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Florida Homestead Exemption: Effect of 1984 Amendment on Availability After Divorce

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COMMENTARY

FLORIDA HOMESTEAD EXEMPTION: EFFECT OF 1985 AMENDMENT ON AVAILABILITY AFTER DIVORCE*

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I. INTRODUCTION

The Florida homestead exemption[1] developed as a means of preventing individual property owners and their families from becoming public wards as a result of financial improvidence or familial neglect.[2] The homestead exemption reflects a public policy of protecting the family and preserving the family home.[3] Article ten, section four of the Florida Constitution embodies this policy by restricting devise and transfer of homestead property and exempting it, to a certain extent, from forced sale by creditors.[4]

The restriction on devise of homestead property applies if the owner is survived by a spouse or minor child.[5] The constitution secures to an owner's

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1. FLA. CONST. art. X, § 4.

2. Bigelow v. Dunphe, 143 Fla. 603, 604, 197 So. 328, 329 (1940); Maines & Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227, 229 (1978).

3. LaGasse v. Aetna Ins. Co., 213 So. 2d 454, 459 (2d D.C.A. 1968), *rev'd on other grounds*, 223 So. 2d 727 (Fla. 1969).

4. FLA. CONST. art. X, § 4(a). Case law has interpreted the homestead provision to mandate promotion of the independence and prosperity of an individual debtor and his family by placing his shelter and certain other property beyond the satisfaction, even of just claims, of creditors. *See* Hill v. First Nat'l Bank, 79 Fla. 391, 398, 84 So. 190, 192 (1920); LaGasse v. Aetna Ins. Co., 213 So. 2d 454, 459 (2d D.C.A. 1968), *rev'd on other grounds*, 223 So. 2d 727 (Fla. 1969).

5. FLA. CONST. art. X, § 4(c). If survived by a spouse but no minor children, the owner may devise homestead property to the spouse. FLA. STAT. § 732.4015 (1985).

dependents the property deemed essential to their well-being. The forced sale exemption extends to one thousand dollars worth of personalty, and to one hundred sixty acres, plus improvements, of rural homestead, or to one-half acre, plus the residence thereon, of municipal homestead.[6] The exemptions from forced sale represent an attempt to balance the immediate needs of a debtor owner against those of his creditors. Preservation of a limited amount of property to the debtor is hoped to encourage his rehabilitation and to facilitate eventual repayment of his just debts.[7]

The homestead exemption has traditionally been reserved to property owned by the "head of a family." However, in 1984 a constitutional amendment was approved extending homestead exemption to property owned by a "natural person." In the context of divorce, this amendment has far reaching effects. This article will examine these effects.

Initially, the article discusses the traditional requirements for characterization of property as homestead. Next, the article sets forth the rights of the homestead claimants' dependents, devisees, and creditors vis-à-vis property under the law as it existed prior to the constitutional amendment. The article then explores the effect of the amendment on existing case law. Finally, the article discusses possible ambiguities and problems arising from the change, and attempts to resolve questions raised by the new law by analyzing them in light of the existing case law.

II. Characterization as Homestead

The constitutional homestead provision is self-executing.[8] Under the present provision, property attains homestead character when an individual acquires land and makes that property his permanent residence.[9] No further act is required to make the property homestead. Whether the owner intends it to be homestead property is irrelevant.[10]

Prior to the amendment of article ten, section four, property did not acquire

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6. Fla. Const. art. X, § 4(a)(1).

7. Maines & Maines, *supra* note 2, at 230; *see also supra* note 4.

8. *In re* Newman's Estate, 413 So. 2d 140, 142 (Fla. 5th D.C.A. 1982). Whether the owner intends the property to be homestead is irrelevant to its classification. However, the owner's intent to make the premises his permanent abode is relevant, because only his residence can be a homestead. An owner may claim only one homestead at a time. *See* Crosby & Miller, *Our Legal Chameleon: The Florida Homestead Exemption*, 2 U. Fla. L. Rev. 12, 29-31 (1949). On the question of intent to make property a permanent residence so that it may qualify as homestead, see Engel v. Engel, 97 So. 2d 140, 141-42 (Fla. 1957); Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 893-95, 13 So. 2d 448, 452 (1943). The Florida homestead tax exemption differs from the exemption from forced sale. The tax exemption is not self-executing; the owner must apply for it. Fla. Const. art. VII, § 6.

9. Prior to the amendment, homestead status accrued by virtue of ownership, residence, and family headship. When these requirements were met, the provision was self-executing and homestead character attached. *See infra* notes 10-11 and accompanying text. Because the amendment as adopted did not mention otherwise, it is assumed that the residence and ownership requirements remain intact and are now the only prerequisites for attachment of the privilege.

10. *See supra* note 8; *cf. In re* McCarthy, 13 B.R. 389, 390 (Bankr. M.D. Fla. 1976) (character of property as homestead depends on actual intention to make the property the permanent residence).

homestead status solely as a result of occupation by the owner. The availability of homestead privilege was closely tied to the existence of a family relationship. Property had to be owned by the head of a family to be characterized as homestead.[11] Homestead status required the coexistence of ownership and family headship in the same individual.[12] Property failing to meet this requirement was not considered a homestead, even if occupied by a family.[13]

A. *Head of Family Requirement*

Traditionally a family depended upon only one of its members for support. Accordingly, only property owned by this person would be classified as homestead, subject to restrictions on devise and transfer and exemption from forced sale.[14] Property owned by any other family member would not qualify as homestead because the family did not depend upon that person for its support.[15]

There could be only one family head, and only his property could be homestead.[16] Courts would not recognize divided authority within a family.[17] Florida courts developed a test for determining family headship that required a showing of either an owner's legal duty to support that arose out of a family relationship (family in law), or continued communal living by at least two persons under circumstances indicating the owner was regarded as being "in charge" (family in fact).[18] A finding of family headship was a complex factual determination,

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11. The 1968 Florida Constitution provided that "there shall be exempt from forced sale . . . the following property owned by the head of a family ...." FLA. CONST. art. X, § 4(a) (1968, amended 1985). Initially, the husband was presumed to be the family head. *See, e.g.*, Solomon v. Davis, 100 So. 2d 177, 178 (Fla. 1958); Anderson v. Garber, 183 So. 2d 693, 694 (Fla. 3d D.C.A. 1966); Barnett v. Pan Am. Sur. Co., 139 So. 2d 192, 194-95 (Fla. 3d D.C.A. 1962). However, the 1968 Florida Constitution may have invalidated this presumption. Article X, section 5 states that no distinction shall be made between men and women in the control and disposition of their property. FLA. CONST. art. X, § 5. For an extensive discussion of the head of family requirement, not limited to the context of divorce, *see* Maines & Maines, *supra* note 2, at 236.

12. FLA. CONST. art. X, § 4 (a).

13. *See, e.g.*, Solomon v. Davis, 100 So. 2d 177, 178-79 (Fla. 1958) (woman who owned property but could not overcome presumption her husband was head of family could not claim advantage of homestead exemption).

14. See *id.* for examples of property, owed by a person who provided substantial support for the family, which was not exempted.

15. *See, e.g.*, Holden v. Estate of Gardner, 420 So. 2d 1082, 1084 (Fla. 1982) (husband of deceased owner sought to invalidate devise of her property by asserting that the 1971 Dissolution of Marriage Act rendered husbands and wives reciprocally responsible for each other's support; thus although decedent was not head of the family, her support obligations rendered the property nondevisable homestead; the court rejected the husband's contentions and affirmed the validity of the devise); *see also* Passmore v. Morrison, 63 So. 2d 297, 299 (Fla. 1953) (no homestead in property where an adopted child did not live with widow on property nor depend on her for support; widow not head of family).

16. *In re* Felsinger, 17 B.R. 226, 228 (Bankr. M.D. Fla. 1982).

17. *Id.; see* Barnett v. Pan Am. Sur. Co., 139 So. 2d 192, 195 (Fla. 3d D.C.A. 1962).

18. Holden v. Estate of Gardner, 420 So. 2d 1082, 1083 (Fla. 1982); Killian v. Lawson, 387 So. 2d 960, 962 (Fla. 1980); Solomon v. Davis, 100 So. 2d 177, 178 (Fla. 1958); Beck v. Wylie, 60 So. 2d 190, 191-92 (Fla. 1952); Flannery v. Green, 482 So. 2d 400, 402 (Fla. 2d D.C.A. 1985); Brown v. Hutch, 156 So. 2d 683, 685 (Fla. 2d D.C.A. 1963). Members of a "family in law" were usually blood relatives. The members did not have to reside together in order for the

and stipulations as to headship were not controlling.[19] Furthermore, family headship was not a permanent status. It could lapse if the claimant ceased to have dependents or ceased to be the person primarily responsible for their welfare.[20]

As a result, courts carefully examined the intra-family relationship when homestead status of property was challenged. If the owner ceased to be primarily responsible for his dependents' needs, the justification for extending homestead character to his property also ceased.[21] A judgment obtained against the owner of property, after his family headship status lapsed, was enforceable against the property, even though homestead status was later reacquired.[22] Likewise, if the owner died when he was no longer considered head of the family, his property was freely devisable.[23]

B. *Head of Family Status After Divorce*

Divorce did not automatically terminate the family relationship.[24] However, the consequences of a divorce, such as changes in residence, award of custody, and imposition of support obligations could alter or terminate family headship.[25] Homestead law contemplated a traditional family. When that family was severed or dispersed by divorce, courts had to determine whether a family unit survived before they could recognize a post-divorce family head or assign homestead character to that person's property.[26]

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family to be considered intact. However, if they did not reside together, the members must have been "dependent" upon the head of the family. *See, e.g.*, Estate of Deem v. Shinn, 297 So. 2d 611, 613-14 (Fla. 4th D.C.A. 1974) (father's legal duty to support his children, although he evaded his support obligation, gave rise to homestead). Members of a "family in fact" might not be blood relatives. Members of such a family had to reside together, dependent upon the owner of the property, in order for him to claim family headship. *See In re* Estate of Kionka, 113 So. 2d 603, 607 (2d D.C.A. 1959), *aff'd*, 121 So. 2d 644 (Fla. 1960). For a general discussion of family in law and family in fact, see Maines & Maines, *supra* note 2, at 224.

19. Anderson v. Anderson, 44 So. 2d 652, 654 (Fla. 1950). *But see* Holden v. Estate of Gardner, 420 So. 2d 1082, 1085 (Fla. 1982) (court deferred to the parties' stipulation of family headship).

20. *See, e.g.*, Barnett v. Pan Am. Sur. Co., 139 So. 2d 192, 194-95 (Fla. 3d D.C.A. 1962); Crosby & Miller, *supra* note 8, at 24-29 (discussion of head of family requirement).

21. *See supra* note 20; *see also supra* note 18 and accompanying text.

22. *See* Crosby & Miller, *supra* note 8, at 35. The "material time" which determines whether a lien will prevail over a claim of homestead exemption is the time of attachment of the lien. If the lien attaches when the property has no homestead status (such as before the owner acquires family leadership), the lien prevails over the claimed exemption, even if the property later acquires or reacquires its privileged status. *In re* Hershey, 29 B.R. 214, 215 (Bankr. S.D. Fla. 1983); Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 530-32, 134 So. 588, 591-92 (1931); *see* First Nat'l Bank v. Peel, 107 Fla. 413, 415-17, 145 So. 177, 178 (1933); *see also* Bessemer Properties Inc. v. Gamble, 158 Fla. 38, 40, 27 So. 832, 833 (1946) (if homestead status attaches prior to proceedings to subject property to creditor's lien, the homestead exemption prevails over the lien).

23. *See* Crosby & Miller, *supra* note 8, at 37.

24. Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 340, 123 So. 780, 780 (1929); Speer & Goodnight v. Sykes, 102 Tex. 451, 119 S.W. 86. (1909).

25. *See infra* text accompanying notes 30-41.

26. *See generally* Vandiver v. Vincent, 139 So. 2d 704, 709 (Fla. 2d D.C.A. 1962) (discussion of factors used to determine whether one is head of a family).

No family unit survived divorce if the family relationship asserted consisted solely of the divorced husband and wife, because courts required a family unit to include at least two persons.[27] In the absence of children, neither ex-spouse could qualify as head of the family, even though one had a court-imposed obligation to support the other.[28] Thus, neither ex-spouse could claim his property, or that of the other, as homestead.[29]

If children were born of the marriage, however, divorce did not automatically terminate the family relationship.[30] A divorced parent could be head of a family consisting of himself and his children, with his property qualifying as homestead. When determining which parent was head of the family after divorce, courts focused on the parents' respective custody and support obligations.[31]

Family headship status did not require that a claimant's children live with him.[32] Under both the 1885[33] and 1968[34] versions of the Florida Constitution, courts recognized that a noncustodial parent could qualify as head of the family and claim his interest in the dependents' residence as his homestead.[35] Under the 1885 constitution, an owner could claim the property lived upon only by his family as his homestead if the subject property were rural.[36] The constitution required that the owner himself reside upon municipal property claimed as a

27. *See* Hussa v. Hussa, 65 So. 2d 759, 761 (Fla. 1953); Johns v. Bowden, 68 Fla. 32, 45, 66 So. 155, 159 (1914).

28. *See, e.g.*, Estate of Van Meter, 214 So. 2d 639, 641 (2d D.C.A. 1968) (despite husband's obligation to support wife, no family relationship found because for over eleven years prior to his death wife did not live with husband on property), *aff'd*, 231 So. 2d 524 (Fla. 1970).

29. *See* Crosby & Miller, *supra* note 8, at 24.

30. Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 341, 123 So. 780, 781 (1929); Vandiver v. Vincent, 139 So. 2d 704, 708-09 (Fla. 2d D.C.A. 1962).

31. Anderson v. Anderson, 44 So. 2d 652, 654 (Fla. 1950); *In re* Estate of Melisi, 440 So. 2d 584, 586 (Fla. 4th D.C.A. 1983); Estate of Deem v. Shinn, 297 So. 2d 611, 613 (Fla. 4th D.C.A. 1974). Communal relationship may be the single most relevant factor to consider in establishing family headship between two parents who both contribute to their child's support. *See* Maines & Maines, *supra* note 2, at 243.

32. Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 340-41, 123 So. 780, 780-81 (1929); *In re* Estate of Melisi, 440 So. 2d 584, 586 (Fla. 4th D.C.A. 1983); *Homestead Protection of Owner's Family*, 17 FUND CONCEPT 63, 63 (1985) [hereinafter cited as *Homestead Protection*].

33. The 1885 Florida Constitution stated, "a homestead . . . owned by the head of a family residing in this State . . . shall be exempt. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence or business house of the owner . . . ." FLA. CONST. art. X, § 1(a) (1885).

Commentators have interpreted the first phrase of this section to mean that the owner himself, rather than just his family, had to be a Florida resident to qualify for the homestead exemption. *See* Crosby & Miller, *supra* note 8, at 31. The latter phrase hints that the drafters may have differentiated between a municipal residence and a rural one in awarding the privilege to property upon which the family resided in the owner's absence. Case law, however, neither addressed nor resolved this ambiguity.

34. FLA. CONST. art. X, § 4(a) (1968, amended 1985). The 1968 constitution disposed of the Florida residence requirement. However, it failed to clarify the difference between municipal and rural property resided upon by an owner's family rather than himself. The 1968 version further complicated the issue by stating that *municipal* property consisting of the residence of the owner or his family would be exempt, without making the same qualification vis-à-vis rural property. *Id.*

35. *See supra* notes 33 & 34.

36. *See supra* note 33.

homestead.[37] The 1968 constitution extended the homestead provision to enable an owner to claim municipal as well as rural property resided upon only by his family.[38]

Placement of support obligations was also a vital determinant of family headship. The parent providing most or all of the family's support was generally considered the family head.[39] Thus, a custodial parent furnishing some support was usually awarded that status.[40] A noncustodial parent who was not under, or did not fulfill, support obligations was unlikely to be found head of the family.[41]

The primary objective underlying the head of family requirement was to tie the homestead privilege to support of a family.[42] It was, thus, vital to determine whether a familial unit existed after divorce and whether there was a family head whose property would be privileged for its support. The courts found it increasingly more difficult to determine family headship in light of the increasing number of divorces, remarriages, offspring of various unions, juggling of support obligations, and the general deterioration of the traditional family.

C. *1985 Amendment*

In the 1983 Session, the Florida Legislature adopted a Joint Resolution providing for submission to the electorate of a proposed amendment to article ten, section four.[43] The amendment, which was approved in the November 1984 election and became effective on January 8, 1985, substituted the language "any natural person" for "head of a family."[44] As a result of this change, availability of the homestead privilege is no longer restricted to the head of a family. Rather, any person owning Florida property may be eligible to claim the property as his homestead.[45] The extended availability of the homestead privilege will affect the rights of dependents, devisees, and creditors of property owners in this

37. FLA. CONST. art. X, § 1(a) (1885).

38. The 1968 provision did not contradict the 1885 version regarding rural property. Apparently, an owner may now claim an exemption for municipal or rural property resided upon by his family in his absence.

39. Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 340, 123 So. 780, 780 (1929). *But see* Caro v. Caro, 45 Fla. 203, 206-07, 34 So. 309, 310 (1903) (unnecessary that dependents receive all of their support from the person claiming headship).

40. Custody in addition to money payment was considered a form of support. *See, e.g.*, Vandiver v. Vincent, 139 So. 2d 704, 710 (Fla. 2d D.C.A. 1962) (by providing for necessities, maintaining clothes, preparing meals, and offering guidance, mother provides support to son who lives with her).

41. Such a parent could, however, be declared head of a family. Usually this occurred where the noncustodial parent ignored his children and then attempted to devise his property away from them. *See In re* Estate of Melisi, 440 So. 2d 584 (Fla. 4th D.C.A. 1983); Estate of Deem v. Shinn, 297 So. 2d 611 (Fla. 4th D.C.A. 1974).

42. Bigelow v. Dunphe, 143 Fla. 603, 608, 197 So. 328, 330 (1940); Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 532, 134 So. 588, 592 (1931); Hill v. First Nat'l Bank, 79 Fla. 391, 398, 84 So. 190, 192 (1920).

43. Act of May 23, 1983, ch. 83-40, 1983 Fla. Laws 129.

44. FLA. CONST. art. X, § 4(a).

45. *Id.; see supra* notes 10 & 34. Property resided upon by its owner or his family qualifies for the homestead exemption under section 4(a) as amended. FLA. CONST. art. X, § 4(a).

state. The effects will be particularly evident in the context of divorce, as the increased possibility of property losing its homestead status after divorce will no longer be present.

III. Descent and Devise of Homestead Property

Article ten, section four (c) of the Florida Constitution provides that homestead property may not be devised if the owner is survived by a spouse or minor child.[46] A homesteader, survived by a spouse but no minor children, may devise the homestead property to the spouse.[47] However, if minor children survive the homesteader, he may not devise the homestead property.[48] The property will pass at death, first to the surviving spouse, if any, and then to the minor children, who are deemed to hold the remainder interest.[49]

Article ten, section four, prior to its amendment, and Florida Statute section 222.19[50] provided that family headship status inured to the surviving spouse upon the death of the homesteader, irrespective of whether two or more persons lived together as a family under the direction of the surviving spouse.[51] Thus, homestead property retained that character in the hands of the surviving spouse. This provision was intended to preserve the property for the homesteader's widow or potential orphans;[52] his creditors could not subject it to forced sale after his death. If the surviving spouse then died without minor children, the former homestead property was freely devisable.

Restricting devise of homestead property placed a substantial burden on an owner's desired disposition of his property. Accordingly, courts required that a family relation exist at the time of the owner's death before the property would be characterized as homestead.[53] When an owner's devise was challenged, the court had to determine whether a family relationship existed at the time

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46. Fla. Const. art. X, § 4(c); *see also* Fla. Stat. § 732.4015 (1985) (governs devise of homestead).

47. Fla. Stat. § 732.4015 (1985).

48. Fla. Const. art. X, § 4(c).

49. Fla. Stat. § 743.401(1) (1985).

50. *Id.* § 222.19(1) (1976, repealed 1985).

51. Fla. Const. art. X, § 4 (1968, amended 1985); Fla. Stat. § 222.19(1) (1976, repealed 1985). *But see* Fla. Stat. § 732.401(2) (1985) (real property does not pass according to the homestead scheme when the decedent owner was a Florida resident and the decedent and the surviving spouse owned the property by the entireties). The spouse would take full ownership of the property which would be claimed as homestead if the wife qualified as head of the family. *See infra* notes 53-56 and accompanying text.

52. *See supra* note 4 and accompanying text.

53. *See, e.g.*, Hussa v. Hussa, 65 So. 2d 759, 761 (Fla. 1953) (property never constituted a homestead since owner's wife lived apart from him after the purchase of the property); *In re* Estate of Pendrys, 443 So. 2d 402, 403-04 (Fla. 4th D.C.A. 1984) (house which mother owned and lived in with minor child constituted homestead since a family relation existed); *In re* Estate of Melisi, 440 So. 2d 584, 585 (Fla. 4th D.C.A. 1983) (owner residing in property with another constitutes homestead if they live together in a family relationship); *In re* Estate of Schorr, 409 So. 2d 487, 489-90 (Fla. 4th D.C.A. 1981) (homestead existed since husband had a legal obligation to support his wife); *In re* Estate of Van Meter, 214 So. 2d 639, 641, (2d D.C.A. 1968) (family relationship must exist at father's death), *aff'd*, 231 So. 2d 524 (Fla. 1970). See *supra* note 22 for a discussion of "material time."

of his death. If a family relationship existed and the decedent owner was the head of that family, the devise was subject to the limitations on devise of homestead property.[54] Conversely, if no family relationship existed, or the owner was not the head of that family when he died, the property was not homestead and was freely devisable.[55]

When an owner, spouse, and minor children resided together under the direction of the owner, he was traditionally considered the family head.[56] The property was homestead and its devise was, consequently, restricted. However, when the spouse was estranged or divorced, determining whether a family existed or whether the owner was the head of it was more difficult.

A family relationship consisting only of a husband and wife could not exist beyond their divorce.[57] Since no family existed, property owned by each spouse became freely alienable and devisable. In addition, when the family consisted of only a husband and a wife, their estrangement would terminate the homestead character of the property. Courts reached this result even though the marriage was never actually dissolved.[58] Thus, not only a divorced, but also an estranged surviving spouse was precluded from asserting rights to the decedent owner's property.

In *Barlow v. Barlow*,[59] the wife left the marital home, claiming mistreatment, and set up house in another city. Two weeks later the husband died. The wife returned to the marital home, claiming it was homestead and passed to her as surviving spouse rather than to her husband's devisee. The Florida Supreme Court rejected her claim, holding that although she was still married to the owner at the time of his death, her abandonment had destroyed the family relationship.[60] The homestead status of the property had ceased. Thus, the husband's devise was valid.[61]

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54. *See, e.g., In re* Estate of Schorr, 409 So. 2d 487, 489-90 (Fla. 4th D.C.A. 1981) (family relationship existed due to legal obligation to support wife).

55. *See* Engel v. Engel, 97 So. 2d 140, 142 (Fla. 2d D.C.A. 1957). Although the decedent and his wife were married when he died, they had maintained separate residences for several years prior to his death. Thus, despite the viability of their marriage, the court refused to invalidate the devise. *Id.*

56. Courts tended to place headship where it would best protect the family. Thus, even an owner who was not technically his family's principal provider could be declared head of the family if the family would otherwise be bereft of support. *See supra* text accompanying note 39. The homestead law and imposition of family headship are not part of a strict scheme. Rather, courts should apply them in a liberal and beneficent spirit, to favor those they were intended to benefit. White v. Posick, 150 So. 2d 263, 265 (Fla. 2d D.C.A. 1963) (citing Marsh v. Hartley, 109 So. 2d 34, 38 (Fla. 2d D.C.A. 1959)).

57. *See supra* text accompanying note 27.

58. Hussa v. Hussa, 65 So. 2d 759, 761 (Fla. 1953); Barlow v. Barlow, 156 Fla. 458, 460, 23 So. 2d 723, 724 (1945); *In re* Estate of Van Meter, 214 So. 2d 639, 643-44 (2d D.C.A. 1968), *aff'd*, 231 So. 2d 524 (Fla. 1970).

59. 156 Fla. 458, 23 So. 2d 723 (1945).

60. *Id.* at 461, 23 So. 2d at 724. The court stated:

> [W]hen the wife announces that she has moved out of the home for keeps and carries her belongings with her, secures employment in a city over 300 miles distant, announces to the world that she is through and secures an attorney to procure a divorce, this constitutes an abandonment of the homestead. . . . [S]he will not be permitted to return and lay claim to the homestead after Barlow is dead. *Id.* at 460-61, 23 So. 2d at 724.

61. *Id.* at 461, 23 So. 2d at 724.

The Florida Second District Court of Appeal made an even stronger statement against recognition of a family relationship between estranged spouses in *In re Estate of Van Meter*.[62] In *Van Meter*, the husband and wife were separated. The husband remained in the marital home and supported his estranged wife pursuant to a separate maintenance decree for eleven years. Upon the husband's death, the wife claimed she was still the husband's family and was entitled to the homestead property. Despite the husband's compliance with the legal obligation to support her, the court refused to void the husband's devise of his property.[63] The court stated that where the family relationship relied upon to prevent devise consisted only of a husband and wife, the relationship must exist at the owner's death.[64] The property must be occupied at that time by both spouses to be classified as homestead.[65]

Barlow and *Van Meter* reflect an attitude suggesting that restriction of an owner's desired testamentary scheme was not justified when the family relationship relied upon by the surviving claimant was that of an estranged spouse. The courts adopted the position that, if an estranged or ex-spouse required support, the support should be awarded as alimony or another form of support rather than by preventing the owner from devising his property according to his wishes. These decisions demonstrate that homestead law was not designed to favor those who failed in marriage.

When a marriage produced children, the family relationship did not necessarily terminate upon divorce. If minor offspring were dependent upon a divorced spouse at the time of his death, courts classified his property as homestead that could not be devised. To ensure minor dependents were adequately provided for after divorce, family headship was imposed on one of the parents. Thus one spouse's property was homestead that would pass at death to his legal dependents.[66]

Family headship status did not require custody of the children.[67] A noncustodial parent could maintain family headship if he provided support to his dependents.[68] Courts were willing to impose family headship on a noncustodial parent who ignored his support obligations to prevent him from devising his property away from those rightfully entitled to it.[69]

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62. 214 So. 2d 639 (Fla. 2d D.C.A. 1968).

63. *Id.* at 643.

64. *Id.* at 641.

65. *Id.* (citing Brown v. Hutch, 156 So. 2d 683, 684-85 (Fla. 2d D.C.A. 1963)).

66. *See supra* text accompanying note 30.

67. *See supra* note 18 and accompanying text. In the area of devise, courts displayed willingness to acknowledge a family with the decedent at its head, even if he had completely ignored his dependents during his lifetime. *See infra* text accompanying notes 110-17. However, courts dealt with an equally evasive parent very differently if he asserted family headship in order to claim homestead exemption on his property. *See infra* text accompanying notes 70-73 and 104-09. Such an owner would lose his homestead privilege when he abandoned his family. These different treatments were never clearly delineated as a rule for courts to follow. However, they do illustrate the historical priority given to a family in homestead law. The privilege would either be applied or removed, in accordance with that policy of protection.

68. Vandiver v. Vincent, 139 So. 2d 704, 709 (Fla. 2d D.C.A. 1962).

69. *See infra* text accompanying notes 70-73.

In *Estate of Deem v. Shinn*,[70] the husband and wife had two children. Husband and wife separated and were divorced. The wife obtained custody of the children and moved out of the state. The husband subsequently acquired Florida property and used it as his residence. His ex-wife and his daughters never lived on the property. The husband affirmatively disregarded his legal obligation for his daughters' support. When he died he specifically disinherited both the adult and minor daughters. The two daughters challenged the will, claiming the property was their father's homestead and thus passed to them rather than to his devisee.

The Fourth District Court of Appeal upheld the challenge, stating the father's bare legal duty to support his minor child sufficed to render him head of a family.[71] The property retained its homestead status even though the father ignored his obligation to support his child. The court held the devise invalid and the property passed to the daughters.[72] The court thereby refused to reward a parent, who willfully deprived his dependent child of her rightful support, with a license to dispose of his property more freely than a responsible parent. The *Deem* court was willing to impose homestead status on property that was never resided upon as a family home,[73] to ensure the owner's dependents received the benefit of his property. Conversely, homestead character could also be imposed on property upon which the owner himself did not reside. If a noncustodial parent retained a co-tenant's interest in the former marital home and did not obtain another residence for himself, his interest in the marital home could be considered his homestead although he did not reside there and had evinced no intention to return.[74]

In *In re Estate of Melisi*,[75] the husband and wife had a child and lived in a jointly owned home. The marriage was dissolved and the mother was awarded custody of the minor child and exclusive possession of the home. The father died without establishing another homestead. He devised his property to a friend. The devise was challenged on behalf of the minor daughter. The court held the father's half interest in the ex-marital home could be homestead property that should pass to the minor daughter at his death.[76] The case was remanded for a determination of whether the father was head of the family when he died.[77] The district court made clear, however, that the property could be homestead, even though the father did not reside on it, if his "family," the daughter he was legally obliged to support, did live there.[78]

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70. 297 So. 2d 611 (Fla. 4th D.C.A. 1974).

71. *Id.* at 613-14.

72. *Id.* at 614.

73. *Id.* at 612; *see infra* notes 173-74 and accompanying text.

74. *In re* Estate of Melisi, 440 So. 2d 584, 585-86 (Fla. 4th D.C.A. 1983); *cf.* Barnett Bank v. Osborne, 349 So. 2d 223 (Fla. 4th D.C.A. 1977) (discussing significance of intent to return under the new law).

75. 440 So. 2d 584 (Fla. 4th D.C.A. 1981).

76. *Id.* at 586.

77. *Id.* at 587.

78. *Id.* at 585.

The *Melisi* court pointed out that an award of exclusive possession of the marital premises to one spouse could preclude a divorced owner from residing on his property with his family.[79] Under these circumstances, the court did not consider the property abandoned. The property could still constitute the owner's homestead.[80] *Deem* and *Melisi* illustrate that the characterization of property as homestead was not always made at the pleasure of its owner. The paramount objective of homestead law was to shelter the family. The courts were willing to carry out that purpose at the owner's death by naming him head of the family despite his wishes.

In summary, while devise of homestead property was subject to certain restrictions, the divorced owner could use it at his pleasure during his lifetime. Although he was head of a family, a divorced property owner who did not remarry could freely utilize and convey the homestead property. However, a recalcitrant parent could also lose the property to his dependents in satisfaction of an unfulfilled obligation to support them.

IV. Intrafamily Property Disputes: Partition and Support

Under a divorce decree, marital property is divided between the ex-spouses. Generally, the court attempts to secure an even division. Divisible property is split into equal parts. Nondivisible property and property in which one spouse has built up a "special equity" are awarded to one spouse, and the other spouse is usually compensated with other property.[81] The marital home is not divisible. It may be given to one spouse; it may be sold and the proceeds split; or, it may be retained. If the spouses own the property by the entireties during their marriage, they become co-tenants upon their divorce.[82] Each spouse then owns an undivided half-interest in the property with the right to immediate possession of the whole.[83]

The court has authority to award exclusive possession of the home to one of the ex-spouses as a form of support.[84] Exclusive possession may be set to

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79. *Id*; *see infra* note 180; *see also* Nationwide Fin. Corp. v. Thompson, 400 So. 2d 559, 560-61 (Fla. 1st D.C.A. 1981) (husband did not abandon property after wife given exclusive possession; sufficient if owner's family resides on property).

80. *Melisi*, 440 So. 2d at 585.

81. *See, e.g.*, Adamson v. Adamson, 458 So. 2d 1152, 1154 (Fla. 2d D.C.A. 1984) (lump sum alimony); Cann v. Cann, 334 So. 2d 325, 330 (Fla. 1st D.C.A. 1976) (award of permanent alimony error where rehabilitative alimony sufficient); Hendricks v. Hendricks, 312 So. 2d 792, 794 (Fla. 3d D.C.A. 1975) (special equity doctrine); Neimann v. Neimann, 294 So. 2d 415, 416 (Fla. 4th D.C.A. 1974) (court's authority to change property ownership limited to lump sum alimony, special equity, partition or agreement by the parties).

82. Ball v. Ball, 335 So. 2d 5, 7 (Fla. 1976); Tillman v. Tillman, 222 So. 2d 218, 220 (Fla. 1st D.C.A. 1969).

83. Andrews v. Andrews, 155 Fla. 654, 658, 21 So. 2d 205, 207 (1945).

84. Pollack v. Pollack, 159 Fla. 224, 31 So. 2d 253 (1947); *see also* Duncan v. Duncan, 379 So. 2d 949, 952 (Fla. 1980) (award of exclusive possession should be either directly connected to the obligation to support or necessary to avoid reduction in the property's value); Mayberry v. Mayberry, 437 So. 2d 785, 785 (Fla. 2d D.C.A. 1983) (error for trial judge to award exclusive

terminate upon a given set of circumstances, such as remarriage or majority of the youngest child.[85] Exclusive possession by one spouse precludes the other spouse from residing in the ex-marital home. However, the nonpossessory spouse retains half-interest in the property and may utilize it freely, subject to restrictions on conveyance and devise.

A. *Partition*

Despite the right as co-tenant to dispose freely of jointly held property, a former spouse may be unable to realize the dollar value of his interest in the ex-marital home by exercise of the right of partition. The possessory spouse's right to exclusive occupation of the home or, possibly, homestead use of it may bar the right of partition.[86] The Third District Court of Appeal reached this result in *Hoskin v. Hoskin*; however, the opinion was unclear as to the basis for its decision.[87]

In *Hoskin*, the court affirmed the denial of partition to an ex-husband who filed a complaint to partition the former marital home. The home was awarded to the ex-wife under a decree of exclusive possession. Exclusive possession was set to terminate upon the ex-wife's remarriage or the majority of their youngest child.

The district court initially approached the case from the position that the ex-marital home had become the ex-wife's homestead.[88] The court stated, without explaining the reasoning, that when the marriage was dissolved and the mother was awarded custody of the children, she became the head of the family. The court apparently interpreted family headship status to allow extension of the ex-wife's homestead privilege to the entire property and held the property, as homestead, was not subject to partition.

However, after asserting the property could not be partitioned due to the ex-wife's homestead privilege, the *Hoskin* court analyzed the effect of an award of exclusive possession to one co-tenant. The court noted a co-owner's right to partition stems from his inherent right to immediate possession of the whole. Accordingly, when that right of possession was not present, neither was the right of partition. Thus, because the award of exclusive possession served to

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possession to husband where record showed husband was not in need of support from spouse). *But cf.* Lange v. Lange, 357 So. 2d 1035, 1036 (Fla. 4th D.C.A. 1978) (wife's emotional attachment to home coupled with her mental illness justified granting her exclusive possession of home).

85. *See, e.g.*, Duncan v. Duncan, 379 So. 2d 949, 951 (Fla. 1980) (wife granted exclusive possession of Florida home until youngest child reaches age of majority); Ambrose v. Rayne, 412 So. 2d 971, 972 (Fla. 3d D.C.A. 1982) (an award of exclusive possession should be for a specified period of time and must serve a special purpose).

86. *Compare* Tullis v. Tullis, 360 So. 2d 375, 377 (Fla. 1978) (right to partition granted if necessary to protect beneficial interests of owners) and Donly v. Metropolitan Realty & Inv. Co., 71 Fla. 644, 646, 72 So. 178, 178 (1916) (homestead exemption not intended to prevent partition) *with* Daniels v. Katz, 237 So. 2d 58, 60 (Fla. 3d D.C.A. 1970) (no partition while former wife maintains property as homestead).

87. 329 So. 2d 19 (Fla. 3d D.C.A. 1976).

88. *Id.* at 21.

bar the ex-husband's right to use the property, he was not entitled to partition it until the exclusive right lapsed.[89]

The *Hoskin* court failed to clarify whether partition was prohibited because of the ex-wife's homestead interest in the property or because of her right to exclusive possession of it. However, in *Tullis v. Tullis*,[90] a case involving similar facts, the Florida Supreme Court held the right of exclusive possession, rather than homestead use by the possessory spouse, should serve as the basis of denial of a co-owner's complaint for partition of an ex-marital home. In *Tullis*, the marital home was jointly owned by the husband and wife. They divorced, and neither spouse was awarded exclusive possession of the property. However, the ex-husband and his minor daughter continued to live on the property. The former wife filed a complaint for partition. The father asserted the ex-marital home was homestead and could not be partitioned because he occupied the premises as the head of a family consisting of himself and his daughter.[91]

The trial court rejected the father's reasoning and ordered the sale of the property.[92] The First District Court of Appeal affirmed, noting that the right to partition is an inherent aspect of co-ownership as tenants in common or joint tenants rather than a "forced sale" as contemplated by the homestead exemption.[93] The district court stated homestead law was not intended to force a nonpossessory owner to submit the enjoyment of his interest to the other's use until he ceased to use the property as a homestead.[94] Thus, the father's homestead use of the home could not serve to bar partition of it by the ex-wife.[95] The district court factually distinguished *Hoskin*, noting that in *Hoskin* the property was occupied by the ex-spouse pursuant to a decree of exclusive possession.[96] The supreme court adopted the position that only an award of exclusive possession of a former marital home sufficed to bar partition of it by a nonpossessory owner.[97] Under *Tullis* and *Hoskin*, homestead use by one owner will not bar partition of jointly held property by an owner entitled to that right. However, such use by the possessory owner has actually served to inhibit the other's freedom to use or exploit his interest in the property.

In a Third District Court of Appeal decision, *Daniels v. Katz*,[98] a mortgagee's action to foreclose upon a nonpossessory owner's interest was prohibited because

89. *Id.*
90. 360 So. 2d 375 (Fla. 1978).
91. 342 So. 2d 88 (Fla. 1st D.C.A. 1977).
92. *Id.*
93. *Id.* at 89-90.
94. *Id.* at 89.
95. *Id.* at 90.
96. *Id.*
97. 360 So. 2d at 377-78. *But see* Smith v. Moughan, 442 So. 2d 338, 339-40 (Fla. 5th D.C.A. 1983) (no exclusive termination date set forth in divorce decree). In *Smith*, the right to partition was waived. The court upheld the agreement and refused to allow the wife to partition her interest from her ex-husband's despite his remarriage and apparent lack of intention to sell the premises. *Id.* at 340. The dissent called the majority decision "a classic bad deal for the ex-wife." *Id.* at 341 (Sharp, J., dissenting).
98. 237 So. 2d 58 (Fla. 3d D.C.A. 1970).

the owner's ex-wife and children lived upon the subject property as their homestead. The wife received exclusive possession of the ex-marital home and custody of the children in a divorce action. Her ex-husband then gave two notes, secured by mortgages on his undivided half-interest in the home, to his attorney. While the notes were in default, the attorney assigned them to a third person, who took with notice of the ex-wife's possession and use of the property. The third party then instituted foreclosure proceedings against the husband's half-interest. The trial court entered judgment of foreclosure. However, the order stated if the property was sold, no partition of it could be made as long as the ex-wife and children resided there and maintained it as their homestead.[99] The district court affirmed, holding the ex-husband could not create an enforceable lien on his interest in the homestead property, and any liens would be unenforceable until the property lost its homestead status.[100]

The rationale in *Katz* appears to be in error. Generally, a co-owner may deal with his interest in jointly owned property as he pleases. However, his conveyance and devise of homestead property are restricted. Otherwise, the owner may freely sell, mortgage or encumber his interest in the property. Yet the *Katz* court concluded that because the resident owner made the property her homestead, the nonresident owner could not create an enforceable lien on it. No law exists that prohibits a property owner from creating a lien on his property simply because the premises are used as homestead by another person. On the contrary, not only may an owner create such a lien, but the lienholder may enforce that obligation against the subject property through foreclosure and sale of it because homestead protects only the owner.[101]

The subsequent owner's right to partition his newly acquired interest from that of the resident owner is properly dealt with pursuant to the rules set forth in *Tullis* and *Hoskin*. These cases adopt the position of the state's highest court that homestead use of property by an owner in possession shall not bar its partition. Only an award of exclusive possession can serve that purpose. If exclusive possession was not awarded, either the co-owner or his successor in interest could partition the property.

The *Katz* court reached the right result but by the wrong means. In an effort to prevent a malicious ex-husband from purposefully depriving his family of their home, the court confused an owner's right to create a lien on his property with his right to partition it. The proper holding in this case would have allowed enforcement of the obligation by the lienholder, with the subsequent owner's right to partition impaired by the ex-wife's exclusive possession of the premises. However, *Katz* has never been overruled and apparently represents the position that a nonresident owner's right to deal freely with his interest in co-owned property may be limited by the resident owner's homestead use of those premises.

99. *Id.* at 59-60.
100. *Id.* at 60.
101. *See* Crosby & Miller, *supra* note 8, at 31.

B. *Support*

After a divorce, one ex-spouse may desire to realize the value, not of his own half-interest in the ex-marital home (through partition), but of the other ex-spouse's half-interest. This situation most commonly arises when a noncustodial parent is in arrears in child support or alimony obligations. The court may hold the errant spouse in contempt of the court order of support.[102] His dependents may prefer to seek judgment against him and subject his interest in the former home to forced sale to satisfy the neglected obligation. The assertion of homestead privilege in the property by the noncustodial spouse would not prevent its partition; however, such an assertion could, in some cases, prevent forced sales of his interest in it.[103]

Generally, a parent was not permitted to avoid forced sale of his property by claiming to be head of the family against which he sought to assert the homestead exemption.[104] In *Anderson v. Anderson*,[105] the husband and wife were divorced and the wife was awarded custody of their children. The husband continued to live in the ex-marital home in which the ex-spouses were cotenants. The husband was obligated to contribute child support but failed to do so. The wife obtained a judgment against him for the arrears. The parties stipulated the ex-husband was head of the family, and he claimed his half-interest in the home was, therefore, homestead exempt from forced sale.[106]

The Florida Supreme Court affirmed the lower court's denial of the husband's exemption claim.[107] The court stated the requirement of family headship would not control when the facts affirmatively showed the father's actions were inconsistent with that status.[108] The court held that since the children were dependent upon their mother, she was the head of the family.[109] The father was not awarded the privilege because his assertion of the homestead exemption against his children was an attempt to defeat the very purpose behind the exemption. Under *Anderson*, a divorced, noncustodial parent contributing nothing toward the support of his children could not claim family headship to avoid forced sale of his property for their benefit.

In *Graham v. Azar*,[110] however, the supreme court held a neglectful parent could avoid forced sale if he remarried and became head of a new family. In *Graham*, the divorced father failed to provide child support required by the

102. *See* Graham v. Azar, 204 So. 2d 193, 196 (Fla. 1967) (chancellor may cite spouse for contempt if he fails to comply with support decree).

103. *Id.* at 195.

104. Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950). However, the owner can assert the homestead privilege against third-party creditors. *See* Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 123 So. 780 (1928). *See generally* Comment, *Florida Homestead: Availability of Exemption after Divorce*, 3 U. FLA. L. REV. 242 (1950) (discussion of *Anderson*).

105. 44 So. 2d 652 (Fla. 1950).

106. *Id.* at 653.

107. *Id.* at 655.

108. *Id.* at 654.

109. *Id.*

110. 204 So. 2d 193 (Fla. 1967).

divorce decree. He remarried. His ex-wife received a judgment against him and attempted to subject his half-interest in the ex-marital home to forced sale to satisfy the arrears. The father filed an affidavit of homestead to prevent the sale. The trial judge denied his claim of exemption.[111] The district court reversed, holding the exemption applicable.[112] The supreme court affirmed,[113] holding the *Anderson* decision did not control the instant facts. Unlike *Anderson*, the instant parent was not attempting to assert the homestead exemption against the very family he claimed to head.[114] Instead, he claimed the exemption as head of a new family. Thus, he avoided sale of his property to satisfy obligations to his old family.

The *Graham* court applied a strict interpretation to the constitutional provision allowing a family head to claim his property as exempt homestead. Justice Ervin dissented, vigorously asserting that the father should not be allowed to advance the homestead privilege to avoid sale of his property for the benefit of the children of his first marriage. The dissenting justice distinguished a judgment for child support from a judgment in favor of a creditor and declared homestead exemption was never intended to cut off dependent children's rights to their parents' property.[115] Justice Ervin reasoned the father was responsible for the support of his children, regardless of whether he was divorced from their mother, and to allow his second family complete priority over the first was discriminatory and contrary to due process.[116]

Despite the supreme court's often repeated admonition that homestead law should be liberally interpreted in favor of those it was designed to protect,[117] the *Graham* decision demonstrates the use of the law against a claimant's dependents. The constitutional language was strictly construed in favor of a new and successful family at the expense of the failed one. Since a viable family existed, it was protected at the expense of its leader's other dependents, as well as his creditors.

The opinions on partition of former marital property and enforcement of support obligations against it illustrate the courts' attempts to balance an individual owner's right to free use of his property against his dependents' right to the support offered by it. Courts recognized the pre-eminent position of the family in homestead law. Thus, one owner could be forced to surrender the value of his interest in the ex-family home, even in the absence of exclusive possession. If a parent refused to support his dependents, this property could be subjected to forced sale for their benefit. The parent could not assert family

111. *Id.* at 194.

112. *Id.*

113. *Id.* at 195.

114. *Id.*

115. *Id.* at 196.

116. *Id.*; *see also* Comment, *Florida Homestead: A Balancing of Equities Between Two Dependent Families,* 20 U. FLA. L. REV. 422, 425 (1967) (interest of child vests at time of divorce, and remarriage does not cut off claim by first wife and child).

117. Olesley v. Nicholas, 82 So. 2d 510, 512 (Fla. 1955); Jetton Lumber Co. v. Hall, 67 Fla. 61, 66, 64 So. 440, 442 (1914); Vandiver v. Vincent, 139 So. 2d 704, 707 (Fla. 2d D.C.A. 1962).

headship against his own dependents unless he had acquired responsibility for a new family. If, however, he had founded a new family, the viable new family would then be favored over the old.

V. Claims of Creditors

Just as an owner could not assert family headship against his own dependents unless he had taken on a new family, he could not assert it to prevent forced sale of his property by creditors unless he actually provided support for a family. When a divorced parent who avoided his support obligations claimed family headship to invoke the homestead exemption against forced sale, courts displayed a general unwillingness to reward his neglect. Without adhering to a stated rule of law, courts generally applied a different standard in forced sale cases than in cases involving attempted devise. When a divorced parent of minor children who had not fulfilled his child support obligations attempted to devise his property, courts were quite willing to ensure shelter of the dependent minors by finding the parent head of the family despite his neglect.[118] Homestead law, however, was not intended to provide the means for an owner to avoid his just debts.[119] A divorced parent was not permitted to avoid execution and sale of his property in satisfaction of a judgment unless he truly did support a family.[120]

In *Osceola Fertilizer Co. v. Sauls*,[121] a divorced father remained in the ex-marital home and supported his child from that property. A creditor secured a judgment against the father and attempted to levy upon his property. The father invoked the homestead exemption. The creditor claimed that because the father was divorced and his child did not reside with him, the father was not head of a family and homestead privilege was not available to him. The supreme court held in favor of the father. The court noted the father's support obligations had continued after the divorce and that the father had complied with them. Therefore, he was still head of the family. The absence of the child from her father's home was for the child's welfare, thus the family had remained intact despite her absence.[122]

Family headship did not require the custodial parent to provide all of the child's support.[123] In *Vandiver v. Vincent*,[124] the husband and wife bought a Florida home. The wife took up residence on the property with their minor child. The husband left the state. After they divorced, he remarried but contributed minor amounts of child support. A creditor obtained judgment against the mother and attempted to levy upon her home. She claimed she was head of a family and

118. *See, e.g., Melisi*, 440 So. 2d 584.

119. Hospital Affiliates, Inc. v. McElroy, 393 So. 2d 25, 28 (Fla. 4th D.C.A. 1980); Frase v. Branch, 362 So. 2d 317, 319 (Fla. 3d D.C.A. 1978).

120. *But see Deem*, 297 So. 2d 611 (court found homestead because father had legal duty to support his children, although he evaded his duty and provided no support).

121. 98 Fla. 339, 123 So. 780 (1929).

122. *Id.* at 340-43, 123 So. at 780-81.

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

124. 139 So. 2d 704 (Fla. 2d D.C.A. 1962).

the residence was her homestead.[125] The creditor asserted the mother was not entitled to such status because she was not the sole supporter of the child. The court held the mother was head of a family consisting of herself and the child despite the fact she did not provide all of the child's support.[126] Thus, a parent could achieve family headship status without being the sole provider. The parent, however, had to contribute some support to the dependents. Only the paramount importance of preserving the family outweighed creditors' rights to satisfaction of their claims. If a parent ignored his family, he lost his exemption.[127] Incidentally, this treatment provided incentive for a divorced parent to attend to his support obligations.

Generally, creditors could expect the family relationship to cease sometime in the future, making homestead property available for execution and sale.[128] Creditors' expectations might be accelerated by a divorce that could transfer family headship from the debtor spouse to the other spouse. The property would then presumably be available for satisfaction of creditors' claims.

In *Barnett Bank v. Osborne*,[129] however, an owner was allowed to assert homestead status to prevent sale of his half-interest in ex-marital property although he was not head of the family. The claimant was divorced from his wife. She received custody of their child and exclusive possession of their jointly owned home. A judgment creditor attempted to levy upon the husband's interest in the home. The trial court granted the husband an order protecting the property from levy as a homestead. The trial court found the ex-husband was not the head of a family. Rather than hold the property was, therefore, subject to the creditor's levy, the court held the ex-wife's homestead exemption applied to her ex-husband's interest in the home.[130]

The Fourth District Court of Appeal affirmed, per curiam, the trial court's decision.[131] The sole dissenting judge argued the homestead exemption applied only to the beneficial interest owned by the head of a family.[132] The dissenting judge declared the ex-husband was not entitled to homestead exemption in his own right, had acted inconsistently with a claim of homestead in his property, and should not be permitted to "sneak in" under his ex-spouse's exemption.[133]

The dissent's position was clearly supported by precedent. Prior case law firmly indicated homestead privilege extended only to property owned by the

125. *Id.* at 706-07.

126. *Id.* at 709-10.

127. *Anderson*, 42 So. 2d at 654.

128. When the family relationship ended, the subject property was no longer homestead. The family relationship could terminate upon divorce of a childless couple, or when the children of a single-parent owner reach the age of majority. When a family no longer demanded the property, creditors were entitled to it. Because homestead law sacrificed the just demands of the creditor, it was justifiably conditioned upon existence of a dependent family.

129. 349 So. 2d 223 (Fla. 4th D.C.A. 1977) (per curiam).

130. *Id.*

131. *Id.*

132. *Id.* at 224 (citing Tullis v. Tullis, 342 So. 2d 88, 89 (Fla. 1st D.C.A. 1977)).

133. *Id.* The ex-husband's undivided one-half interest, subject to the ex-wife's right of possession, is "subject to levy, just as it is subject to disposition by the [ex-husband] himself." *Id.*

head of a family, and property not owned by the head of a family, accordingly, was not entitled to the exemption.[134] However, *Osborne* has never been overruled. The *Osborne* claimant managed to exempt his half-interest by convincing the court his wife's privilege extended to exempt his property. Both ex-spouses were thus able to exempt their interests in the same home.[135] The creditor was unable to levy upon either ex-spouse's interest to satisfy the debt.[136]

Osborne is an anomalous decision. Generally a creditor could not be totally precluded from satisfaction against one of the owners' interests in the home after a divorce. Creditors were held to be on notice of the exempt character of homestead property. However, they had a reasonable expectation of recovering against homestead property upon divorce because then at least one of the co-owners would not be head of a family. A creditor could satisfy its judgment out of this owner's interest in the ex-marital home.[137] Thus the rights and expectations of creditors and dependents were balanced. The creditor was entitled to any property on which the family was not dependent.[138] *Osborne*, however, prejudiced the rights of creditors by exempting property not essential to family support.

Divorce collapsed the traditional family and made determination of family headship more difficult. Application of the family head requirement often confused the courts and resulted in unintended consequences. In *Barnett v. Pan American Surety Co.*,[139] for instance, a creditor obtained a judgment against a woman after her marriage was dissolved. Her ex-husband left the state, and she retained custody of their children. She singlehandedly provided them with a home and support. A writ of execution was issued against her home. She claimed the property was her homestead. The creditor challenged her assertion. During the pendency of the litigation, the woman remarried and her new husband moved into her home.[140] The court held her new husband was presumed to be head of the family and, because headship and ownership were not joined

134. *See, e.g.*, Bessemer Properties v. Gamble, 158 Fla. 38, 39, 27 So. 2d 832, 833 (1946) (homestead exemption extends to any right or interest in land held by the head of the family); Morgan v. Bailey, 90 Fla. 47, 49-50, 105 So. 143, 144 (1925) (homestead exemption applies to beneficial interest owned by the head of the family); Thomas v. Craft, 55 Fla. 842, 846, 46 So. 594, 595 (1908) (claimant must have headship as well as ownership of the property interest involved); Hinson v. Booth, 39 Fla. 333, 20 So. 687 (1897) (no homestead exemption for one person in another's property).

135. 349 So. 2d at 223. Normally, only one owner of a piece of property could claim it as his homestead. Within a marriage only one spouse could be family head, and only that person's property could be homestead. *In re* Felsinger, 17 B.R. 226, 228 (Bankr. M.D. Fla. 1982). Property owned by the other spouse would be available for satisfaction of creditors' claims. If property were jointly owned by two persons who were not married, only the resident could claim his interest as homestead. FLA. CONST. art. X, § 4(a)(1).

136. 349 So. 2d at 223.

137. *See supra* note 135.

138. The homestead law was not provided as an imposition upon creditors. Jetton Lumber Co. v. Hall, 67 Fla. 61, 66, 64 So. 440, 442 (1914); Pasco v. Harley, 73 Fla. 819, 823, 75 So. 30, 32 (1917).

139. 139 So. 2d 192 (Fla. 3d D.C.A. 1962).

140. *Id.* at 193-94.

in the woman, her home was not an exempt homestead.[141] The home was therefore subjected to sale to satisfy the creditor's claim.

The *Barnett* court did not consider whether the woman was head of her family when the judgment lien attached to the property. If she had been, the lien could not properly have attached because the property would have been homestead. Only when her family headship lapsed could the lien have attached.[142] This lapse could have occurred when she remarried because her new husband would have been presumed head of the family.[143] Nevertheless, the decision illustrates that even property used by a responsible divorced parent to support dependents could be subjected to levy and sale as the result of application of the family headship requirement.

Flannery v. Green,[144] a recent case decided under the old article ten, section four, is another example of injudicious treatment of an unconventional owner. In *Flannery*, an unmarried man and woman lived together on land the man owned in Florida. They had one child. After a time, the woman left with the child. The father continued to provide substantial support for the child. A creditor obtained judgment against the father, who filed an affidavit of homestead. The trial court found the father was head of neither a family in law nor a family in fact.[145] The Second District Court of Appeal affirmed, holding the trial court's finding was reasonably supported by the evidence.[146] The district court reasoned the father was not head of a family in law because, although paternity of the child was undisputed and the father had a legal duty to support the child, the legal duty did not arise out of a "family relation."[147] The district court ruled the trial court was not unreasonable in finding that the father's actions did not evidence a substantial concern for the child's welfare.[148] The court also concluded no family in fact existed. Although such a family could exist after divorce when the noncustodial parent retained primary responsibility for the welfare of the child, the evidence supported a finding that the father did not retain such responsibility.[149] Thus, homestead law did not protect the father.

The *Barnett* and *Flannery* decisions demonstrate the unintended consequences that often resulted from the application of the head of family requirement after a divorce. The *Barnett* court assumed, because the mother had remarried, the property was no longer essential for her well-being. Her new husband was

141. *Id.* at 195.

142. *See supra* note 22.

143. *Barnett*, 139 So. 2d at 194; Solomon v. Davis, 100 So. 2d 177, 178 (Fla. 1958); *cf. Anderson*, 44 So. 2d at 652 (father not permitted to claim homestead in land against claim of ex-wife for child support arrearages, although wife had remarried and moved away with the children). In dicta, the *Anderson* court stated that even if the father were still the head of the family, homestead could not insulate his property from claims by those protected by homestead. *Id.* at 655.

144. 482 So. 2d 400 (Fla. 2d D.C.A. 1985).

145. *Id.* at 402-03.

146. *Id.* at 402.

147. *Id.*

148. *Id.* at 403.

149. *Id.*

presumed able to provide for her, so he acquired family headship in her stead. *Flannery* reflects the prejudice of homestead law toward traditional marriage and demonstrates its application to punish those who did not conform to those norms. Even *Sauls* and *Vandiver* show that the more closely a divorced family resembled a unified one, the more favorable its treatment would be under homestead law.[150]

The traditional family, however, is a rapidly disappearing phenomenon. Prior to amendment of the homestead exemption provision, even-handed application of the head of family requirement was growing increasingly difficult. To establish predictability and provide adequate protection to a new type of family, the Florida Constitution was amended to abolish the head of family requirement and extend homestead privileges to any natural person.

VI. Analysis: Projected Effect of the New Law

Effective January 5, 1985, any natural person may claim his property as homestead.[151] An owner's marital status or responsibility for the welfare of others are no longer dispositive of availability of the privilege. Any person who owns and resides upon property is a homesteader,[152] and his property is subject to all the advantages and restrictions incumbent in that classification.

The constitutional amendment creates an astounding increase in the number of potential homesteads. The change is particularly significant as it affects the availability of homestead after an owner is divorced. Under the old law, if a homesteader was divorced, the prospects of his property losing homestead status were greatly increased. The privilege would continue only if the owner remained somehow responsible for a family. Responsibility for a family is now completely irrelevant to the availability of homestead status.[153]

The basic premise of homestead law, shelter of the family, was displaced by the amendment.[154] The change is presumably intended to strengthen this policy by ridding the law of its dependence on outmoded familial ideals. In many ways the change serves this goal. However, by its very language homestead law is no longer tied to the existence and continuance of a viable family.[155]

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150. In *Sauls*, although the claimant parent did not reside with his dependents, he maintained close ties with them and gave them leadership and support. The scenario of the father as leader and provider was the familial ideal at the time of the decision. Since the facts so closely adhered to that ideal, the residency requirement was expendable. *See supra* text accompanying notes 121-22. In *Vandiver* the family head was the mother. Her husband had left the state. The children did not receive much support or guidance from him. Thus the mother fulfilled the traditional role as breadwinner and role model and was awarded the homestead privilege. *See supra* text accompanying notes 124-26.

151. Fla. Const. art. X, § 4(a).

152. *Id.*; *see also supra* note 34 and accompanying text.

153. On its face the homestead provision is no longer tied to the existence of a family, or the policy of its continuing viability. *See* Fla. Const. art. X.

154. Homestead law in Florida is deeply rooted in the policy of sheltering an owner's family from the consequences of financial improvidence. *See supra* text accompanying notes 1-4. The amendment did not overrule the vast amount of case law expounding this concern.

155. Although the constitution provides that the exemption shall inure to any natural person,

Accordingly, an owner's dependents may actually suffer as a result of the more indulgent exemptions.

In the area of devise, the new law affords more favorable treatment to the owner's family. Under the old law, courts had to make complicated determinations of a divorced owner's family headship before an attempted devise could be invalidated. Abrogation of the family headship requirement allows a divorced parent to effectively devise his property even if he is survived by minor children. Thus, the amended homestead provision facilitates the results sought in the *Deem* and *Melisi* cases.

The *Deem* court focused on the issue of the homestead status of a divorced parent's property when the parent totally ignored support obligations and the children never occupied or visited the premises.[156] The court refused to reward neglect with greater freedom to dispose of property, and imposed family headship on the father by virtue of his legal duty of support. The devise was invalidated. Under the new law, this time-consuming and expensive determination is unnecessary. Despite the parent's neglect of his children, and regardless of where his children live, an owner's property takes on homestead character by virtue of his residence upon it.

When the owner's family occupies his property but he himself does not, as in the *Melisi* case, characterization of the premises is less clear cut. The *Melisi* court held that property the owner himself did not reside on could constitute his homestead if he was head of the family residing there. Abolishment of the family headship requirement casts doubt upon this result. Whether an owner must occupy the subject property himself is unclear.[157] The language of the homestead provision upon which this case law developed remains unchanged by the amendment.[158] Property resided on by the owner's family will probably continue to qualify as the owner's homestead. This approach guarantees continued protection of the owner's dependents, and maintains a connection between homestead privilege and the owner's family. For instance, it is unreasonable for property occupied by the owner to be subject to restrictions on devise of homestead, while the same property occupied solely by the owner's dependents is non-homestead property that could be fully devised.

The new law provides comprehensive protection for an owner's minor dependents at his death. It provides even more protection than was considered necessary under the old law. Prior to the amendment only one head of a family was permitted and only property owned by that person qualified as homestead. Thus, only the property of one parent was subject to the homestead restrictions

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§ 4(a)(1) still provides that an owner may exempt the municipal residence of himself or his family. FLA. CONST. art. X, § 4(a)(1). This reference may indicate some continuing concern for protection of the family, as well as the individual owner. The amendment was probably suggested as a means of improving familial protection.

156. *Deem*, 297 So. 2d at 612.

157. Under the constitution before the 1985 amendment, the owner did not have to reside on the property for homestead status to attach. Matter of Cooke, 412 So. 2d 340, 341 (Fla. 1982). Thus, under the amended provision, property resided upon by the owner's family may probably still be claimed as homestead. *See Homestead Protection*, *supra* note 32, at 66.

158. *See supra* note 155.

on devise that guaranteed passage of such property to the owner's minor children. Under the amended homestead provision, property owned by both parents may qualify as homestead.[159] If both parents die before their children have reached the age of majority, the children may inherit two homestead properties instead of only one.[160]

While the constitutional homestead exemption now affords very favorable treatment to the owner's family at his death, the change disfavors a property owner who dies separated from his spouse and without children. An estranged spouse with no family is subject to a harsh restriction on his freedom to devise his property. Under the old law, as illustrated by the *Barlow* and *Van Meter* cases, no family relationship could survive divorce or estrangement of spouses who had no children.[161] Estranged spouses were denied the right to assert the decedent's property was homestead which they would take as surviving spouse.[162]

If *Barlow* and *Van Meter* arose under the newly amended homestead provision, the attempted dispositions would fail. Homestead privilege is no longer dependent upon a family relation; estrangement of spouses would not affect the characterization of their property as homestead.[163] Thus, an owner who is estranged from his spouse is not free to devise his property as he pleases. Rather, he may devise the homestead property only to his absent spouse, even though they may have been separated for years. An attempt to devise the property otherwise would conceivably be invalidated in the survivor's favor.

This unfortunate result might be avoided by application of the law of abandonment.[164] If an estranged spouse returns to claim survivor's rights in a de-

159. FLA. CONST. art. X, § 4(a). As natural persons, each may claim the exemption.

160. FLA. STAT. § 732.4015 (1985). Inheritance of one homestead should ordinarily suffice to protect the orphaned family from destitution. *Cf., e.g., In re* Felsinger, 17 B.R. 226, 228 (Bankr. M.D. Fla. 1982) (only one family head can exist, therefore, legally impermissible to propose two independent family units composed of a father and his children and the mother and the same children). If this is still true, then the family now will receive more than it actually needs, at the sacrifice of the owner's desired disposition scheme. Furthermore, since homestead property retains its character in the hands of the owner's heirs, the new law may impose upon creditors by removing more than is "necessary" from their grasp.

161. *See supra* text accompanying notes 59-66.

162. In both cases the owner's devise was upheld. *Barlow*, 156 Fla. at 461, 23 So. 2d at 724; *Van Meter*, 214 So. 2d at 643.

163. FLA. CONST. art. X, § 4(a). Thus, the statute would govern the descent of the property. FLA. STAT. §§ 732.401-.4015 (1985).

164. Abandonment of the homestead destroys its homestead character. An owner may abandon homestead by express declaration or by conduct consonant with a declaration. To determine whether the homestead has been abandoned, courts should examine the pertinent facts of the case, which might include a permanent change in principal place of residence, or simply quitting the premises with intent never to return. *See Barlow*, 156 Fla. at 458, 460-61, 23 So. 2d at 724; *In re* Estate of Newman, 413 So. 2d 140, 142 (Fla. 5th D.C.A. 1982); *cf.* Engel v. Engel, 97 So. 2d 140, 142 (Fla. 2d D.C.A. 1954) (regret over purchase of property and uncertain possibilities of acquiring a different property do not defeat intent to make property permanent residence). However, involuntary departure from the premises does not constitute abandonment. *In re* Estate of Pendrys, 443 So. 2d 402 (Fla. 4th D.C.A. 1984). Similarly, temporary absence with intent to return does not constitute abandonment. Collins v. Collins, 150 Fla. 374, 377, 7 So. 2d 443, 444 (1942); Read v. Leitner, 80 Fla. 574, 577-78, 86 So. 425, 426 (1920).

cedent's property, a court could examine the circumstances surrounding the separation. If the survivor were found to have voluntarily left the marital home, intending not to return, the court could find all spousal privileges to the decedent's property were thereby abandoned.[165] The owner's devise could then be upheld.

If the new law governing testamentary disposition of homestead property evolves as anticipated, the respective rights of owners and their dependents will be more evenly balanced than before. Dependent children will be assured of the support offered by their parents' property. However, the owner's freedom to devise that property will not be unnecessarily hampered.

The amendment should not impact the partition rights of co-owners, when one owner makes the jointly held property a homestead, as severely as it impacts the area of devise of homestead. Courts will likely continue to apply the principles set forth in *Hoskin* and *Tullis*. The right of exclusive possession, rather than homestead use, will serve to prevent partition of the subject premises. If this desirable and logical course is followed, the great increase in the number of homesteads will not affect partition rights of co-owners.

However, the limitation set forth in *Daniels v. Katz*, restricting the rights of a co-tenant to freely exercise his property rights if the subject property is occupied by the other owner as a homestead, may have a radical effect after the amendment. *Katz* limited a non-resident owner's freedom to exercise his property rights when the occupant owner made the subject premises a homestead.[166] In such a case, the absent owner could not even create a lien upon his property interest.[167]

Due to the vast increase in homesteads under the new law, application would paralyze non-resident owners' use and enjoyment of their property interests. Such a result would likely be deemed unduly restrictive. In addition, the supreme court in *Tullis* stated that homestead law was never intended to impair a common owner's enjoyment of his beneficial interest in property.[168] The *Katz* decision is not likely to serve as guiding precedent. Thus, under the new law as well as the old, a common owner may encumber his property as he pleases. If he or his successor in interest wishes to partition the property, mere use of it as homestead will not bar exercise of that right.

The amendment to article ten, section four should not greatly affect the

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165. *Barlow*, 156 Fla. at 459-60, 23 So. 2d at 723. "The homestead is not something to toy with and use as a 'city of refuge' from the law's exactions. It was provided for the benefit of the family as a place of actual residence, as a haven where integrity, patriotism, and respect for civic and moral virtues is generated." *Id.* An estranged spouse should not be allowed to impair an owner's desired disposition scheme.

166. *See supra* text accompanying notes 98-100.

167. *Daniels*, 237 So. 2d at 60. "We determine that a former husband cannot create an enforceable lien on his undivided interest in homestead property by giving his attorney notes secured by mortgages." *Id.* However, if the husband's half-interest were not homestead, he should have been allowed to dispose of it freely. If the half-interest were homestead property, it would have been subject to restrictions on conveyance and devise; however, a divorced owner has no spouse and can freely sell or encumber his half-interest.

168. *Tullis*, 360 So. 2d at 377. The *Katz* holding conflicts with this policy statement.

rights of co-owners to partition their property. However, abrogation of the head of family requirement has a potentially critical effect on the ability to recover child support arrears through sale of a recalcitrant parent's property. In the past, an evasive parent could not avoid forced sale of his property in satisfaction of neglected support obligations by asserting the homestead exemption against his dependents.[169] The *Graham* case held evasive parents could succeed in this effort only by attaining headship of a new family.[170] A parent could not claim headship of the very family whose demands he sought to avoid.[171] However, if he successfully asserted headship of a new family, the neglected issue of his former marriage were considered creditors.[172] They gained no advantage whatsoever by their relationship to the parent, and he was free to ignore their needs.[173]

The removal of the head of family requirement strengthens this undesirable state of affairs. Because family headship is no longer crucial to availability of homestead privilege, a parent may more easily avoid fulfillment of support obligations. If shunted dependents attempt to enforce a claim for support against their parent's property, the parent may now claim the property as homestead, exempt from forced sale. Abolishment of the head of family requirement has thus vastly diminished the incentive for a divorced parent to continue to support his children. A neglectful parent is afforded the same homestead privileges and advantages as a responsible one. Such an outcome perverts the homestead provision, accomplishing a result it was conceived to prevent. Courts should recognize the adverse consequences and curtail this possibility.

The courts might remedy this situation in a manner similar to that presented by Justice Ervin's dissent in *Graham*. Justice Ervin reasoned a child's right to support is not a debt in the legal sense but rather a parental responsibility. Hence the support does not come within the purview of the homestead exemption from sale in satisfaction of the owner's debts.[174] Alternatively, the courts may recognize child support claims as debts but place them in a special class to which the homestead exemption would not apply. Finally, if the judicial system is unwilling to implement a change, the legislature would be justified in proposing an amendment to article ten, section four to specifically exclude

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169. *Anderson*, 44 So. 2d at 655.

170. *Graham*, 204 So. 2d at 195.

171. *Id.* (dictum); *Anderson*, 44 So. 2d at 655.

172. *Graham*, 204 So. 2d at 195. The *Graham* court noted that although certain claims are excluded from the homestead exemption, a judgment for child support is not one of the exclusions. *Id.*

173. *Id.* The court stated: "[W]e resist the temptation to venture upon a philosophical discussion regarding the father's duty to support his minor children." *Id.* The court noted that delinquencies in child support are otherwise enforceable.

174. *See Graham*, 204 So 2d at 196 (Ervin, J., dissenting).

> Section 1, Article X [of the Constitution], appears to me to afford no barrier to enforcement of the judgment. A father is responsible for the support of his minor children regardless of the fact he is divorced from their mother. *A judgment for support of a child, . . . is unlike the judgment of a creditor who has no status as a child of the judgment debtor.*

Id. (emphasis added); *see also* Comment, *supra* note 116, at 423-25 (supporting arguments expressed by Justice Ervin in *Graham*).

judgments for child support claims from its terms. On its face, the homestead exemption currently provides no deterrence to evasive parents. It would seem to permit, if not encourage, such irresponsible behavior. If the homestead exemption is to remain consistent with its historic goal of ensuring shelter for the homesteader's family, ample coverage must be provided for dependents during the homesteader's lifetime as well as at his death.[175]

Just as the newly indulgent homestead law impairs children's access to their parents' support, it may similarly affect the ability of creditors to collect debts against an owner's property. The homestead amendment has the desirable effect of increasing predictability and extending protection to worthy owners whose claims would have been questioned under the old law. The results achieved in *Sauls* and *Vandiver* would remain unchanged if those cases were decided today. However, under the present law, a court would not need to make troublesome determinations of family headship. Whether a claimant's family is absent, or whether he provides a majority of their support, is now irrelevant. If the owner or his family occupies the subject property, it is exempt homestead. The amendment would thus change the outcomes of *Barnett* and *Flannery*. Property brought into a marriage will no longer lose its homestead character simply because its owner is not the family's principal provider. Likewise, unconventional families will no longer be disadvantaged.[176]

The homestead law as amended may so strongly favor property owners that it unnecessarily protects generous amounts of their property from creditors' claims.[177] Courts presume creditors are aware homestead property is unavailable for satisfaction of their claims.[178] In the past, creditors could proceed on the assumption a homestead claim might fail, or family headship might lapse upon divorce or under changed family circumstances. The property would then be available to them. Under the new law, availability of the exemption is undisturbed by such occurrences; only abandonment might cause homestead status to lapse.[179] This development removes a great deal of property from the reach of creditors. It also enhances the likelihood of the *Osborne*-like result recurring frequently.

In *Osborne*, a non-resident owner who was not head of the family was allowed to avoid a creditor's sale of his interest in jointly-owned property by extension

175. *See generally* Maines & Maines, *supra* note 2 (discussion of purpose and application of homestead law).

176. *Compare Barnett*, 139 So. 2d 192 (wife lost head of family status due to remarriage); *Flannery*, 482 So. 2d 400 (father denied homestead due to failure to prove family in law or family in fact relationship). In *Flannery* the court, however, implied that a father could claim homestead upon showing of family relationship although the father and mother had never married and the child did not live with the father. The father would need to prove "substantial concern" for the welfare of the child. *Id.* at 402-03.

177. *See supra* note 160.

178. Heddon v. Jones, 115 Fla. 19, 154 So. 891 (1934).

179. Once property acquires the status of a homestead, it retains that characteristic unless abandoned or alienated in the manner provided by law. Wilson v. Florida Nat'l Bank & Trust Co., 64 So. 2d 309, 313 (Fla. 1953). Now that the lapse of head of family status does not affect the privilege, apparently the only means of waiving homestead is abandonment. For a discussion of what constitutes abandonment, see *supra* note 155.

of his co-tenant's homestead exemption. Both property owners were thus able to exempt their respective interests in the same property. Under the old law, this decision was clearly erroneous. Only property owned by the family head could be homestead, so only one interest in a given piece of land should have been exempted.[180] However, the abolishment of the head of family requirement makes it possible for each co-owner to claim his respective interest in the same piece of property as exempt.[181] Even a childless, non-resident owner can claim his interest in jointly-owned property as homestead to exempt it from sale by his creditors.[182]

Homestead was not developed as a means for an owner to escape honest debts.[183] It was meant to balance the interests of owners and creditors. Courts will probably apply the law of abandonment in such circumstances. The burden should be placed on the non-resident owner to prove he or his family intends to return to the premises.[184] If the non-resident owner fails in his proof, the privilege should be withdrawn and the property made available to creditors.

The ambiguities presented by the amendment as it applies to creditors' rights can probably be overcome to balance creditors' and owners' respective rights more evenly than under the old law. Exemption of property owned by single persons, divorcees, and nontraditional families is the single most desirable effect of the amendment, because it secures to them and to their families the protection both were formerly denied. Consequential narrowing of the pool of properties available to creditors will not result in unacceptable imposition on the latters' rights if the exemption remains tied to the residence of the owner or his family.

VII. Conclusion

The consequences of abolishing the head of family requirement on claims of homestead in the context of divorce are unclear. The courts will have to develop the new law. Many of the most workable and practical tenets of the old law should be transferred to the new.

Despite the absence of explicit constitutional language, the homestead exemption should remain tied to the family. Florida's homestead exemption is an extremely generous one. Its generosity has historically been justified by its close connection to the family. Guidelines should be formulated conditioning restrictions on devise to assist dependent families. Likewise, a homesteader must not

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180. *See supra* notes 134-35.

181. Fla. Const. art. X, § 4(a). If both owners can claim the premises as their actual or intended permanent residence, each may apparently claim the premises as his homestead. A non-resident owner will have a substantial burden to prove he intends to return to the premises to make them his permanent abode. It is unclear what significance an award of exclusive use to the resident spouse will have on the claimant's position. It may ease his burden of proving intent to return despite nonresidence.

182. If such an owner resides at least periodically upon the property, he may succeed in exempting it as his "permanent" home. "Permanent" does not require a conclusive intent to reside forever upon a given abode; it means the presence of an intention to reside at a particular place for an indefinite period of time. Engel v. Engel, 97 So. 2d 140, 142 (Fla. 2d D.C.A. 1957).

183. *Vandiver*, 139 So. 2d at 708.

184. *See supra* note 181.

be allowed to assert the privilege against his family. Residence criteria should be developed allowing creditors access to property upon which the owner does not reside and to which he cannot show a realistic intent to return. Abolishment of the antiquated head of family requirement has succeeded in extending a valuable privilege to many worthy property owners who could not previously have claimed it. However, because of its potential for abuse in the context of divorce, it should remain firmly anchored in the context of a viable family.