles of law and equity that were developed under previous statutes and case law." See FLA. STAT. § 726.111 (1991).

263. FLA. STAT. § 732.105 (1991); *Romano*, 757 F. Supp. at 1331 (transfer of homestead to son for inadequate consideration avoided to enforce federal tax liens; however, government's tax lien is superior to homestead exemption under Florida law).

264. Ch. 93-256, § 5, 1993 Fla. Laws 2497, 2499 (to be codified at FLA. STAT. § 222.30).

265. *Id.*

of non-exempt assets into exempt assets does not satisfy that intent element.

Effective October 1, 1993, the Florida Legislature extended the fraudulent transfer doctrine so that an exemption provided under Florida Statutes chapter 222 is not effective if it results from a "fraudulent transfer or conveyance under chapter 726."²⁶⁶ The homestead realty exemption is created by the Florida Constitution, not chapter 222 of the Florida Statutes.²⁶⁷ Thus, the Florida Uniform Fraudulent Transfer Act and its extension do not enable a creditor to reach the purchase of a homestead, payment of a mortgage on a homestead, or conveyance of a homestead to another if the homestead is exempt under the constitution. The Act could apply to the extent a mobile home on leased land is statutorily exempt absent additional, unusual factors.²⁶⁸ In addition, the conversion of nonexempt assets into exempt assets generally is not prohibited under the Bankruptcy Code,²⁶⁹ although certain transfers are avoidable.²⁷⁰

The Florida Uniform Fraudulent Transfer Act also provides that a transfer may be fraudulent if the debtor does not receive "reasonable and equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at the time of the transfer or the debtor became insolvent as a result of the transfer obligation."²⁷¹ A transfer of nonexempt assets to exempt assets usually involves an exchange of equivalent value. Thus, a transfer of assets into a homestead made when the debtor was insolvent, or was rendered insolvent, should not be covered by the act. Based on the judicial interpretation of the predecessor statute,²⁷² it also is questionable

266. *Id.* § 4, 1993 Fla. Laws at 2499 (to be codified at FLA. STAT. § 222.29 (effective Oct. 1, 1993)).

267. Florida Statutes sections 222.01-222.08 provide the procedures for a person to follow to claim the constitutional exemption.

268. See FLA. STAT. §§ 222.05, 222.29 (1991).

269. See *Govaert v. Primack*, 89 B.R. 954 (Bankr. S.D. Fla. 1988) (move to Florida and acquisition of \$450,000 homestead 18 months before filing bankruptcy petition was not a fraudulent transfer avoidable under the Bankruptcy Code); *Tavormina v. Robinett*, 47 B.R. 591, 592 (Bankr. S.D. Fla. 1985) (transfer of wife's homestead to tenancy by the entirety not avoidable even though transfer made when both husband and wife were insolvent, because "transfer of exempt property cannot adversely affect any creditor, and therefore, cannot be fraudulent transfer [under 11 U.S.C. § 548(a)]."); *Judson v. Levine*, 40 B.R. 76 (Bankr. S.D. Fla. 1984) (use of \$100,000 to satisfy line of credit secured by mortgage on homestead four days prior to filing bankruptcy petition was not fraudulent on grounds for imposition of an equitable lien).

270. See *e.g.*, 11 U.S.C. § 547 (1988).

271. FLA. STAT. § 732.106 (1991). A debtor with exempt assets may be insolvent. *Id.* §§ 732.102, 732.103.

272. See *supra* notes 261-63 and accompanying text.

whether this act can be used to avoid the constitutional exemption.

There is a judicial exception to the homestead exemption that may help. The Supreme Court of Florida has stated that the homestead laws should be liberally construed but not interpreted or applied "to make them instruments of fraud or unjust imposition upon creditors."²⁷³ This raises the question as to what type of fraudulent conduct or set of facts would preclude application of the homestead exemption.

Generally, acquiring an exempt homestead does not make the exemption an instrument of fraud. This is true even if this results from a conversion of nonexempt assets to exempt assets. Moreover, a person can expand a homestead by acquiring additional acreage contiguous to an existing homestead, even when the acreage is acquired when the person is subject to an outstanding judgment.²⁷⁴ The exception to this rule arises when the nonexempt assets used to purchase the initial homestead property or the additional acreage were fraudulently obtained. In some cases, the fraud will result in denial of the exemption completely.²⁷⁵ In other cases, the fraud will result in the imposition of an equitable lien.²⁷⁶ In one liberal decision, a Florida district court held the exemption would work a fraud against a former wife due alimony if her former husband was allowed to claim the exemption for a home. In *Gepfrich*, the husband had purchased the home when he was in arrears on alimony payments and claimed he could not afford to maintain the new home and pay his current and past due alimony obligations.²⁷⁷

In addition, using nonexempt assets to satisfy a mortgage on a homestead will not make the exemption an instrument of fraud, especially

273. *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 450 (Fla. 1943). See *Milton v. Milton*, 58 So. 718, 719 (Fla. 1912) and *Jettson Lumber Co. v. Hall*, 64 So. 440, 442 (Fla. 1914) for similar language. Some district courts have extended this by stating that the homestead exemption laws also should not be applied "as a means to escape honest debt." See, e.g., *Gepfrich v. Gepfrich*, 582 So. 2d 743, 744 (Fla. 4th Dist. Ct. App. 1987) (homestead exemption could not be used to defeat claim for alimony); *Frase v. Branch*, 362 So. 2d 317, 319 (Fla. 2d Dist. Ct. App. 1978), *appeal dismissed*, 368 So. 2d 1362 (Fla. 1979) (contract to sell a portion of tract exceeding 160 acres, signed by one spouse only, could not be avoided by claiming that portion was part of the homestead exemption, when the portion retained exceeded 160 acres); *Vandiver v. Vincent*, 139 So. 2d 704, 708 (Fla. 2d Dist. Ct. App. 1962).

274. *Quigley v. Kennedy & Ely Ins., Inc.*, 207 So. 2d 431 (Fla. 1968), *cert. denied*, 210 So. 2d 869 (Fla. 1968).

275. *In re Gherman*, 101 B.R. 369 (Bankr. S.D. Fla. 1989) (exemption denied on alternate grounds for use of embezzled funds to purchase homestead or abandonment).

276. See *supra* notes 49-51 and accompanying text.

277. 582 So. 2d at 743.

if the property was mortgaged after the exemption attached. An exception may apply when the funds used to satisfy the mortgage were wrongfully obtained. In most cases, the remedy would be to grant the injured party an equitable lien upon the homestead.²⁷⁸

Presently, the burden is on a creditor to reach property before it becomes exempt or is converted into an exempt asset.²⁷⁹ Should this result change by allowing the fraudulent transfer doctrine to extend to conversions of nonexempt assets into a constitutionally exempt homestead?

Consideration should be given to shifting the burden if two elements are met. First, the conversion occurs when the debtor is insolvent or when the conversion renders the debtor insolvent. Second, the person whose claim arose before the conversion must have been prevented from reaching the nonexempt asset *because of circumstances beyond the person's control*. Lack of diligence on the part of the creditor would not be one of those circumstances. For example, this exception would protect a creditor if an insolvent debtor converts assets while a case is pending on the creditor's cause of action, but before a judgment is rendered against the debtor. Additionally, it would apply if an insolvent debtor converts assets, after a judgment creditor schedules a deposition to discover whether the debtor has nonexempt assets but before the deposition takes place. It also should protect a creditor who was recorded with a judgment in the county where the homestead property is located or acquired.

Would such a result provide unequal treatment for debtors? Under this approach, a person with an existing creditor who is insolvent or will become insolvent after a conversion will not be able to exempt property he or she purchased. By contrast, a person who is solvent can purchase a homestead and exempt it from a future creditor, whose cause of action arose after the purchase, even if the debtor thereafter becomes insolvent. This treatment is analogous to situations where a solvent person makes a gift that cannot be set aside present or future by creditors as a fraudulent conveyance; while a present creditor could have the gift set aside if the debtor were insolvent at the time of the gift.²⁸⁰ When the insolvency occurs, in relation to the

278. *Friedman v. Luengo*, 104 B.R. 489 (Bankr. S.D. Fla. 1989) (equitable lien imposed on homestead in favor of corporation for funds wrongfully taken from corporation's escrow account). *But see Raymos v. Collins*, 19 B.R. 874 (Bankr. R.D. 1982) (debtor was denied discharge when he used "business resources to satisfy a mortgage on his homestead" and also because he failed to disclose the transfer).

279. *Heddon v. Jones*, 154 So. 891 (Fla. 1934).

280. *See* FLA. STAT. § 726.105 (1991) (exceptions when transfers can be voidable by future creditors).

transfer or acquisition of an exempt asset, it creates unequal treatment and that is appropriate. Solvent debtors are treated differently from insolvent debtors with respect to their conveyances and transfers. Each would be entitled to claim the exemption with respect to creditors' claims that arose after the transfer or conversion occurred.

Whether a conversion while insolvent can be set aside should be tested under the judicial fraud exception or the applicable statutes. If the courts determine that a creditor cannot reach the converted assets under present law, then a new statute or constitutional amendment should be considered.

d. Judgment Creditors When Homestead is Sold

A judgment creditor cannot obtain a valid lien against a Florida homestead unless it falls within an exception or the homestead is abandoned. The supreme court has stated that "once property acquires the status of homestead such characteristic continues to attach to it unless the homestead be abandoned or alienated in the manner provided by law."²⁸¹ The meaning of the reference to alienation is unclear, unless it is considered a reference to the issue of whether the proceeds from an alienation by sale are exempt.

A sale by a married owner is an alienation for purposes of the joinder requirement. This raises an issue as to whether a sale or the execution of a contract to sell a homestead, or the sale itself, is an abandonment or alienation of the homestead for creditor purposes. This would be relevant if the seller does not intend to reinvest the proceeds in another home.²⁸² If the sale is not considered an abandonment or alienation, the sale can be made free of liens, other than excepted liens. The seller will be entitled to receive the proceeds without having to satisfy those creditors at the time of

281. *Wilson v. First Nat'l Bank & Trust Co.*, 64 So. 2d 309 (Fla. 1953). *See also In re Estate of Skuro*, 487 So. 2d 1065, 1066 (Fla. 1986); *Clark v. Cox*, 85 So. 173, 174 (Fla. 1920).

282. If the seller resides on the property but dies before consummating the sale, the supreme court has held that the contract is not treated as an alienation for devise purposes. Thus, an owner with minor children who contracts to sell the homestead but dies before the closing cannot devise the homestead. The court did not discuss whether the decedent intended to reinvest the proceeds if he lived. *In re Estate of Skuro*, 487 So. 2d at 1066.

"While we recognize the doctrine of equitable conversion, because of the unique treatment of the law of homestead property, we find that doctrine inapplicable when the potential vendor is physically residing on the property as his home at the time of his death. Had Skuro abandoned possession and no longer claimed it as his family's place of abode, the doctrine would likely apply.

Id.

the sale. A judgment creditor's remedy would be to reach the proceeds, after the closing, once the proceeds are in the hands of the seller. On the other hand, if the sale is treated as an abandonment or alienation, a judgment that could not attach to the homestead while it was the residence of the owner could attach to the property at the time of the contract or sale. If a sale constitutes an abandonment, then a related question is whether a gift of the homestead also could be treated as an abandonment.

Clearly, a sale is not an abandonment or alienation of the exemption if the owner intends to reinvest the proceeds in another homestead within a reasonable time. Further, the proceeds are exempt if they are not commingled and the owner intends to reinvest them and does so within a reasonable period of time. But is the converse true? Is a sale an abandonment if the owner does not intend to reinvest the proceeds of the sale? The supreme court has not ruled on this issue. In *Beensen v. Burgess*,²⁸³ the Fourth District held that a seller who vacated his homestead before a closing in order to surrender possession of the property at closing had not abandoned the homestead. In *Beensen*, the seller temporarily resided with his daughter until the closing; but, it was unclear whether the seller reinvested the proceeds in another homestead. *Beensen* was followed by the federal district court in *Brown v. Lewis*.²⁸⁴ In *Brown*, the owner of a homestead signed a contract to sell and then permanently moved to Michigan two months prior to the closing. The court held that she had not abandoned the property when she moved. Thus, the property retained its exempt status and the buyer's title was not subject to a lien for a judgment against the seller. Neither court discussed the seller's intention to reinvest the proceeds; however, in *Brown v. Lewis*, the owner established permanent residency in Michigan and could not claim the intent to reinvest the proceeds in a Florida residence.

The law should be clarified as to whether these cases are correct. If these cases are correct, a buyer has no obligation to satisfy a judgment against the seller if it is not a valid lien against the homestead, and the buyer will receive title free from those judgments. The burden is on the creditor to attach the proceeds once they are in the hands of the seller.

If these cases are correct, consideration should be given to whether this rule should be changed to grant a creditor the right to be paid at closing if the seller does not intend to reinvest the proceeds. If the seller intends to reinvest the proceeds, consideration should be given to whether the proceeds

283. 218 So. 2d 517 (Fla. 4th Dist. Ct. App. 1969).

284. 520 F. Supp. 1114 (M.D. Fla. 1981).

should be held in escrow. This would place a significant burden on the escrow agent. The proceeds would be held in escrow for a reasonable period of time and during that time could be disbursed only for the purposes of reinvesting them in a new homestead. Once the reasonable time period for reinvesting expired, any remaining proceeds would be used to satisfy the creditors' judgments.

Satisfying creditors out of sale proceeds would protect creditors. On the other hand, it would place a burden on the homeowner to prove non-abandonment (i.e., an intent to reinvest), a burden on the buyer to assure that the judgments were satisfied or the proceeds properly escrowed, and a burden on an escrow agent. This would unduly burden homestead owners, buyers, and commerce, when the creditor presently has an adequate remedy. The burden under present law is on the creditor to find and reach the nonexempt proceeds. There does not seem to be any compelling reason to shift the burden, when present law allows the creditor to reach the nonexempt proceeds.²⁸⁵

e. Creditors with Dischargeable Debts Under Bankruptcy

When a homeowner files a petition in bankruptcy or is involuntarily placed there, the rules change. The homeowner can claim the state exemption in bankruptcy. The creditors may be satisfied, in whole (rarely) or in part out of nonexempt, unsecured assets of the estate. To the extent a creditor is not paid in full, the debt is discharged unless the debt is not dischargeable in bankruptcy.

If the debt is not dischargeable, the homeowner remains liable for the debt. Then, if the homeowner sells the exempt homestead with no intent to reinvest the proceeds, the creditor could reach the sales proceeds. In addition, in some cases, the homestead may be liable for some of the owner's debts; either because the debt is secured by a nonavoidable lien²⁸⁶ or the debt is a certain type of nondischargeable debt.²⁸⁷

Most debts are dischargeable.²⁸⁸ This means that after the discharge,

285. Ch. 93-256, § 5, 1993 Fla. Laws 2497, 2499 (to be codified at FLA. STAT. § 222.30(2)).

286. Present bankruptcy law allows a debtor who claims a homestead under Florida law to avoid a pre-existing judicial lien if the lien attached after the debtor acquired his or her interest in the property under 11 U.S.C. § 522(f)(1) (1992). *Owen v. Owen*, 500 U.S. 305 (1991). This is a problem under bankruptcy law that Florida law cannot address.

287. 11 U.S.C. §§ 522(c)(1), (3) (1992).

288. *Id.* § 523.

the homeowner no longer has these debts.²⁸⁹ Thus, the homeowner can sell the homestead and keep the proceeds free from the claims of the discharged creditors. It even means that a homeowner can contract to sell the home before the petition is filed and still claim the homestead exemption.²⁹⁰

If the debt is not dischargeable, a person who stacks a bankruptcy discharge on top of the homestead exemption can reap great benefits from it. This benefit would be obtained by contracting to sell the homestead, either before or after the bankruptcy petition is filed, and closing the sale after the petition is filed.²⁹¹ If the property is exempt, the trustee should have no reason to avoid the contract to sell.

The problem that needs to be addressed is the fact that a discharge precludes the creditor from reaching the sales proceeds. If the claim of a "temporary" exemption coupled with a bankruptcy discharge results in this type of abuse, the creditor should have a remedy, such as denial of the exemption or revocation of the discharge. One question is whether this abuse can be corrected by a change in Florida law. Permanent residency is a requirement for the Florida homestead exemption. Permanent residency does not mean that a person cannot sell the homestead. It means that the person must intend to make that home (or a substitute home) his present, permanent residence. A voluntary sale after the exemption is claimed may raise a question as to whether the prerequisite intent existed at the time the exemption was claimed. Similarly, the execution of a contract to sell before the exemption is claimed raises a question as to whether the prerequisite intent existed. In this context, the question of permanent residency, abandonment, and alienation really are the same issue. In a non-bankruptcy context, the creditor is protected by its right to reach the proceeds. In the bankruptcy context, the discharge cuts off these rights. Could Florida establish a different rule regarding permanent residence and abandonment

289. If the debt is secured by a valid lien, the discharge means that the debtor is relieved of personal liability for the debt; however, the lien secures a nonrecourse liability.

290. *In re Crump*, 2 B.R. 222 (Bankr. S.D. Fla. 1980). In *Crump*, the homestead was exempt on the petition date (November 27, 1979), even though the debtor entered into the contract to sell (November 1, 1979) and even though the debtor intended to leave the house the day after the petition was filed "to reside at least temporarily in a rented house, which they would like to purchase but have no present prospect of being able to purchase." *Id.* at 223.

291. *See id.*; *see also In re Washofsky*, 78 B.R. 347 (Bankr. S.D. Fla. 1987) (homestead was exempt as of date petition was filed, even though debtor vacated the property after petition was filed and moved into a rental apartment, and homestead was under contract for sale).

when the exemption is claimed in bankruptcy as opposed to when it is claimed in a nonbankruptcy proceeding?²⁹² Assuming that Florida could do this, it does not seem desirable. If the bankruptcy exemption were more desirable, it would provide an incentive for the debtor to file a voluntary petition. If the bankruptcy exemption were less desirable, it would provide an incentive for a qualifying creditor to file an involuntary petition. Present bankruptcy law contains some of these incentives, but that is not sufficient reason for Florida law to contain more incentives. In addition, changing the rules could affect debtors that need their homesteads and have no intention to sell them after bankruptcy.

Accordingly, the Florida courts need to resolve the issue of whether the intent to sell without reinvesting the proceeds constitutes an abandonment as of the sale.²⁹³ Then, the bankruptcy issue needs to be addressed with regard to whether the debtor can claim the exemption and receive the proceeds, free from any liability to those creditors.

B. *Transfer Provisions*

The devise provisions were revised in 1968 to limit the protected class of children to minor children.²⁹⁴ They also were revised in 1972 to allow a devise to the spouse (one protected class), in the absence of any minor children (the other protected class). If devise is prohibited because there is a minor child, however, the statutory descent provisions extend a benefit to adult children. In addition, the 1984 extension of the exemption to all natural persons increased the number of homesteads. It extended protection to the spouse and heirs of natural persons who were not heads of a family. Thus, it increased the number of spouses who can be protected and the number of heirs who can benefit from the decedent's exemption. Several supreme court decisions after these revisions and amendments reflect inconsistencies between the purpose for the transfer restrictions and inurement of the exemption and the results of these provisions. An inconsistency arises when those who reap the benefit of these provisions do so to the detriment of the decedent's creditors. These cases and inconsisten-

292. Maryland has a homestead exemption, limited in value, that differs for bankruptcy and nonbankruptcy proceedings. The value is \$5000 in a bankruptcy proceeding and \$3000 in a nonbankruptcy proceeding. MD. CTS. & JUD. PROC. CODE ANN., § 11-504 (1989).

293. Determining that the abandonment occurred immediately preceding the sale would prevent creditors from forcing the sale of the homestead. If the sale is an abandonment, then the question of when a creditor's lien attached would be relevant, if there were several creditors and insufficient funds to satisfy them all.

294. FLA. CONST. art. X, § 4(c).

cies will be discussed in the context of how the transfer provisions should be reformed.

When considering reform, it is important to consider the impact of the supreme court's decision in *Shriners Hospital for Crippled Children v. Zrillic*.²⁹⁵ In *Shriners*, the court held that an individual's right to "acquire, possess and protect property" is protected by the constitution of Florida²⁹⁶ and that right includes the right to devise. It also includes the right to dispose of property during lifetime. Obviously, the constitutional right to alienate or devise property may be restricted by another provision of the constitution. Further, "constitutionally protected property rights are not absolute, and 'are held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order [and] general welfare.'"²⁹⁷ Nevertheless, in determining whether the present transfer provisions are desirable, it is helpful to view them from the standpoint that the right to alienate and devise property is a basic protected property right, and it should be restricted only to the extent necessary to secure the general welfare of the people. Thus, the right to alienate or devise homestead should be restricted only to the extent necessary to protect the persons the exemption is designed to protect.

In *Shriners*, the supreme court also stated that "Florida law is replete with protections for surviving family members who may have been dependent on the testator. For example, the Florida Constitution expressly provides protection in the form of homestead exemptions for real and personal property"²⁹⁸ It should be noted that the present homestead exemption provides protection for surviving family members, whether or not they are dependent on the homestead for shelter.

The transfer provisions affect a married person's right to alienate or devise his or her homestead. They do not affect a parent's right to alienate the homestead, even if that parent has a minor child, unless the parent is

295. 563 So. 2d 64 (Fla. 1990).

296. Article I, section 2 of the Florida Constitution provides:

SECTION 2. Basic rights.—All natural persons are equal before the law and have inalienable rights, among which are the right . . . to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited.

297. *Shriners*, 563 So. 2d at 68. (quoting *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976)).

298. *Id.* at 69. See also FLA. CONST. art. X, § 4; FLA. STAT. §§ 732.401-732.4015 (1985).

married. They do, however, prevent the parent of a minor child from devising the homestead at death. Should these provisions be retained or amended? To determine this, it is necessary to analyze the purposes of these provisions and the effect of these provisions.

1. *Inter Vivos* Provisions

The requirement for spousal consent for an inter vivos alienation has applied since 1868.²⁹⁹ Originally, this requirement applied only to a married owner who was head of a family. Thus, only a spouse married to the head of a family was protected by this provision. The purpose of this provision was to protect the spouse who was part of the family but did not own the homestead. In most cases, the husband was the head of the family, and the wife resided there with her husband and needed the shelter of the homestead. The constitution protected this wife from her husband transferring or mortgaging the homestead without her consent. If the wife did not reside with her husband, then he usually was not the head of the family and the property did not qualify as homestead. The joinder provision also protected a husband if the wife owned the home and she was the head of the family.

In some cases, the constitution protected a spouse of the head of the family, when the spouse did not reside on the homestead or was not part of the family. For example, a spouse who had temporarily or involuntarily abandoned the homestead was protected from the other spouse alienating the homestead without his or her consent. Thus, if the husband owned the homestead and the wife abandoned the homestead because he physically abused her, a court probably would have ruled that he was the head of the family and could not convey it without her consent. On the other hand, if the wife had voluntarily and permanently abandoned the husband and the homestead, the result was less clear. If the husband was the head of the family, which included his children, the court had the equitable power to waive the joinder requirement if the wife voluntarily abandoned him and the children.³⁰⁰ This doctrine of spousal abandonment was part of the law in effect, when the owner was required to be the head of the family in order

299. One difference in the present constitution is that it specifically authorizes gratuitous transfers. FLA. CONST. art. X, § 4(c). Another difference is that the Florida Constitution of 1885 required a deed or mortgage to be duly executed, resulting in a requirement for two subscribing witnesses to a contract to purchase, which has been eliminated. See FLA. CONST. of 1885, art. X, § 4.

300. See *In re Estate of Scholtz*, 543 So. 2d 219, 220 (Fla. 1989) (regarding its characterization of the pre-1985 caselaw).

to qualify for the homestead exemption.³⁰¹

In 1984, the homestead exemption was amended to apply to any natural person owning a homestead. Since then, any spouse married to a natural person owning a homestead is protected. This amendment substantially changed the classes of spouses that can prevent a homeowner from alienating it by extending protection to spouses of natural persons who are not the head of a family. The spouse of any person who owns a homestead is protected, whether that person is the head of the family and whether the homestead is that spouse's residence.

Consider the following example: A husband owns the home in which he and his wife reside. He and his wife are the sole members of the family, and he is the head of the family. The wife abandons him and the home and moves to another state, with no intention of returning to him or the home. Thereafter, the husband is no longer the head of the family. If the abandonment occurred in 1984, the home would not be a homestead and the husband could sell or mortgage the home without her consent. If the abandonment occurred after January 7, 1985, the home would be a homestead and the husband could not sell or mortgage the home without his wife's consent, unless the marriage has been dissolved.³⁰² Thus, under the present law, a spouse is protected from alienation, even if he or she does not reside on the homestead and has abandoned the owner-spouse and the homestead.

In many cases, the nonowner-spouse is dependent on the owner-spouse for shelter and support. This nonowner spouse needs the protection accorded him or her under the constitution to prevent the owner from alienating the homestead without his or her consent. If the home is owned by both spouses as tenants by the entireties, both spouses are protected. Neither can alienate the property without the other's consent. But if only one spouse owns the home, the other may need protection. The joinder requirement should be retained to protect that owner's spouse. The question is whether the joinder requirement should apply to all spouses.

The joinder requirement for a married owner should not be abolished entirely.³⁰³ It should be retained, but only for a limited class of spouses.

301. See *Barlow v. Barlow*, 23 So. 2d 723 (Fla. 1945) (regarding devise restriction).

302. See *In re Estate of Scholtz*, 543 So. 2d at 219 (concept of spousal abandonment does not apply to devise restriction, so that husband who was survived by a spouse who lived separately from him for 29 years, was not entitled to devise homestead that he purchased during their separation).

303. If the choice is to have the restriction apply to all nonowner spouses or to none of them, then its present scope should be retained so that it applies to all spouses.

Thus, the joinder requirement should apply to spouses whose permanent residence is or was the homestead, so long as that residence has not been voluntarily and permanently abandoned by that spouse.

A spouse who has never resided in the homestead or who resided there and then voluntarily abandoned it as a permanent residence does not need protection. That spouse can choose to remain married or dissolve the marriage and divide the assets, including the homestead. Consider the example of an estranged husband and wife with no children. Neither has attempted to have the marriage dissolved. Each owns and lives alone in a separate homestead. Neither relies on the other for support or has any contact with the other. Neither of them can give, mortgage, or sell their respective homesteads without the other's consent (except to create a tenancy by the entirety). Neither spouse should have the right to prevent the other from alienating his or her homestead.

The purpose of the joinder requirement should be to provide a spouse who chooses to reside in the homestead with the security that the homestead will not be alienated without that spouse's consent. If the spouse lives in the home and the nonowner chooses to abandon it, that home still would be the owner's homestead and the joinder requirement should apply.

The joinder requirement should not apply to other spouses. Accordingly, the law should provide that the right to prevent the owner spouse from alienating the homestead, without the other nonowner spouse's consent, can be waived by the nonowner spouse. Permanent, voluntary abandonment of the homestead by the nonowner spouse would operate as a waiver of the joinder requirement. In addition, this requirement should be waivable by agreement between the spouses. The requirements for the waiver agreement could parallel the requirements for an agreement to waive the right to inherit the homestead or they could parallel the requirements for other provisions of an antenuptial agreement.³⁰⁴ Waiver of the right to inherit restores the right to devise the homestead to a married owner who has no minor children.³⁰⁵ Similarly, waiver of the right to join in an alienation should restore the right of a married person to freely alienate the homestead during lifetime.

An unmarried parent can alienate his or her homestead, even if he or

304. Compare FLA. STAT. § 732.702 (1991) (no consideration required; disclosure required only if the agreement is made after the marriage) *with* Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962) (the requirements for an antenuptial agreement are that it must contain fair and reasonable provisions for the waiving spouse or the waiving spouse must receive full, fair and open disclosure of the other spouse's wealth).

305. City Nat'l Bank v. Tescher, 578 So. 2d 701, 703 (Fla. 1991).

she has minor children. By contrast, that parent cannot devise the homestead, if he or she is survived by any minor children. At first, this appears to be inconsistent, but it is not. The laws regarding parental support are designed to protect the minor child while the parent is alive. The parent needs the ability to purchase or sell the homestead in order to determine the appropriate means of providing a shelter for that minor child. The parent's ability to alienate the homestead should not be restricted when that parent has a minor child.³⁰⁶ The restriction on alienation should apply only when the owner is married, regardless of whether the owner has any minor children; however, the restriction should not apply if the spouse has waived the homestead rights by abandonment or agreement.

2. Devise Provisions

The original purpose of the devise prohibition was to protect the widow and children of the head of the family. Now, the devise prohibition is designed to protect a widow, a widower, or only a minor child, but not an adult child. The constitution prohibits devise, but it does not guarantee that the homestead will descend to the protected class, nor does it necessarily guarantee the protected class the exclusive right to reside in the homestead. The legislature fills in this gap, by determining how the homestead will descend. To determine if the prohibition on devise should be maintained, it is essential to consider how the homestead descends when devise is prohibited. If the descent provisions do not benefit the members of the protected class, then they should be amended. If they cannot be amended to do this effectively, then the prohibition on devise should be revised.

The devise prohibition only applies when the owner's interest is one

306. Any proposal requiring that a minor child consent to the alienation, through his or her natural or legal guardian or guardian ad litem, would be inappropriate or unduly burdensome. If the child lives with the parent who owns the homestead, that parent will provide shelter for the child, be it this homestead or another home. If the child does not live with the parent who owns the homestead, why should that child have the right to prevent the parent-owner from selling that home? In addition, if the owner is the child's guardian, there is no reason to require the owner to consent in his or her capacity as guardian. Further, there is no reason to require a guardian ad litem to be appointed. Even if the guardian ad litem could make an informed decision as to what is in the best interests of the minor child, the owner's decision as to what is in the best interest of the owner and child should override the guardian ad litem's decision. If the child does not reside with the owner, the owner's former spouse or the child's other parent (if the child was born out of wedlock) could be the child's guardian. Requiring that guardian's consent would be problematic. If the owner is married and has a minor child, the spouse's joinder should be the only joinder requirement, even if that spouse is not the child's other parent.

capable of being devised. Thus, the devise prohibition does not apply if the homestead is owned as a tenancy by the entirety or a joint tenancy with right of survivorship. It also does not apply if the owner has only a life estate or a beneficial life interest in an irrevocable trust.

When the owner has a devisable interest but devise is prohibited under the constitution, the homestead descends pursuant to the Florida Probate Code. The surviving spouse receives a life estate and the descendants (including any minor child) a vested remainder. If there is a surviving spouse or descendant, but not both, the homestead descends to the surviving spouse or descendants, as the case may be. The minor child is not granted possession of the homestead so long as the surviving spouse is alive. If the surviving spouse is the minor child's other parent or guardian, the child will live with the spouse on his or her life estate. Further, if there is no surviving spouse or the surviving spouse dies, the minor is not granted exclusive possession if there are other descendants. Instead, ownership and possession are shared with the other descendants, per stirpes. In addition, the minor will reside in the home only if the child's guardian also resides there. One result of these provisions is that adult children are treated differently depending on whether the owner is or is not survived by a surviving spouse or a minor child.

In recent years, there have been legislative proposals to remove all of the devise prohibitions. However, the devise prohibition is an integral part of the homestead protection and should be retained in some fashion to protect the surviving spouse. Whether the prohibition against devise should be retained if the owner is survived by a minor is questionable and is discussed *infra*.

When the constitution was revised in 1968, adult children lost their status as members of the protected class. An adult child has no right to prevent the parent from devising the homestead.³⁰⁷ An adult child has a statutory right to inherit an interest in the parent's homestead, if the parent cannot devise it or chooses not to devise it. This lack of standing is reflected in two decisions of the supreme court.

In *In re Estate of Finch*,³⁰⁸ the Supreme Court of Florida held that the owner of a homestead who is survived by a spouse and adult children and who wants to devise the homestead has only one choice: the owner can

307. Upon the death of the parent, an adult child could contest an *inter vivos* alienation, if the parent was married and the spouse was required to join in the alienation but failed to do so.

308. 401 So. 2d 1308 (Fla. 1981).

devise a fee simple interest in the homestead to the surviving spouse.³⁰⁹ Otherwise, the homestead will descend by statute, with the surviving spouse receiving a life estate and the descendants (adult children) receiving the vested remainder. In *Finch*, the husband owned the homestead and he wanted to devise a life estate to his wife and a vested remainder to only one of his two adult daughters. The court held that “[w]here a testator dies leaving a surviving spouse and adult children, the property may not be devised by leaving less than a fee simple interest to the surviving spouse.”³¹⁰

In *City National Bank v. Tescher*,³¹¹ the court held that a married person with adult children, but no minor children, could devise the homestead when the surviving spouse waived homestead rights in an antenuptial agreement.³¹² This decision was followed by *Hartwell v. Blasingame*,³¹³ which held that the surviving spouse’s waiver was binding on the adult children, so that they could not contest their parent’s devise of the homestead.³¹⁴ Accordingly, if a surviving spouse has waived the right to inherit an interest in the homestead, the owner has the right to devise the homestead if there are no minor children. The waiver is equivalent to the spouse’s death, so the owner is treated as not being survived by a spouse.

The reason the owner cannot devise the homestead when survived by a spouse or minor child is premised on the assumption that the spouse and minor child need the shelter that the homestead can provide them. The surviving spouse can be protected by providing a life estate to that surviving spouse. A surviving minor child can be protected by providing the minor with a term interest during his or her minority.

If there is a surviving spouse and minor child, it is not possible to guarantee both of them possession of the homestead. If the surviving

309. *Id.* at 1309. If the owner is a tenant in common, so that the owner’s homestead interest is an undivided interest in the property, then the owner can devise that undivided cotenant interest to the surviving spouse. See also *supra* notes 139-40 and accompanying text (regarding a devise to the spouse of an interest as a tenant in common).

310. *Finch*, 401 So. 2d at 1309.

311. 578 So. 2d 701 (Fla. 1991).

312. *Id.* at 703. In *Tescher*, the wife owned the homestead and her husband waived his rights by an antenuptial agreement. The wife was survived by two adult children and four adult grandchildren, and the homestead was not specifically devised. The personal representative wanted to sell the homestead and distribute it as part of the residuary devise. The probate court’s order authorizing the sale was affirmed by the district court and the supreme court. *Id.*

313. 584 So. 2d 6 (Fla. 1991).

314. *Id.* at 7. In *Hartwell*, there were no minor children. *Id.* at 6.

spouse is the minor child's parent or guardian, the child will be protected by that spouse or guardian rather than by the homestead law. If the surviving spouse is not that child's parent or guardian, the surviving spouse's right to possession should be superior to the minor child's. Accordingly, if the surviving spouse receives a life estate, the minor's term interest would not begin until the surviving spouse died, and then it would begin only if the surviving spouse died while the child was still a minor. If there were no surviving spouse, the minor child's term would begin when the owner died and would cease when the child attained the age of majority or died prior thereto. If there were several minors and they did not want to share possession, the homestead could be offered for rent, with any rental income shared by the minors and used by their guardians to provide substitute housing. The life estate and term interest would be alienable by the surviving spouse and minor child (via guardian), respectively. Thus, the surviving spouse and minor child can be protected without granting all descendants a remainder interest in the homestead.

If the surviving spouse is the minor child's other parent, the minor child does not need to receive a term interest when the owner dies. Instead, the owner of the homestead should be able to devise the homestead to the surviving spouse. If this occurs and the surviving spouse resides there, it will be the surviving spouse's homestead. Then, the minor child will be protected by the homestead laws, when the surviving parent dies during the minority of that child.

A life estate or term interest is sufficient to protect a surviving spouse or minor child, respectively. There is no reason that the owner should not have the right to devise a remainder interest in the homestead as he or she pleases. This remainder would be subject to the life estate of the surviving spouse, if any, and to the term interest for the minor child or children, if any.

The constitution and statutes should be amended so that the surviving spouse receives a life estate, minor children receive a term interest, and the remainder interest can be devised as the owner chooses.³¹⁵ The remainder would default to the owner's lineal descendants to the extent not devised otherwise. This amendment will overcome the result of *Finch*.³¹⁶ The present law grants an adult child a right to inherit if there is a surviving

315. A minor's term interest should qualify as a homestead if the life estate qualifies and the minor resides with the life tenant. The same should apply to the remainder interests if the holder of that interest resides with the holder of the possessory interest, be it the life estate or the term interest. See *supra* part II A.1.c.vii. (regarding remainder interests).

316. 578 So. 2d at 701.

spouse—a right that the adult child would not have if there were no surviving spouse. This amendment will avoid that result unless the owner wants that result and chooses not to devise the homestead.

The owner could devise a contingent or vested remainder interest. For example, the decedent could choose to vest the remainder interest in the surviving spouse, in order to give that spouse the right to dispose of the property or remainder once the child attains the majority. The remainder interest could be vested in an adult child if the owner chose to do so. Or the remainder interest could be vested in any other person or entity the owner chooses. Or the remainder interest could be contingent upon the occurrence of certain events or the remainder beneficiary surviving the life estate or term interest.

The owner should not be able to create successive life estates, granting a married adult child a residence for life and thereby avoiding the homestead rights the surviving spouse of the married child might have in the residence. The owner should not be able to impose a restriction that would prevent the remainder beneficiary from alienating or devising it. To the extent the remainder interest qualifies as a homestead, that owner's spouse and minor child should receive the full protection accorded them under the homestead laws.

Consideration also should be given to allowing devises in trust. This would allow the owner to devise a life estate and term of years in trust. A new trust form, a qualified homestead trust ("QHOT") could be established for this purpose. The QHOT would provide the surviving spouse with the exclusive right to use the homestead during his or her life. The spouse would have the right to direct the trustee to rent the homestead to others during the surviving spouses lifetime. If it were rented, the spouse would be entitled to the net income. The trustee would have the obligation to maintain the homestead, but only to the extent there were adequate funds available for this purpose. Funds could be provided from rental income, by the surviving spouse or trust funds provided by the decedent. The trustee would have the right to sell the homestead, with the surviving spouse's consent.³¹⁷ The trustee would have the right to reinvest the proceeds in

317. Should the remainder beneficiaries be granted a right of first refusal? This would give them the right to purchase the homestead at the price and upon the terms presented in a bona fide offer for the homestead. If a remainder beneficiary were a minor, this would require the appointment of a guardian ad litem, which is one of the problems associated with the present statutory life estate and vested remainder. Further, the right of first refusal could affect the trustee's ability to sell the homestead and close when the buyer would want, particularly if there are comparable properties for sale without that right. Thus, the protection

a new homestead, with the surviving spouse's consent. If there were a mortgage on the homestead, the surviving spouse would be required to pay the interest on the mortgage and the remainder beneficiaries the principal.³¹⁸ If any beneficiary advanced funds for another beneficiary's share of the expenses, that beneficiary would be entitled to recover the funds advanced, plus interest, from any sale of the homestead and possibly a lien against that beneficiary's interest. A beneficiary could serve as the trustee. After the surviving spouse died and all minor children had attained the age of majority or had died, the homestead would be distributed, outright, to the remainder beneficiaries. The QHOT should be designed so that it can qualify for the marital deduction, as qualified terminal interest property.³¹⁹

An additional question is whether all surviving spouses should be granted protection against disinheritance. It is arguable that a spouse who has never resided on the homestead or who voluntarily abandoned it is not entitled to that protection.

In *Barlow v. Barlow*,³²⁰ the supreme court held that a surviving wife was not entitled to any interest in her husband's homestead when she had abandoned her husband and the home prior to his death. Ms. Barlow removed her effects from the home, voluntarily and permanently left it, and moved to another city where she retained counsel to procure a divorce. The abandonment occurred within two weeks of the husband's death, while his death was imminent. This case was decided when the head of the family requirement existed. It was decided on one of two grounds: either that the husband no longer was the head of the family, consisting of his wife and himself, or that it would be inequitable to allow the wife to abandon the husband and then return after his death to claim an interest in his homestead.³²¹

In 1988, the issue of whether "the concept of abandonment as set out in *Barlow v. Barlow* [is] still viable in view of the 1985 amendment of the homestead provisions of the Florida Constitution" was certified to the supreme court.³²² In *In re Estate of Scholtz*,³²³ the husband and wife had been separated for twenty-nine years and he had purchased the

that the right of first refusal could provide appears to be outweighed by the detriments.

318. Whether a burden should be imposed on the term interest of a minor would need to be decided.

319. I.R.C. § 2056(b)(7).

320. 23 So. 2d 723 (Fla. 1945).

321. *Id.* at 724.

322. *In re Estate of Scholtz*, 525 So. 2d 516, 516 (Fla. 4th Dist. Ct. App. 1988).

323. 543 So. 2d at 219 (Fla. 1989).

homestead while they were separated. They filed joint income tax returns, but "there was no familial support between them," "no domestic relationship," and "no evidence of any reconciliation."³²⁴ The court held that the "concepts of abandonment and inequity that were part of the cases predating the 1985 amendment all related to the definition of homestead which contemplated a 'head of the family.'"³²⁵ Accordingly, the supreme court held that spousal abandonment of the homestead does not prevent that spouse from receiving an interest in the homestead. Therefore, the restrictions against devise applies to a married owner who has been abandoned by his or her spouse, unless the spouse has waived homestead rights in a valid agreement.

The effect of the extension of the exemption to all natural persons is that a married owner must provide his or her surviving spouse with a residence (for the survivor's life or in fee), unless the surviving spouse waives that right. Under present law, this right can be waived by agreement, without consideration.³²⁶ It can be waived without any disclosure, if the agreement is made prior to the marriage,³²⁷ but it cannot be waived by abandonment. This result should be changed. A spouse who voluntarily abandons the homestead or chooses never to reside there should not be granted a life estate in that homestead when the owner-spouse dies.

The purpose for the Florida homestead law does not mandate that all spouses should be protected against disinheritance. When the exemption was extended to any natural person, the class of protected spouses was expanded unnecessarily.³²⁸ If the homestead is the permanent residence of the nonowner spouse, that spouse deserves the protection the constitution accords him or her. If the homestead is owned as a tenancy by the entirety,

324. *In re Estate of Scholtz*, 525 So. 2d at 517.

325. *In re Estate of Scholtz*, 543 So. 2d at 221.

326. FLA. STAT. § 732.702 (1991).

327. *Id.*

328. The Background Papers for the Constitutional Revision Commission of 1977-78 indicate that deleting the head of the family requirement "would alter the policy behind the art. X exemptions; namely to protect the owner's dependents." *Background Papers, Constitutional Revision Commission 1977-78*, at 3 (copy on file at the *Nova Law Review* office). This report, however, does not discuss the devise provisions in connection with this change. In *In re Estate of Scholtz*, 543 So. 2d at 221, the supreme court noted:

While we may have some doubt about whether the proponents of the amendment considered its effect as related to the prohibition against the devise of homesteads, we are unable to state with any certainty that they did not intend the surviving spouse and the children to receive the homestead regardless of whether the family unit continued to exist at the time of the owner's death.

that spouse will be protected. A spouse who is financially unable to purchase a home in his or her own name or in a tenancy by the entirety or who is unable to convince the other spouse to create a tenancy by the entirety needs protection. But a spouse who has permanently and voluntarily abandoned the homestead does not.

The homestead law should be amended, so that the right to inherit an interest in the homestead can be waived by agreement or abandonment. Waiver by agreement has been sanctioned by the supreme court and is codified in the current probate code. Waiver by abandonment is not part of the present law, according to the supreme court's decision in *In re Estate of Scholtz*.³²⁹ Accordingly, a constitutional amendment is required to make it part of the homestead laws. Waiver by abandonment would arise if a spouse failed to make the homestead his or her permanent residence during the owner's lifetime or had voluntarily and permanently abandoned it prior to the owner's death.

3. Inurement of Exemption

If creditors cannot reach a person's homestead while he or she is alive, should they have a last chance when he or she dies? This issue arises if the decedent owned an interest in the homestead as the sole owner, as a co-tenant, or as a beneficiary of a revocable trust.³³⁰

In *Public Health Trust v. Lopez*,³³¹ the supreme court held that the decedent's exemption inures to the heirs of any natural person, even when the heirs are not dependent on the decedent.³³² The court noted that "[t]he term 'heirs' is defined by section 731.201(18), Florida Statutes (1985), as those persons entitled to the decedent's property under the statutes of intestate succession."³³³ The court applied this rule to heirs who were adult children of the decedent but were not dependent on the decedent at the

329. 543 So. 2d 219 (Fla. 1989).

330. This issue does not arise if the decedent's interest did not survive his or her death or was the type of interest that passes by survivorship rather than by devise, intestacy or homestead statutes. For example, a life estate terminates when the decedent dies, and the decedent's creditors would have no right to reach the remainder interest. Another example arises when the homestead is owned as a tenancy by the entirety or a joint tenancy with right of survivorship—the surviving spouse or joint tenant receives the property by survivorship and the decedent's interest does not survive for purposes of a sole creditor of the decedent being able to reach it.

331. 531 So. 2d 946 (Fla. 1988).

332. *Id.* at 951.

333. *Id.* at 951 n.6 (citing FLA. STAT. § 731.201(18) (1985)).

time of death. *Lopez* consolidated two cases. In one case, the adult children lived with their mother who owned the homestead. In the other, the adult children lived elsewhere.³³⁴

Under the present law, the decedent's surviving spouse, minor children, and other descendants who receive an interest in the homestead do so with the benefit of the decedent's exemption. In addition, any other person who inherits the decedent's property if the decedent dies intestate will receive the benefit of the exemption (and will apply it to any interest in the decedent's homestead that the person inherits). Further, the rules are applied when the persons who would inherit the property receive it by devise.³³⁵

In some cases, the provisions are fair. They are fair if the persons who occupied the homestead while the decedent was alive receive an interest in the homestead and the decedent's exemption inures to them. In other cases, the provisions are not fair. A person who was a member of the decedent's family in law³³⁶ and resided on the homestead, but did not have the right to inherit from the decedent, would not be protected if the decedent died intestate. If the decedent devised the homestead to that family in law, they would receive the homestead but not the exemption. Thus, the homestead will pass through administration, subject to the decedent's creditors. This has always been an anomaly was part of the law when the head of the family requirement existed as well.

Another inequity arises when the spouse or heirs who receive the homestead and the exemption never used the property as their permanent residence. This inequity existed under the old law, but it was less likely to happen. Prior to January 8, 1985, only the head of the family was entitled to the exemption, so only the heirs of the head of the family benefitted from the protection. Now that the exemption has been extended to any natural persons, the exemption inures to the heirs of any natural person with a homestead. Thus, there are more homesteads for more heirs to receive free from creditors. For example, after 1984, an unmarried man who owns a home and lives there alone can qualify for the homestead exemption. If he dies intestate or devises the property to the persons who would be his heirs, they will receive the homestead free from his creditors. If he were survived by his parents, the exemption would inure to them. They would get this protection even though the decedent did not provide them a home during his

334. *Id.* at 947.

335. *See supra* note 93.

336. For this purpose, a family in law would arise from communal living, if the owner provides that family in law with the shelter of the homestead, whether or not one person was regarded as the head of that family. It would not include bona fide tenants.

lifetime. Prior to the 1984 amendment, he would not have qualified for the exemption, so that his creditors could reach the homestead during his lifetime and upon his death. This creates a windfall to these heirs, at the expense of the decedent's creditors.

The exemption should inure to a person who receives the homestead if the homestead was that person's permanent residence when the decedent died. By contrast, a person who receives an interest in a homestead that was not his or her residence should not receive the benefit of the exemption. For example, an adult son who owns his own home, exempt from his own creditors, should not be able to receive his mother's homestead, free from the reach of her creditors. In addition, the exemption should inure to the persons who resided there and receive an interest in the homestead, even if that person would not be an heir of the decedent under the laws of intestacy. In this way, persons who would not be heirs at law would be protected if they depended upon the owner for shelter, via the homestead.

Another question is whether the exemption should inure to a person who receives the decedent's homestead but does not intend to permanently reside there after the decedent's death or who intends to sell it without reinvesting the proceeds in a new homestead. The inurement of the exemption has never been tied to the spouse or heir establishing that property as his or her homestead. This may have made sense under the head of the family requirement. For example, a spouse or child who was dependent on the decedent for shelter could receive the decedent's homestead, free from the decedent's creditors, even if that person would not qualify as the head of a family after the decedent's death.³³⁷ Under present law, any natural person who owns a homestead can qualify for the exemption if the property is her or her permanent residence. If the constitution is amended so that the exemption inures only to those who used the homestead as their permanent residence, it does not seem necessary to impose the additional requirement that that person must continue to use the homestead as a permanent residence after the owner's death.

III. CONCLUSION

Florida's homestead exemption is a powerful exemption with a

337. Florida Statutes, section 222.19 addressed this problem for the surviving spouse by conferring head of the family status on the surviving spouse, even if the spouse lived alone and could not have qualified as head of a family otherwise. FLA. STAT. § 222.19 (repealed 1983).

significant history. The exemption is conferred by the Constitution of the State of Florida and this exemption cannot be amended without the approval of the Florida voters. This exemption does not solve the problem of those who are homeless, because it only benefits those who can afford to purchase and maintain a home. At the same time, it will help prevent homeowners who suffer financial adversity from becoming homeless and assure them shelter while they work to satisfy their creditors or avail themselves of a discharge and fresh start in bankruptcy.

The purpose of the exemption is two-fold; to protect the homestead from the owner's creditors (via lien attachment or forced sale), to protect certain members of the owner's family from the owner (via alienation or disinheritance), and to protect those members from the owner's creditors (via inurement of the exemption). In most cases, the exemption accomplishes these purposes. There is a need for clarification of the law or reform in a few areas.

The major areas of the law that need reform involve the class of persons that is designed to be protected by the exemption. These areas relate to the constitutional restrictions on alienation and devise and the impact of the statutory descent provisions involving the homestead. Reform is necessitated as a result of the changes made to the Florida Constitution in 1968 and 1984. This article suggests a number of alternative reforms, and the following are recommended as the best alternatives:

1. The joinder requirement for alienation by married persons protects all spouses, even when they have never used the homestead as a permanent residence or have voluntarily abandoned it. Extending the exemption in 1984 to all natural persons extended the protection against alienation to all spouses. At the same time, this amendment eliminated the concept of spousal abandonment. The concept of abandonment should be revived so that a spouse who voluntarily and permanently abandons the homestead does not have the right to prevent the owner-spouse from alienating the homestead. In addition, the joinder requirement should be waivable in a manner similar to the way that the devise restriction is waivable. This would extend the supreme court's decision in *City National Bank v. Tescher* to *inter vivos* alienation. In this way, homestead rights could be waived by abandonment or agreement.

2. The devise restriction also should be limited to cases where the owner is survived by a spouse who has not voluntarily abandoned or waived the homestead. This amendment would change the rule adopted by the supreme court in *In re Estate of Scholtz*. Then, the right to inherit an interest in the homestead could be waived by abandonment or agreement, and the right to devise would not be restricted by the existence of a

surviving spouse if his or her rights had been waived. Further, the devise restriction applicable when the owner is survived by a minor child should be limited, so that the survival of a minor child does not prevent the owner from devising the homestead to the surviving spouse if that survivor is also the parent of the minor child. In this way, the restriction would apply when it is desirable to limit the surviving spouse's interest to a life estate in order to protect the minor child who is not the surviving spouse's child.

3. If there is a protected spouse, but no protected minor child, then the surviving spouse should receive a life estate and the minor child a term interest (possessory during minority, but only after the surviving spouse's death).³³⁸ The owner should have the right to devise the remainder as he or she chooses. This would overrule *In re Estate of Finch*. The use of a qualifying homestead trust ("Q-HOT") should be considered, whereby the homestead could be held in trust after the owner's death for the life of the surviving spouse and the minority of any surviving children. This type of trust could be designed so that it could qualify for the marital deduction for estate tax purposes.

To the extent a child or other person receives a future interest in the homestead (for a term or as a remainder interest), that interest should qualify for the exemption if the possessory interest (the life estate or term interest) qualifies for the exemption and the holder of the future interest resides with the owner of the possessory interest in the homestead. This would change the rule adopted in *Aetna Insurance Co. v. Lagasse*.

These changes would require constitutional and statutory amendments. These changes would be consistent with the supreme court's holding in *Shriners*, that the right to acquire, possess, and dispose of one's property is a constitutional right that should be limited only to the extent necessary to promote the general welfare of the people in Florida. Clearly, any constitutional restriction on the devise of homestead would be constitutional; however, any constitutional restriction on devise should be allowed only to the extent there is a compelling need for the restriction. Further, a restriction on devise should be imposed only to the extent the statutes on descent can effectuate the purpose for the restriction.

In addition, the devisees or heirs of the homestead should receive that homestead, free from the claims of the owner's creditors, only when there is a reason that the exemption should shield them from the owner's improvidence or misfortune. Thus, the exemption should inure upon the

338. Ownership by tenants by the entirety would avoid creation of a term interest at the death of the first spouse.

death of the owner only to the class of persons who need the protection of the exemption. This class should include only the persons whose permanent residence was the homestead at the time of the owner's death. This class could include a person who would not be an intestate heir. A person within this class who voluntarily abandoned the homestead would not be entitled to the protection.

In addition, there is a need for the homestead law to be judicially clarified or amended so that (1) a rural homestead used by the owner's family as a residence qualifies as the owner's homestead; and (2) only one homestead owned by a person can qualify for the exemption.

The constitutional requirement that only an interest in an estate of land can qualify for the exemption should remain. The exemption should be extended legislatively when needed so that the following applies:

1. The homestead exemption for mobile homes attached to land, which the owner has the right to lawfully possess, should be granted by a clear statutory exemption, with specific exemptions similar to those applicable to the constitutional exemption. The extent, if any, to which the restrictions on alienation and devise apply should be determined.

2. The homestead exemption should be extended statutorily to cooperatives, with due regard given to creating specific exceptions and restrictions on alienation and devise.

3. Consideration should be given to creating a statutory exemption for leasehold interests.

Consideration also should be given to creating a statutory or constitutional exemption for personal property reasonably necessary for the use of the homestead as a residence.

Consideration also should be given to curtailing any abusive use of the homestead and the incentive for debtors to move to Florida for this exemption. This may include expansion of the judicial fraud exception for homesteads as well as a proposals to amend the federal bankruptcy laws.

APPENDIX A³³⁹

Florida Constitution of 1868:
(effective May 8, 1868)

ARTICLE IX—HOMESTEAD

Section 1. 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, owned by the head of a family residing in this State, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempted from forced sale under any process of law, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon, or for house, field, or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner.

* * * * *

Section 3. The exemptions provided for in sections 1 and 2 of this article, shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption, and the exemption provided for in section 1 of this article shall apply to all debts, except as specified in said section, no matter when or where the debt was contracted, or liability incurred.

* * * * *

Florida Constitution of 1885:
(effective January 1, 1887)

ARTICLE X—HOMESTEAD AND EXEMPTIONS

§ 1. Exemption of homestead; extent

Section 1. A homestead to the extent of one hundred and sixty acres

339. Note: The underlined portions of the text represent sections added to or changed from preceding version.

of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But 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 exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article.

§ 2. Exemption to inure to widow and heirs

Section 2. The exemptions provided for in section one shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts, except as specified in said section.

§ 3. Exemptions in former constitution; applicability

Section 3. The exemptions provided for in the Constitution of this State adopted in 1868 shall apply as to all debts contracted and judgments rendered since the adoption thereof and prior to the adoption of this Constitution.

§ 4. Homestead may be alienated by husband and wife

Section 4. 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 such relation exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law.

§ 5. Homestead area not reduced by subsequently including in municipality.

Section 5. No homestead provided for in section one shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town, without the consent of the owner.

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Florida Constitution—1968 Revision
(effective January 7, 1969)

ARTICLE X—MISCELLANEOUS

Section 4. Homestead—exemptions

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

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

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

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

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

* * * * *

Florida Constitution—Amended in 1972:
(effective January 2, 1973)

ARTICLE X—MISCELLANEOUS

The first sentence of article X, section 4(c) was amended to read as follows:

§ 4. Homestead—exemptions

...

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

* * * * *

Florida Constitution—Amended in 1984:
(effective January 8, 1985)

Article X, Section 4(a) was amended in 1984, to change the reference from “the head of a family” to “a natural person.” Art X § 4, as amended reads as follows:

ARTICLE X—MISCELLANEOUS

Section 4. Homestead—exemptions—

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

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

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

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

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