A. Scope.

1. What is Homestead Real Property?

Definitions of Homestead can be found in two separate provisions of the Florida Constitution. One definition is set forth in Article X, §4(a)(1) of the Florida Constitution relative to (i) the protection afforded from forced sale under process of any court and (ii) both the restriction on the lifetime alienation of homestead real property and the devise of homestead real property at death. Another definition is set forth in Article VII, §6(a) of the Florida Constitution pertaining to eligibility for securing certain exemptions from ad valorem taxes. As will be discussed later in these materials, homestead can come within the definition of one of these constitutions provisions and not that of the other. Homestead (“protected homestead”) is also defined in the Florida Probate Code.

2. Special Aspects Existing With Respect to Homestead.

Some of the more notable aspects pertaining to homestead real property include: (1) creditor protection; (2) restrictions on alienation and devise; (3) ad valorem tax issues; (4) potential documentary stamp tax liability; (5) its impact on Medicaid eligibility; (6) estate tax apportionment; and (7) federal income tax exemptions.

This portion of the presentation will focus on the restrictions pertaining to the alienation of homestead during lifetime and the devise of homestead at death, the impact on ad valorem tax exemptions which occur by implementing certain estate planning strategies during lifetime and the effect of death on the ad valorem tax exemptions, situations in which documentary stamp taxes may become payable, the availability of creditor protection relative to homestead during one’s lifetime and the inurement of creditor protection to the devisees and heirs of a decedent, the potential impact due to homestead not being subject to estate tax apportionment, and the federal income tax exemption pertaining to one’s homestead and the effect that death has on the federal income tax exemption. The impact of homestead ownership on eligibility for the Medicaid Institutional Care Program will also be addressed on a very superficial basis.
B. WHAT IS HOMESTEAD?

1. In General. Homestead is the real property owned by a Florida resident which is used as his or her primary residence, as distinguished from a vacation residence. Note that the concept of homestead is addressed in the rules that pertain to ad valorem taxes, to the lifetime alienation and testamentary devise and descent of one’s residence, and to the ability of judgment creditors to seek satisfaction of their judgments against the debtor’s residence. To constitute homestead, the owner must possess the actual intent to reside permanently in one’s homestead, coupled with actual use and occupancy. In In re: Randall E. Gentry, 23 Fla. L. Weekly Fed. B179 (Bankr. M.D. Fla. November 15, 2011), U.S. Bankruptcy Judge Caryl E. Delano ruled that with respect to homestead and the attendant exemption from creditors, the term “permanent” means for an indefinite period of time, citing to In re Wilbur, 206 B.R. 1002 (Bankr. M.D. Fla. 1997) and Engle v. Engle, 97 So. 2d 140 (Fla. 2d DCA 1957). Judge Delano also noted that the Florida Supreme Court, in Butterworth v. Coggiano, 605 So. 2d 56 (Fla. 1992), directed that the homestead exemption be liberally construed.

2. Creditor Protection and Restrictions on Devise and Alienation. With respect to the provisions of Article X, §4(a)(1) of the Florida Constitution, which, inter alia, relate to the protection afforded to the owner of the homestead from forced sale under process of any court and the restriction imposed on the lifetime alienation of homestead and the devise of the homestead real property at death regarding the ability of such decedent to devise the homestead to devisees of his or her choosing, homestead is defined as an interest (legal or equitable) in real property of a natural person. If the property is located outside a municipality, for purposes of protection of the homestead from judgment creditors, the area of the homestead is limited to one hundred and sixty (160) acres of contiguous land and the improvements thereon. If the property is located within a municipality, the area of the homestead is limited to a one-half (½) acre of contiguous land and the residence of the owner and his or her family situate thereon.

   a. In the case of White v. Posick, 150 So.2d 263 (Fla. 2d DCA 1963), the court held that a separate structure consisting of a garage and overhead apartment used for storage and laundry, and an adjoining lot with a swimming pool and patio, were a part of the resident’s homestead, and, thus, were not available to satisfy the claims of the resident’s creditors. The court reasoned that the garage apartment, pool and patio were conventional residential appurtenances. Although the White case was not in an estate setting, it is certainly instructive as to what should be a part of the homestead of a decedent which is able to pass to a decedent’s heirs free of the claims of the decedent’s creditors.

   b. In the more recent case of In re Ensenat, 20 Fla. L. Weekly Fed. B 452 (Bankr. S.D. Fla. 2007), the debtors had lived in a home in the city limits of Miami since 1979. The property, which apparently did not exceed ½ acre in size, had two structures situated thereon. One building was the home in which the debtors actually lived. The second building contained two bedrooms, one bathroom, a living room and a kitchen, and was connected to the “main” home by a covered patio. The seconding building also had a its own electric meter and water supply, and had
a separate gated entrance. The debtors’ niece, as well as the niece’s young son and boyfriend, resided in the second building. No rent was paid by the niece to the debtors. In holding that both buildings constituted the homestead of the debtors, U.S. Bankruptcy Judge Isicoff found the second building to be within the “residence” of the debtors. Judge Isicoff acknowledged the public policy of Florida that the homestead protection is to be interpreted in a liberal and beneficial spirit in which the provisions were conceived and enacted in the interest in the family home. The court cited to the White case, supra. Again, despite the fact that the Ensenat case was not in an estate setting, it is certainly instructive as to what should be a part of the homestead of a decedent which is able to pass to the heirs of a decedent free of the claims of the creditors of the decedent.

3. **Ad Valorem** Taxes. With respect to the provisions of Article VII, §6(a) of the Florida Constitution, which pertains to the exemption from *ad valorem* taxes provided to the owner of the homestead real property, homestead is defined as the permanent residence of the owner, or another legally or naturally dependent upon the owner. Moreover, ownership of the homestead “may be held by legal or equitable title, by the entirety, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.” This definition, which is obviously very vague, may be impacted by statutes and case law implementing or interpreting this constitutional provision.

4. Estate Administration. The Florida Probate Code, in §731.201(33), Florida Statutes, defines *protected homestead* to mean homestead as described in Article X, §4(a)(1) of the Florida Constitution as discussed above which passes to a spouse or heir of the owner with the protection which inures in accordance with the provisions of Article X, §4(b) of the Florida Constitution.

C. Special Aspects of Homestead.

1. Restrictions on Descent and Devise or Lifetime Alienation.

   a. Constitutional Restrictions. Article X, §4(c) of the Florida Constitution provides as follows:

   **SECTION 4. Homestead; exemptions.--**

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

(1) §732.401, Florida Statutes, provides as follows:

732.401 Descent of homestead.--

(1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent’s death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent’s descendants in being at the time of the decedent’s death, per stirpes.

(a) The right of election may be exercised:

1. By the surviving spouse; or

2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse’s probable lifetime.

(b) The election must be made within 6 months after the decedent’s death and during the surviving spouse’s lifetime. The time for making the election may not be extended except as provided in paragraph (c).

(c) A petition by an attorney in fact or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent’s death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

(d) Once made, the election is irrevocable.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:
ELECTION OF SURVIVING SPOUSE
TO TAKE A ONE-HALF INTEREST OF
DECEDENT’S INTEREST IN
HOMESTEAD PROPERTY

STATE OF
COUNTY OF

1. The decedent, __________, died on _______. On the date of the decedent’s
dearth, the decedent was married to ________, who survived the decedent.

2. At the time of the decedent’s death, the decedent owned an interest in real
property that the affiant believes to be homestead property described in s. 4,
Article X of the State Constitution, that real property being in County, Florida,
and described as: (description of homestead property).

3. Affiant elects to take one-half of decedent’s interest in the homestead as a
tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse’s
attorney in fact or guardian of the property and an order has been rendered
by a court having jurisdiction of the real property authorizing the undersigned
to make this election.

(Affiant)

Sworn to (or affirmed) and subscribed before me this day of (month) , (year)
, by (affiant)

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

(Type of Identification Produced)

(3) Unless and until an election is made under subsection (2), expenses
relating to the ownership of the homestead shall be allocated between the
surviving spouse, as life tenant, and the decedent’s descendants, as
remaindermen, in accordance with chapter 738. If an election is made,
expenses relating to the ownership of the homestead shall be allocated between
the surviving spouse and the descendants as tenants in common in proportion
to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse’s life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent’s descendants may not be divested.

(5) This section does not apply to property that the decedent owned in tenancy by the entireties or joint tenancy with rights of survivorship.

(2) §732.4015, Florida Statutes, provides as follows:

732.4015 Devise of homestead.--

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner’s spouse if there is no minor child or minor children.

(2) For the purposes of subsection (1), the term:

(a) “Owner” includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor’s death as if the interest held in trust was owned by the grantor.

(b) “Devise” includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor’s homestead.

(3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse’s interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739. As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there is no minor child.

c. Practical Issue #1 - How was the Protected Homestead Titled? Upon the death of a decedent who was married on the date of his or her death, or who was survived by at least one minor child, a determination must be made immediately as to whether the decedent owned homestead real property (or as the equivalent term is used in the Florida Probate Code, protected homestead), and if so, exactly how was the protected homestead titled.
(1) Married Decedent.

(a) Tenancy by the Entirety. If the protected homestead was owned by the decedent and his or her surviving spouse as tenants by the entirety ("TBE") the protected homestead will not be subject to the constitutional or statutory restrictions on devise, but shall vest in the surviving spouse by operation of law. *Fla. Stat.* §732.401(2).

(b) Joint Tenancy with Right of Survivorship. Will the same rule apply if the protected homestead was owned by the decedent and his or her surviving spouse as joint tenants with right of survivorship ("JTWROS")? “Yes” according to the Florida Second District Court of Appeal. *See Ostyn v. Olympic*, 455 So.2d 1137 (Fla. 2d DCA 1984).

(c) An Interest Owned by the Decedent. If the decedent owned the entire fee simple interest in the protected homestead or he or she owned a fractional share of the protected homestead as a tenant in common, such interest in the protected homestead is subject to the constitutional and statutory restrictions. The result will depend on whether the decedent is also survived by one or more lineal descendants.

(i) No minor child. If the decedent is survived by his or her spouse, but not by any minor children, the decedent may devise his or her entire interest in the protected homestead outright to his or her surviving spouse. *Fla. Stat.* §732.4015(1).

(ii) At least one minor child. If the decedent is survived by his or her spouse and at least one minor child, the decedent may not devise his or her entire interest in the protected homestead to anyone, including his or her surviving spouse. *Fla. Stat.* §732.4015(1). The failed devise is thus subject to the provisions of §732.401, Florida Statutes, resulting in the decedent’s surviving spouse receiving a life estate in the protected homestead and the remainder interest vesting in the decedent’s lineal descendants on a *per stirpital* basis. Moreover, the surviving spouse may elect to receive an intestate share (an undivided one-half interest as a tenant in common) in lieu of a life estate if such election is made within 6 months of the death of the decedent and during the surviving spouse’s lifetime. *Fla. Stat.* §732.401(2).

(iii) No surviving lineal descendants. If the decedent is survived by his or her spouse, but not by any lineal descendants, the decedent’s entire interest in the protected homestead will pass to the surviving spouse. *Fla. Stat.* §732.102(1).

(iv) At least one surviving lineal descendant. If the decedent is survived by his or her spouse and by at least one lineal descendant, the decedent’s entire interest in the protected homestead, unless devised in fee simple to his or her surviving spouse, will pass in the form of a life estate to the surviving spouse, with the remainder interest vesting in the decedent’s lineal descendants on a *per stirpital* basis. *Fla. Stat.* §732.102(1).
(2) Unmarried Decedent.

(a) No minor child. If an unmarried decedent is not survived by any minor children, the decedent may freely devise his or her entire interest in the protected homestead as he or she sees fit because no constitutional or statutory restrictions apply. But is this really true? A fairly recent Florida Supreme Court decision illustrates the inability of a specific devisee to receive his or her devise when the decedent’s protected homestead is not specifically devised and thus passes as a part of the residuary estate to one or more heirs of the decedent.

On application for review from the Florida Fourth District Court of Appeal, the Supreme Court of Florida was presented with the issue of whether the decedent’s protected homestead property, when not specifically devised, passes to the general devisees before the residuary devisees in accordance with §733.805, Florida Statutes, when a decedent is not survived by a spouse or any minor children. *McKean v. Warburton*, 888 So.2d 18 (Fla. 2005). [A revised opinion was issued on January 5, 2006 at 919 So.2d 341 (Fla. 2006).] In the Court’s January 5, 2006 opinion, it answered the certified question in the negative. The decedent’s will bequeathed specific sums to two individuals. The estate did not have funds available to satisfy those specific bequests. The only asset of any real value was the decedent’s condominium, which constituted the homestead property of the decedent. The Court held that where a decedent is not survived by a spouse or minor children, the decedent’s homestead property passes to the residuary devisees, who were the decedent’s half-brothers, and not to the general devisees, unless there is a specific testamentary disposition ordering the property to be sold and the proceeds made part of the general estate. **It is noteworthy to add that the ruling may have been different had the recipients of the homestead (the residuary beneficiaries) not both been heirs of the decedent. See Snyder, infra.**

The result in *Warburton* would also have been different had the owner empowered or directed the personal representative to sell or encumber the homestead to satisfy the specific bequests. Of course, such a provision would have most likely enabled creditors to reach the decedent’s equity in the homestead.

In a subsequent case, the Florida Supreme Court reaffirmed its holding in *Warburton*. *McEnderfer v. Keefe*, 921 So.2d 597 (Fla. 2006).

(b) At least one minor child. If an unmarried decedent is survived by at least one minor child, the decedent may not devise his or her entire interest in the protected homestead to anyone, including to one child if the decedent was survived by more than one child. *Fla. Stat.* §732.401(1). This results in the protected homestead passing intestate in accordance with the provisions of §732.103(1), Florida Statutes, i.e., to the lineal descendants of the decedent on a per stirpital basis. **See Fla. Stat. §732.104.**
d. Practical Issue #2 - Homestead Owned in an Inter Vivos Trust?

(1) Restrictions in General. The restrictions on the owner’s devise of his or her homestead as contained in the Florida Constitution and Florida Statutes hereinbefore described are not circumvented by the interposition of a revocable trust. The term “owner” includes the grantor of a trust described in §733.707(3), Florida Statutes, that is evidenced by a written instrument which is in existence at the time of the grantor’s death as if the interest held in trust was owned by the grantor. Fla. Stat. §732.4015(2)(a). The term “devise” includes the disposition by trust of that portion of the trust estate, which, if titled in the name of the grantor of the trust, would be grantor’s homestead. Fla. Stat. §732.4015(2)(b). Because of this restriction, Florida courts have indicated that homestead real property cannot be effectively devised by way of a revocable trust on the death of a transferor if the transferor is survived by a spouse or a minor child. See In re Estate of Johnson, 397 So.2d 970 (Fla. 4th DCA 1981). Note also that the treatment of a protected homestead owned by an irrevocable trust may be in parity with the rules applicable to an estate. See Cutler v. Cutler, 994 So.2d 341 (Fla. 3rd DCA 2008).

(2) Title Insurance Issues. Another consideration pertains to determining how to proceed, after the death of the grantor of the revocable trust, to secure a court order which declares the decedent’s protected homestead, albeit owned by the decedent’s revocable trust, to be homestead property for purposes of Florida law in terms of not being subject to the claims of the decedent’s creditors and vesting in the beneficiaries of the decedent’s revocable trust as applicable. In a 1991 decision, the Florida Fifth District Court of Appeal held that such a petition to determine the homestead status of real property could not be brought in a probate proceeding. Ford v. Ford, 581 So.2d 203 (Fla. 5th DCA 1991). The court reasoned that the probate court did not have authority to entertain the petition because the decedent did not own the decedent’s protected homestead as required by Florida Probate Rule 5.405 as in effect in 1990 (the year of the death of the decedent). Note, however, that §732.4015, Florida Statutes (1989), was amended in 1992 (§16, Chapter 92-200, Laws of Florida.) and again in 2001 (§38, Chapter 2001-226, Laws of Florida).

In 1991 §732.4015, Florida Statutes, provided as follows:

As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner’s spouse if there is no minor child.

In 1992, §732.4015, Florida Statutes, was amended by Laws 1992, c. 92-200, § 16, effective Oct. 1, 1992. This amendment changed §732.4015, Florida Statutes, as follows:

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner’s spouse if there is no minor child.
(2) For the purposes of subsection (1), the term:

(a) “Owner” includes the settlor of a trust evidenced by a written instrument in existence at the time of the settlor’s death pursuant to which the settlor retained the right either alone or in conjunction with any other person to amend or evoke the trust at any time before his death.

(b) “Devise” includes a disposition by trust of that portion of the trust estate which, if titled in the name of the settlor of the trust, would be the settlor’s homestead.

In 2001, § 732.4015, Florida Statutes, was amended again by Laws 2001, c. 2001-226, § 38, eff. Jan. 1, 2002. The amendment changed § 732.4015, Florida Statutes, as follows:

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner’s spouse if there is no minor child.

(2) For the purposes of subsection (1), the term:

(a) “Owner” includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor’s death as if the interest held in trust was owned by the grantor.

(b) “Devise” includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor’s homestead.

The purpose of the 1992 and 2001 amendments to §732.4015, Florida Statutes, was to clarify that a grantor of a revocable living trust who conveys his or her homestead property to his or her revocable trust is still subject to the restrictions on devise of the homestead property as set forth in §732.4015(1), Florida Statutes, as if he or she had never conveyed the homestead property to the revocable living trust. However, these amendments also clearly demonstrate that the Florida Legislature deems a grantor of a revocable trust, which holds title to homestead property, to be the owner of such homestead property.

Thus, it follows, if a grantor of a revocable living trust is deemed to be the owner of homestead property for purposes of the restrictions on the devise of homestead property, the grantor
of a revocable living trust might also be viewed as the owner for purposes of Florida Probate Rule 5.405. Therefore, the Ford decision is arguably no longer valid in light of the 1992 and 2001 amendments to §732.4015, Florida Statutes. That is, to the extent that Ford stands for the proposition that a grantor of a revocable trust that holds title to the grantor’s homestead property does not “own” the homestead property as of the date of his death, Ford has been superseded by the 1992 and 2001 amendments to §732.4015, Florida Statutes. As such, when §732.4015, Florida Statutes, and Florida Probate Rule 5.405 are read together, it stands to reason that a Petition to Determine Homestead Status of Real Property with respect to real property titled in a grantor’s revocable living trust may be heard in conjunction with a properly filed probate proceeding. In other words, Florida Probate Rule 5.405 should be interpreted to provide a circuit court judge presiding over a properly filed probate proceeding with sufficient authority to determine the homestead status of real property that is titled in the decedent’s revocable living trust as of the date of the grantor’s death because the homestead property is, in fact, “owned” by the decedent as per §732.4015(2)(a), Florida Statutes. Moreover, consider the situation in which the personal representative has to apportion estate taxes among assets and interests which are neither a part of the probate estate nor owned by the decedent’s revocable trust. The personal representative would need to confirm that the residence of the decedent, even if held in the decedent’s revocable trust, was protected homestead and thereby not subject to apportionment for estate taxes. See Fla. Stat. §733.817(2).

(3) Authority of Trustee to Sell Homestead Real Property After Death of the Grantor. Several trial court judges have ruled in unpublished decisions that, with respect to homestead real property titled in the deceased grantor’s revocable trust, the trustee of such trust does not have the inherent power or authority to sell the homestead if it would otherwise pass to the spouse or heirs of the deceased grantor. In a recent case, the Florida Third District Court of Appeal, on a motion for rehearing, held that homestead real property owned by the deceased grantor’s revocable trust vested in the “twinkle of an eye” in the decedent’s spouse as to a life estate and the decedent’s children as to the remainder interest. Aronson v. Aronson, 37 Fla. L. Weekly, D299 (Fla. 3d DCA February 1, 2012) [“Aronson III”]

(i) Facts. In July of 1996, while a resident of Massachusetts, Hillard Aronson created a revocable trust and conveyed property (including his Key Biscayne condominium) to the trust. Hillard later moved to Florida and died on November 10, 2001, survived by his wife, Doreen Aronson, and his two sons from a prior marriage, James Aronson and Jonathan Aronson. Under the trust, James and Jonathan became trustees on their father’s death. Hillard’s revocable trust left a life estate in his assets to Doreen, and upon her death the balance of the trust assets were to be distributed equally to James and Jonathan. The trust also included a 5 or 5 power permitting Doreen to withdraw portions of the principal of the trust annually. As so often happens, the step sons and step mother wound up in protracted probate litigation which has lasted over 5 years.

First, Doreen claimed in the first case “Aronson I” (Aronson v. Aronson, 930 So.2d 766 (Fla. 3d DCA 2006)) that she received all of the interest in the Key Biscayne condominium by virtue of a quitclaim deed to her signed by her husband. The Florida Third District Court of Appeal, in
Aronson I, held that the quit claim deed from Hillard, individually, to Doreen was void as Hillard did not own the condominium; rather Hillard’s trust was the owner. Aronson I cleared up any concerns regarding whether or not a grantor of a revocable trust could convey, whether by gift or sale, trust property in his individual capacity with a bright line rule that in fact the grantor cannot.

Next, after being ruled against in Aronson I, Doreen began exercising her annual withdrawal powers over 5% of the fair market value of the Key Biscayne condominium. Further Doreen demanded reimbursement of certain expenses she paid for the Key Biscayne condominium (including the payment on the mortgage) which she claimed were properly expenses of the trust, not her expenses.

The decedent’s sons as trustees of the trust countered with a plan to sell the Key Biscayne condominium as trustees of the trust which led Doreen to sue for her homestead protection (arguing it was her homestead so the trustees could not sell the Key Biscayne condominium) and for reimbursement of her expenses.

The trial court found that the Key Biscayne condominium was Doreen’s homestead so it could not be sold without her consent, ordered the trust to reimburse her for the mortgage amount she had paid (almost $130,000), and ordered another $136,000 to her for repairs and improvements she paid while she occupied the condo (although did not reimburse her for taxes or maintenance charges, which were the life tenant’s obligation). The trial court also ruled that the trustees had to issue Doreen a deed for 5% of the Key Biscayne condominium for each year she exercised her withdrawal power.

On October 27, 2010, the Florida Third District Court of Appeal entered its opinion in Aronson II affirming virtually all of the trial court rulings, but added that Doreen should also have been awarded prejudgment interest. Aronson v. Aronson, 35 Fla. L. Weekly D2404 (Fla. 3d DCA October 27, 2010).

The trustees, however, filed a motion for rehearing on the argument that the entire basis of the decision was founded on a mistake. The trustees argued that the Key Biscayne condominium was the decedent’s homestead and the devise via his trust of a life estate to his wife was invalid on the basis of the Florida Supreme Court’s opinion in In re Estate of Finch, which held that the devise to a decedent’s surviving spouse of a life estate in homestead real property, absent a valid waiver of homestead rights in accordance with the provisions of §732.702, Florida Statutes (such as in a valid marital agreement), is constitutionally infirm. In re Estate of Finch, 401 So.2d 1308, (Fla. 1981). Thus, at the moment of Hillard’s death, title to the Key Biscayne condominium devolved by Section §732.401, Florida Statutes, as a life estate to Doreen and the remainder to James Aronson and Jonathan Aronson (the sons of Hillard from a prior marriage of his).

On February 1, 2012, after due consideration of the motion for rehearing, the Florida Third District Court of Appeal in Aronson III reversed the rulings under review and confirmed that the purported devise in the husband’s revocable trust was invalid. Therefore, “in a twinkle of an eye,
as it were” title passed as a statutory life estate and remainder. Thus, the court voided the balance of the provisions of the revocable trust as they might apply to the homestead, i.e., the Key Biscayne condominium. From that moment on, the court held, “the trustee had no power or authority with respect to the former marital home.”

What Aronson III did not specifically address, however, is whether, when homestead real property of a decedent is owned by the decedent’s revocable trust on the death of the deceased grantor, the trustee of such trust has the authority to sell the homestead real property if such homestead is to otherwise be distributed to the spouse or heirs of the deceased grantor.

e. Practical Issue #3 - Are all Homesteads Created Equally?

Despite the equal protection clauses of the United States and Florida Constitutions, not all homestead real property is treated equally, unless the Florida Supreme Court ultimately rules otherwise.

The Florida Third District Court of Appeal, in a decision entered on May 2, 2007, affirmed the decision of the trial court in ruling that a cooperative apartment is not considered to be homestead property for the purpose of subjecting it to the restrictions on devise contained in Article X, §4(c) of the Florida Constitution and §§732.401 and 732.4015(1), Florida Statutes. Phillips v. Hirshon, 958 So.2d 425 (Fla. 3d DCA 2007). The holding in Phillips is in accord with the 1978 decision of the Florida Supreme Court in In re Estate of Wartels, 357 So.2d 708 (Fla. 1978), and contrary to the decision of the Florida Fifth District Court of Appeal in Southern Walls, Inc. v. Stilwell Corp., 810 So.2d 566 (Fla. 5th DCA 2002). In its holding in Phillips, the district court cited to Wartels as well as several other Florida cases that supported its interpretation of Florida law as it applied to homestead status for cooperative apartments vis-a-vis the constitutional and statutory restrictions on devise.

In Phillips, the decedent devised a life estate in his Key Biscayne penthouse, a high-rise cooperative apartment, to his girlfriend, Karen Orlin. The decedent died on April 1, 2003, survived by his girlfriend as well as by his two children, Joseph Levine, an adult, and David Levine, a minor. Thereupon, separate petitions were filed by Joseph and David (by David’s mother as his guardian) to determine homestead status of real property (i.e., the cooperative apartment). The brothers argued that the cooperative apartment was homestead real property in the hands of their father at the time of his death, and therefore not subject to devise by him under the provisions of Article X, §4(c) of the Florida Constitution. The trial court granted Ms. Orlin’s motion to dismiss each of the petitions filed by the decedent’s sons, based on her position that the cooperative apartment was not homestead real property for purposes of Article X, §4(c) of the Florida Constitution.

The court affirmed the decision of the trial court holding that a cooperative apartment was not homestead real property for purposes of Article X, §4(c) of the Florida Constitution and §§732.401 and 732.4015, Florida Statutes. The court noted that homestead may have different meanings in different contexts, such as ad valorem taxation, exemption from forced sale, and devise and descent, citing to Snyder v. Davis, 699 So.2d 999 (Fla. 1997), and Cutler v. Cutler, 32 FLW D583 (Fla. 3d DCA 2007). The court recognized that the sources of the exemption from forced sale and the restrictions on devise and descent are set forth in Article X, §§4(a) and 4(c) of the Florida Constitution.
Constitution, respectively, of the Florida Constitution, but both have in common Article X, §4(a)(1) which defines the physical limitations of the benefit if allowable. The ad valorem tax exemption finds its constitutional parentage in Article VII, §6 of the Florida Constitution.

Observant of Florida’s historical decisions on the treatment of cooperative apartments and homestead protection, the district court cited Wartels as a reminder of the sweeping opinion by the Florida Supreme Court that a cooperative apartment may not be considered homestead property for the purpose of subjecting it to the statutes regulating the descent of homestead property.

The brothers recognized precedent, but insisted the cases were distinguishable because Wartels was decided before the Florida Legislature adopted a new Cooperative Act (effective January 1, 1977) in 1976. The brothers noted that the purpose of the Cooperative Act was “to give statutory recognition to the cooperative form of ownership of real property,” Fla. Stat. §719.102, which was a previous shortfall of cooperatives in meeting the definition of homestead as “interests in reality” as emphasized in Wartels. (“The words contained in Article X, Section 4(a)(1) . . . have been repeatedly defined to mean that homestead property must consist of an interest in reality.” Id. at 710.) The crux of the brothers’ argument was that if condominiums, with a provision in the Condominium Act giving statutory recognition to the condominium form of ownership of real property (§718.102, Florida Statutes) were recognized as homestead property subject to protection under Article X, §4 of the Florida Constitution, then cooperative apartments, with an identical provision in the Cooperative Act giving statutory recognition to the cooperative form of ownership of real property, should be subject to the same rules and absolute protections under the Florida Constitution.

The Phillips court, citing Braswell v. Braswell, 890 So.2d 379 (Fla. 3d DCA 2004), agreed that it is well recognized that a condominium is homestead property that is subject to protection under Article X, §4 of the Florida Constitution. Notwithstanding the fact that the court was intrigued by the brothers’ argument, the court reverently acknowledged the court’s institutional role to adhere to Wartels and affirmed the lower court’s decision. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1979), 78 A.L.R.3d 321.

The district court re-acknowledged that homestead in Florida has been given different meanings depending on the context in which it is used, but submitted that a better policy may be for the courts not to diverge when interpreting the same subsection of the Florida Constitution. For this reason, the court certified questions to the Florida Supreme Court requesting clarification on the validity of Wartels in light of the Cooperative Act enacted in 1976, and the resulting impact on cooperative apartments for purposes of devise and descent under Article X, §4 of the Florida Constitution.

The conflicting statutory purpose and case law presented to the district court handcuffed the court to its institutional role, but the opinion in Phillips made it clear that the court felt the sons should have prevailed. With creditor protection and tax exemption cases expanding the meaning of “real property” that can qualify for homestead purposes, it seems that the next step would be to extend to cooperative apartments similar protections for purposes of devise and descent. Moreover, it is doubtful that a cooperative apartment would also receive protection from the claims of a decedent’s creditors under the reasoning of Phillips because the legal parentage of the restriction on the descent and devise of homestead is linked to the protection from forced sale, i.e., the definitional provisions set forth in Article X, §4(a)(1) of the Florida Constitution.

Although the Florida Supreme Court initially accepted jurisdiction of the Phillips case, the
court ultimately dismissed jurisdiction in a per curiam decision entered April 17, 2008. Levine v. Hirshon, 980 So.2d 1053 (Fla. 2008). Thus, for now, cooperative apartments will not be subject to the restrictions on devise and, arguably, the restrictions on alienation. Why a cooperative apartment should be treated differently than a condominium or a traditional home is a question for which a logical answer is not apparent. It is disappointing that the Supreme Court ultimately chose not to resolve this important issue.

f. Practical Issue #4 - Can the Restrictions on Devise and Descent be Waived?

(1) The provisions of §732.702, Florida Statutes, specifically allow, inter alia, for the rights of a surviving spouse as to protected homestead to be waived, wholly or partly, before or after marriage, by a written contract, agreement or waiver, signed by the waiving party in the presence of two subscribing witnesses. Fla. Stat. §732.702(1). Compare Fla. Stat. §61.079 enacted by the Florida Legislature in 2007 as the Uniform Premarital Agreement Act, CS for SB 624, Chapter 207-171, Laws of Florida, which does not require witnesses. If such written contract, agreement or waiver is signed during the marriage, as distinguished from prior to the marriage, each spouse must make a fair disclosure to the other spouse of that spouse's assets, liabilities and income. Fla. Stat. §732.702(2). No consideration, other than the signing of the agreement, contract or waiver is necessary for its validity. Fla. Stat. §732.702(2).

(2) Several cases have held that a waiver of the homestead interest made during life is valid when determining whether homestead is properly devised. See City of National Bank of Florida v. Tescher, 578 So.2d 701 (Fla. 1991); Cleeves v. Cleeves, 509 So.2d 1256 (Fla. 2d DCA 1987). Therefore, if the decedent is not survived by a minor child at the time of his or her death but the decedent is survived by his or her spouse, it appears that a devise contained in the decedent’s will or the testamentary dispositive provisions contained in the decedent’s revocable trust agreement, coupled with the transfer of the decedent’s homestead by the decedent and his or her spouse to the decedent’s revocable trust, would be effective if the surviving spouse had signed a valid premarital or postmarital agreement waiving her or his right to be devised an interest in the protected homestead. See Tescher, supra. This author favors the use of a marital agreement otherwise valid under Florida law as the preferred method to overcome the constitutional and statutory restrictions on devise when the decedent is married but has no minor children, due to the blessing of this technique by the Florida Supreme Court in Tescher. This author, however, does not believe that this method will be effective if the decedent is survived by a minor child.

QUERY: Would the holding in Tescher be applicable to allow a devise to a credit shelter trust using a pecuniary formula in light of decision of the Florida Supreme Court in McKean v. Warburton, supra?

MY THOUGHT: Maybe!

The following is an example of language that a marital agreement may contain to effectuate a waiver for the specific purpose of allowing one spouse to have sole ownership of the homestead and to, upon his or her death, fund a testamentary credit shelter trust for the lifetime benefit of the other spouse using the homestead:

Marital Home. WIFE and HUSBAND had owned real property that the parties are still using as their principal marital residence located at 123 Maple Street, Melboring, Brevard County, Florida 32900, more specifically described as Lot 3, Block Z, TUPIS ESTATES SOUTH - PHASE 9 NASH CENTRAL P.U.D., according to the Plat thereof, as recorded in Plat Book 51, Pages 1 through 11,
inclusive, of the Public Records of Brevard County, Florida. Such real property shall hereinafter be
referred to as the "Real Estate". HUSBAND recently conveyed his entire ownership interest in the
Real Estate to WIFE's sole name for estate tax planning purposes. WIFE and HUSBAND are
entering into this Agreement for the primary purpose of facilitating a waiver by HUSBAND of
HUSBAND's right to receive any interest in the Real Estate in the event that WIFE should die prior
to the death of HUSBAND. Moreover, WIFE agrees to devise the Real Estate at her death, should
WIFE predecease HUSBAND, to a testamentary trust for HUSBAND's lifetime use and control.
Finally, if for any reason, WIFE should transfer any interest in the Real Estate during WIFE’s
lifetime to HUSBAND, WIFE waives any right WIFE would otherwise have to receive any interest
in the Real Estate in the event that HUSBAND should die prior to the death of WIFE. Neither
HUSBAND nor WIFE, however, intend to waive or release any right that either of them may have
to an equitable distribution of the Real Estate in the event HUSBAND and WIFE dissolve their
marriage.

QUERY: Consider whether the holding in Tescher would have been different
if the decedent was survived by a minor child.

MY THOUGHT: Yes!

g. Practical Issue #5 - Can Disclaimers be Used as a Post-Mortem
Planning Tool?

In contrast to the law regarding waivers executed during life, the 15th Judicial Circuit Court
in and for Palm Beach County, in In re Estate of Janien, 12 FLW Supp. 221, Case No. 502004-CP-
000973-XXXX-MB (15th Cir. 2005), held that a husband’s postdeath disclaimer of his interest in
homestead property devised in his wife’s will to one of two surviving adult children did not cure the
improper devise of homestead and thereby operated to disclaim only the surviving spouse’s default
life estate granted to him under §732.401(1), Florida Statutes, and vested title to the homestead in
the two surviving children as tenants in common. The holding of the circuit court in Janien was
affirmed by the Florida Fourth District Court of Appeal in a per curiam decision entered November
30, 2005, reported at 916 So.2d 806. The holding in Janien would probably have been different if
the decedent’s will contained the following provision: “I devise my protected homestead to my
spouse, John A. Doe, if he survives.” One should note, however, that in a per curiam decision, the
Florida Second District Court of Appeal held to the contrary. See In re Estate of Sudakoff, No. 9,187
(Fla. 12th Cir. Ct. March 25, 1994), aff’d per curiam 654 So.2d 927. For a further discussion of this
issue see Harrison, Homestead — The Post-Death Spousal Disclaimer: A Cure for a Constitutionally

QUERY: Consider whether the holding in Janien would have been different if
the decedent’s will contained the following provision:

I devise my protected homestead to my spouse, John A. Doe, if he survives
me; otherwise, to my daughter, Jane B. Smith.

MY THOUGHT: Yes!

h. Lifetime Alienation. Article X, §4(c) of the Florida Constitution,
inter alia, prevents a married individual from alienating his or her homestead by mortgage, sale, gift
or other conveyance without the joinder of his or her spouse.

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

See Taylor v. Maness, 941 So.2d 559 (Fla. 3d DCA 2006); see also In re Estate of Schorr, 409 So.2d 487 (Fla. 4th DCA 1981).


   (1) In General. Florida provides certain exemptions from the assessed value of one’s homestead for purposes of determining the amount of ad valorem taxes which are to be paid.

   (a) In determining whether homeowners were a permanent resident of Florida, the fact that the homeowners were receiving a residency-based property tax credit in another state was held not to be determinative, rather simply a factor to consider. Wells v. Vallier, 773 So.2d 1197 (Fla. 2d DCA 2000). In Wells, the homeowners, had, for sixteen years, (i) applied for and received the homestead tax exemption for their Pasco County home, (ii) maintained valid Florida drivers licenses and had not secured drivers licenses in any other state, (iii) have had one or more motor vehicles registered in Florida and in no other state, (iv) have been registered voters in Florida and in no other state, (v) listed their Florida address on their federal income tax returns, (vi) have maintained their primary personal checking and savings accounts in financial institutions located in Florida, (vii) have been physically present in Florida on the average of seven to eight months of each calendar year, (viii) have had their accountants, brokers, physicians and church affiliation in Florida, (ix) have maintained their family keepsakes in their Florida residence, and (x) have signed their respective Wills in Florida. The court reasoned that the fact that the homeowners had secured a $100 per year residency-based tax credit relative to their “summer home” was not, in and of itself, determinative.

   Note that §196.031(6), Florida Statutes, was added in 2001 (§2, Chapter 2001-204, Laws of Florida). Subsection (6) provides that “[a] person who is receiving or claiming the benefit of an ad valorem tax exemption or a tax credit in another state where permanent residency is required as a basis for the granting of that ad valorem tax exemption or tax credit is not entitled to the homestead exemption provided by this section.” Arguably, Subsection (6) statutorily overrules Wells. However, Subsection (6), or similar language, is not in the Florida Constitution. This language is also not in the Florida Administrative Code, and the Florida Supreme Court has held that the Legislature cannot impose conditions on the availability of the basic homestead exemption as provided in Article VII, §6(a) of the Florida Constitution. See Sparkman v. State, 58 So.2d 431 (Fla. 1952).

   (b) The owner of the homestead must be a permanent resident of the United States in accordance with U.S. immigration laws to qualify for Florida homestead ad valorem exemptions. See DeQuervain v. Desguin, 927 So.2d 232 (Fla. 2d DCA 2006); Alcime v. Bystrom, 451 So.2d 1037 (Fla. 3d DCA 1984); Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963); Fla. Stat. §§196.012(17) and (18); Fla. Stat. §196.015. The most well known of these
ad valorem tax exemptions is the “$25,000 exemption.”

(2) The $25,000/$50,000 Exemption. Florida law provides that residents do not have to pay ad valorem taxes on the first twenty-five thousand dollars ($25,000) of the appraised value of their homestead. Fla. Const. Art. VII, §6; Fla. Stat. §196.031. However, a joint resolution presented to the voters of Florida on January 29, 2008, was passed, thereby modifying Article VII, §6(a) of the Florida Constitution to increase the homestead exemption to $50,000 relative to all levies other than school district levies.

(3) Additional Exemption for Low Income Elders. Subject to income limitations, an additional benefit is available to individuals who have attained the age of sixty-five (65). Specifically, the law provides that the legislature may allow counties or municipalities to grant an additional homestead tax exemption not exceeding twenty-five thousand dollars ($25,000) to any person who has attained age sixty-five (65) and whose household income does not exceed twenty thousand dollars ($20,000). Fla. Const. Art. VII, §6(f); Fla. Stat. §196.075. For property owned as tenants by the entirety, only one spouse needs to have attained age sixty-five (65) by January 1st in order to qualify for the additional exemption. See Op. Atty. Gen. Fla. 071-379 (Dec. 2, 1971). Moreover, during the November 7, 2006 General Election, the Florida voters, by a margin of 76.4% (3,533,101) to 23.6% (1,092,128), approved amending Article VII, §6(f) of the Florida Constitution to increase the maximum additional homestead exemption for low income seniors from twenty-five thousand dollars ($25,000) to fifty thousand dollars ($50,000), effective January 1, 2007. During its regular 2007 session, the Florida Legislature amended §196.075, Florida Statutes, to increase the amount of the maximum additional homestead exemption for low income seniors, thereby implementing the amendment to Article VII, §6(f) of the Florida Constitution.

(4) $500 Widow/Widower Exemption. Pursuant to §196.202, Florida Statutes, property up to the value of five hundred dollars ($500) of every widow or widower who is a bona fide resident of Florida is exempt from taxation. This exemption also applies to blind persons and totally and permanently disabled persons.

(5) Partially Disabled Veterans. Florida law affords additional ad valorem tax relief to an ex-service member as defined in §196.012(20), Florida Statutes, who was partially (at least as to 10%) disabled during a period of wartime service or misfortune, and to his or her surviving spouse. Thus, if the disabled ex-service member predeceases his or her spouse and the spouse holds title to the property and permanently resides thereon, the surviving spouse is afforded the same tax relief. Fla. Stat. §196.24. Moreover, an unremarried surviving spouse of a deceased partially disabled ex-service member who is also a partially disabled ex-service member can stack his or her deceased spouse’s ad valorem homestead exemption granted under §196.24, Florida Statutes, with the exemption available to such surviving spouse. Op. Atty. Gen. Fla. 2006-15.

(6) Permanently and Totally Disabled Veterans. Florida law affords superior ad valorem tax benefits to disabled veterans and their surviving spouses. Florida grants a permanently disabled veteran with service-connected permanent and total disability a full and complete exemption from ad valorem taxes as to their homestead real property. Fla. Stat. §196.081(1). If the disabled veteran predeceases his or her spouse and the spouse holds title to the property and permanently resides thereon, the surviving spouse is afforded the same tax relief. Fla. Stat. §196.081(3). If, however, the veteran spouse dies from a service-connected cause while on active duty, the surviving spouse is entitled to an exemption from ad valorem taxes with respect to his or her homestead regardless of whether the veteran spouse had an interest in the property. Fla. Stat. §196.081(4); Op. Atty. Gen. Fla. 98-61 (Oct. 2, 1998). Note, however, the Florida Attorney
General opined that, in order to be eligible for the homestead exemption provided pursuant to the provisions of §196.081(1), Florida Statutes, a veteran must hold title to the real property either in his or her name or together with his or her spouse. Moreover, the veteran’s surviving spouse may not claim the carry-over benefit of the exemption provided in §796.081(3), Florida Statutes, if the veteran never held title to the real property, either in the veteran’s own name or together with their surviving spouse, unless the veteran’s spouse now owns a replacement residence after having sold the residence which had qualified pursuant to the provisions of §796.08(1), Florida Statutes. Furthermore, in the event that a replacement residence is purchased, the exemption on the new residence may not exceed the amount granted from the most recent ad valorem tax roll. The exemption would be lost if the surviving spouse remarried. Finally, if the veteran died from service-connected causes while on active duty, and if the veteran was a permanent resident of the state of Florida on January 1st of the year in which the veteran died, the surviving spouse may claim the exemption pursuant to the provisions of §196.081(4), Florida Statutes, for property which such surviving spouse owns that qualifies as homestead property, even though the deceased veteran never held an interest in that real property. Op. Atty. Gen. Fla. 2007-04.

(7) Wheelchair Confined Veterans. Florida law affords an ex-service member who has been honorably discharged from military service with a service-connected total disability a full and complete exemption from ad valorem taxes as to their homestead real property if the U.S. Government or the U.S. Department of Veterans Affairs certifies that the veteran has been awarded financial assistance due to the disability because the veteran needs specially adapted housing and is required to use a wheelchair for transportation. Fla. Stat. §196.091(1). If the disabled veteran predeceases his or her spouse and the veteran and his or her spouse had owned the homestead as tenants by the entirety, the surviving spouse is afforded the same tax relief. Fla. Stat. §196.091(3).

(8) Special Provision for Certain Disabled Veterans. Section 6 of Article VII of the Florida Constitution was amended during the November 7, 2006 General Election by an overwhelming majority of the Florida voters - 77.8% (3,552,441) to 22.2% (1,011,968) - by adding a new subparagraph (g), which in essence expands the existing exemptions from ad valorem taxes on homestead provided to honorably discharged veterans who are partially or totally disabled with a more comprehensive exemption relative to a veteran who is at least 65 years of age who was a resident of Florida when he or she enlisted in military service and has a combat related disability. The extra exemption granted by this provision is over and above what would already be available under existing Florida Statutes relative to a partial disability. A partially disabled veteran who meets the other criteria hereinbefore described would receive an exemption based on the percentage of the disability rather than merely a flat $5,000 exemption under §196.24, Florida Statutes. During its regular 2007 session, the Florida Legislature enacted new §196.082, Florida Statutes, to implement Article VII, §6(g) of the Florida Constitution.

(9) Save Our Homes. The so-called Save Our Homes amendment to the Florida Constitution is set forth in Article VII, §4(c) of the Florida Constitution (“Save Our Homes”). See Fla. Stat. §193.155. Save Our Homes offers a significant tax break to Florida residents by imposing a cap of three percent (3%) or the percent change in the Consumer Price Index for the preceding calendar year, whichever is lower, on annual valuation increases of homestead property for ad valorem tax purposes. This constitutional amendment provides that all persons who have obtained homestead status and are entitled to a homestead exemption shall have their property assessed at just value on January 1st of that year or on January 1st of the year following the date of the amendment (i.e. January 1, 1994), if later. Under no circumstances shall the assessment exceed just value.
Article VII, §4 of the Florida Constitution was amended as a result of the proposed amendment approved by the voters in a special election held on January 29, 2008, which added a portability element to the Save Our Homes Cap regime. New Article VII, §4(c)(8) of the Florida Constitution enables homeowners to preserve up to $500,000 of their under assessment (the amount by which the just value exceeds the assessed value) on their existing homestead when they sell or otherwise abandon the homestead exemption in their existing homestead and acquire a new homestead. It appears from the language of Article VII, §4(c)(8) of the Florida Constitution that the new homestead must be acquired within two years of the sale or abandonment of the prior homestead to receive the benefit of portability.

(10) Damage Due to Hurricanes and Other Misfortunes. Section 193.155, Florida Statutes, as amended in 2006 (effective January 1, 2006), provides that an individual’s homestead shall not be reassessed for ad valorem tax purposes if the homestead is damaged or destroyed due to misfortune or calamity and the repairs or reconstruction do not increase the original square footage of the homestead by more than 10% or if the total square footage of the homestead does not exceed 1,500 square feet. The repairs or reconstruction must commence no later than 3 years from the January 1st which follows the year in which the misfortune or calamity occurs. If a greater area is added to the homestead, the amount which exceeds the 10% amount or a total square footage of 1,500 square feet is to be reassessed proportionately.

Section 196.031, Florida Statutes, as amended in 2006 (effective January 1, 2006), now contains new subsection (7), which provides that the homestead exemption is not lost merely because the owner is unable to reside in the homestead due to the homestead becoming uninhabitable resulting from due to misfortune or calamity if the owner intends to repair or rebuild the homestead and move back in. The repair or reconstruction must begin within 3 years after the January 1st following the calamity. In the interim, the owner cannot obtain homestead exemption for any other property.

(11) Adding Co-Owners to the Title. Effective July 1, 2006, §193.155(3), Florida Statutes, as amended in 2006, purports to enable Florida residents to add the name of one or more persons, whether or not related to them, to the legal title to their homestead real estate without causing a loss of their homestead exemption for ad valorem tax purposes or the loss of their Save Our Homes cap on the annual reassessment of the just value of their homestead. The traps for the unwary include the following:

(a) The donor is making a taxable gift for federal gift tax purposes, thus reducing the remaining available lifetime gift tax exemption for using estate tax minimization strategies.

(b) The current and future creditors of each donee would be able to seek foreclosure on the interest in the donor’s homestead gifted to such donee or donees if the real property in question was not also the homestead of such donee or donees.

(c) Any donee could force the sale of the donor’s homestead by bringing a partition action (not my kid).

(d) The donor may lose the ability to take full advantage of the reduction in income taxes otherwise available to the donor pursuant to the provisions of §121 of the Internal Revenue Code of 1986, as amended, (hereinafter the “Code”). The provisions of §121
of the Code are discussed in more detail in later in these materials.

(e) The donor would not be able to sell his or her homestead to a third party or otherwise alienate the homestead without the cooperation of each donee unless the donor could force the sale of the donor’s homestead by bringing a partition action. Consider the additional complications which would ensue if a donee should become incapacitated.

(f) If a donee should die before the donor, the donee’s interest in the donor’s homestead will either pass to the donor and any other joint owners if the homestead was owned in a joint tenancy with right of survivorship, or to the heirs of the deceased donee (if the donee dies intestate) or the beneficiaries of the estate of the deceased donee (if the donee dies testate) if the homestead was owned in a tenancy in common. In either event, the intended result contemplated by the donor may not be attained.

(g) The donor’s general homestead exemption ($25,000) under §196.031(1), Florida Statutes. Op. Att’y Gen. Fla. 2007-08. In this Florida Attorney General Opinion, the Florida Attorney General opined that, although the revisions made to §193.155(3)(a), Florida Statutes, during the 2006 legislative session, precludes the reassessment of homestead real property merely because the owner adds another person to the title of the homestead real property (assuming that the additional owner does not apply for homestead), no similar revision was made to §196.031(1), Florida Statutes, relative to the general homestead exemption afforded to homeowners (the typical $25,000 exemption). Therefore, the owner’s homestead exemption would be limited to that person’s proportionate interest in the real property in accordance with §193.155(7), Florida Statutes. This appears to be in accord with a previous Florida Attorney General Opinion. See Op. Att’y Gen. Fla. 03-11 (2003).

(h) If the homestead is encumbered by a mortgage note, documentary stamp taxes will be due and owing. See Fla. Admin. Code Rule 12B-4.013.

(12) Transferring Homestead to a Limited Liability Company. The Florida Attorney General opined that real property owned by a limited liability company does not qualify for a homestead exemption, notwithstanding the fact that it may be a single member limited liability company. The Florida Attorney General reasoned that the beneficial interest which may be owned by the single member of the limited liability company does not rise to the level required pursuant to the provisions of §§196.031(1) and 196.041, Florida Statutes. Op. Att’y Gen. Fla. 2007-18.

(13) Transferring Homestead to a S Corporation. The Fourth District Court of Appeal has held that real property owned by a S corporation of which the individual residing in the home located thereon was the sole shareholder does not qualify for a homestead exemption. Prewitt Management Corporation v Nikolits, 795 So.2d. 1001 (4th DCA 2001).

(14) Transfers of Homestead to a Revocable Trust. If homestead property is transferred to a revocable trust, a memorandum of trust must be recorded in the public records in the county where the property is located in order to satisfy the eligibility requirements for the homestead exemption for ad valorem tax purposes. The memorandum of trust must be in a form satisfactory to the county property appraiser’s office. Note that the Memorandum of Trust may be incorporated in the deed instrument being used to convey the homestead property to the revocable trust.
The following is an example of a memorandum of trust form that many of the property appraisers’ offices in Florida have approved:

PREPARED BY:

________________________________________
________________________________________
________________________________________

MEMORANDUM OF TRUST

THIS Memorandum of Trust made and entered into on ..........(date)......, by ................., as Trustee under that certain Trust Agreement dated ................., is being recorded to memorialize and place on the public record notice of the existence of said Trust that among its assets includes real property that under the terms of the trust provided for the present possessory right of possession in .....(name)....., .....(address)....., for homestead purposes in accordance with Department of Revenue Rule 12D-7.011 and is recorded in compliance with F.S. 196.031(1) as amended, which may entitle the following described property to homestead exemption status if all other requirements are met.

LEGAL DESCRIPTION SET FORTH BELOW OR ATTACHED AS EXHIBIT “A”.

________________________________________, Trustee

Mailing Address: ________________

Sworn to and subscribed before me on ____ (date), by ______________________ (name).

________________________________________

Notary Public — State of Florida
(name, typed or printed)

Personally Known _________
OR
Produced Identification ____

Type of Identification Produced: ________________________________

(Seal)

RECORD AND RETURN TO:

________________________________________
________________________________________
________________________________________
In addition, it is recommended that the following provision be set forth within the body of the trust agreement that creates the revocable trust:

**Reserved Right to Reside in Residence.** Furthermore, I, (the grantor), reserve the right during my lifetime to possess and to reside in and on the residential real property comprising the trust estate at (address), more specifically described as Lot __, Block __, of ________, according to the Plat thereof, as recorded in Plat Book ___, Page ___, of the Public Records of __________ County, Florida.

(15) Transfers of Homestead to a Qualified Personal Residence Trust.

(a) Generally, the courts have held that the grantor of a QPRT is entitled to continue to receive the *ad valorem* tax exemption for homestead. *See Robbins v. Welbaum*, 664 So.2d 1 (Fla. 3d DCA 1995) (holding that taxpayers who placed their permanent residence into a qualified personal residence trust (“QPRT”) were entitled to the homestead exemption, even though the QPRT limited the taxpayers’ use of their residence to the earlier of ten years from the QPRT’s creation or one of the taxpayer’s death, as it was sufficient that the taxpayers owned beneficial title to the residence during the year they claimed the exemption); *See also Nolte v. White*, 784 So.2d 493 (Fla. 4th DCA 2001).

(b) If the retained term interest of the grantor of a QPRT ends and the grantor desires to continue to reside in the residence which comprises the QPRT, the grantor would pay the trust fair rental value for such privilege to avoid the ability of the IRS to otherwise assert that §2036(a) of the Code applies to cause the value of the residence to be includable in the gross estate of the grantor. When drafting the lease agreement between the trustee of the QPRT and the grantor, consider using a term of 98 years or greater to enable the grantor (lessee) to obtain the *ad valorem* homestead exemption under Chapter 196, Florida Statutes, as well as the Save Our Homes cap. *Fla. Stat. §196.041; Fla. Const. Art. VII, §§6(a), 4(c). See Higgs v. Warrick*, 994 So.2d 492 (Fla. 3d DCA 2008); *See also Op. Att’y Gen. Fla. 2007-33.

(c) Be careful not to ignore the restrictions on devise aspects of homestead and the tools to effectuate a waiver to those restrictions in the event the grantor of a QPRT dies before the expiration of the grantor’s retained term interest pursuant to the QPRT and the grantor is survived by his or her spouse.

(16) Transfers of Homestead to a Land Trust. If properly drafted and the “memorandum of trust” document is properly prepared and recorded as discussed *supra*, relative to revocable trusts, the homestead *ad valorem* exemption and SOH cap should be available to the trust beneficiaries of a land trust if such beneficiaries would have otherwise qualified for the homestead *ad valorem* exemption. *See also Op. Att’y Gen. Fla. 2008-44.*


(1) Death of Homeowner Survived by Spouse.

(a) Decedent’s Interest Passes Outright to Spouse. Upon the death of the homeowner, whereupon the decedent’s surviving spouse receives a legal or beneficial interest in the homestead owned by the decedent, whether due to operation of law or
passing via a will or a trust, or by way of intestacy, or the homestead is held in trust for the decedent’s surviving spouse, the surviving spouse may continue to enjoy the homestead exemption if the surviving spouse continues to use the protected homestead as his or her primary residence without the value of the decedent’s interest in the protected homestead being reassessed due to the death of decedent. See Fla. Stat. §193.155 (3)(b).

(b) Spouse Must be a Permanent Resident. Just like the decedent, the decedent’s surviving spouse, must be a permanent resident of the United States in accordance with U.S. immigration laws to qualify for Florida homestead ad valorem exemptions. See DeQuervain, supra; Alcime, supra; Juarrero, supra; Fla. Stat. §§196.012(17) and (18); Fla. Stat. §196.015.

(c) $500 Widow/Widower Exemption. As mentioned above, pursuant to §196.202, Florida Statutes, property up to the value of five hundred dollars ($500) of every widow or widower who is a bona fide resident of Florida is exempt from taxation. This exemption also applies to blind persons and totally and permanently disabled persons.

(d) Spouse as a Beneficiary of a Trust. If the decedent’s interest (whether a partial interest or the entire interest) in his or her homestead passes to a testamentary or continuing trust for the benefit of the decedent’s surviving spouse, the homestead exemption afforded to Florida residents pursuant to Article VII, §6 of the Florida Constitution, does not apply to a beneficiary under a trust instrument which vests no present possessory right to the property in such beneficiary. See Op. Atty. Gen. Fla. 072-12 (Jan. 11, 1972). Indeed, where real property is placed in trust, the trust beneficiary, even when he or she makes his or her permanent home on the real estate, does not have legal or equitable title to the property as contemplated by Article VII, §6 of the Florida Constitution. If, however, the trust is considered a passive trust, and the beneficiary has a present possessory interest and makes the real estate comprising the corpus of the trust his or her permanent home, the beneficiary may have sufficient equitable title to support a claim for homestead exemption. See Op. Atty. Gen. Fla. 072-12 (Jan. 11, 1972). Even if the surviving spouse is the trustee or a co-trustee of the decedent’s testamentary or continuing trust, the surviving spouse must be provided with the right to possess and occupy the decedent’s homestead. Quite some time ago, the Florida Attorney General opined that when a will devised tax exempt homestead to trustees, with powers to manage and reinvest, and provided that trustees should pay income from trust to one of the trustees as beneficiary for life but did not authorize such trustee to occupy the tax exempt homestead, even though she did so, her title as trustee did not support a claim for the homestead ad valorem tax exemption while she resided on the property. Op. Atty. Gen. Fla. 055-78 (April 5, 1955). Therefore, if homestead property is to fund a continuing or testamentary trust after the death of the grantor of a revocable trust or the maker of a will, such as a QTIP trust or credit shelter trust, a special provision (similar to the following) should be included in the governing document to assist the trust beneficiary in obtaining the homestead exemption for ad valorem tax purposes:

Homestead Possessory Right. Notwithstanding anything herein to the contrary, if any portion of my homestead residence or any other residential real estate (collectively “homestead real estate”) is an asset of the (Name of) Trust, my spouse, JANE B. DOE, shall have the exclusive and continuous present right to full use, occupancy and possession of such homestead real estate for life. It is my intention that my spouse’s interest in such property shall constitute a “beneficial interest for life” and “equitable title to real estate” as contemplated by Section 196.041(2), Florida Statutes, and this (my Last Will and Testament [or Trust Agreement]) shall be so construed.
Practice Point: If proper drafting was not done, consider seeking judicial reformation pursuant to the provisions of §736.0416, Florida Statutes, insofar as ad valorem taxes are a type of tax. Such relief should be given retroactive effect.

(e) Remember also that the surviving spouse must timely apply for the ad valorem homestead exemption. United States Gypsum Company v. Green, 110 So.2d 409 (Fla. 1959); Straughn v. Camp, 293 So.2d 689 (Fla. 1974); State v. Thompson, 101 So.2d 381 (Fla. 1958); Lake Garfield Nurseries Company v. White, 149 So.2d 576 (Fla. 2d DCA 1963); Op. Atty. Gen. Fla. 2003-11. The Florida Attorney General opined that the requirement that the owner must timely apply for the homestead exemption also applies to subsequently acquired real estate adjacent to the existing homestead. Op. Atty. Gen. Fla. 2007-22.

(f) The Save Our Homes Cap; Death of the Owner of Homestead Real Property. Upon the death of the owner of homestead, §193.155(3), Florida Statutes, provides as follows:

(3) Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change in ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except as provided in this subsection. There is no change of ownership if:

(a) Subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled and:

1. The transfer of title is to correct an error;

2. The transfer is between legal and equitable title; or

3. The change or transfer is by means of an instrument in which the owner is listed as both grantor and grantee of the real property and one or more other individuals are additionally named as grantee. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application shall be considered a change of ownership;

(b) The transfer is between husband and wife, including a transfer to a surviving spouse or a transfer due to a dissolution of marriage;

(c) The transfer occurs by operation of law under s. 732.4015; or

(d) Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner.

Therefore, if homestead passes to or for the benefit of the decedent’s surviving spouse, and if he or she is otherwise eligible for the homestead exemption for ad valorem tax purposes, the value of the homestead should not be reassessed so long as the surviving spouse timely applies for the homestead exemption with the property appraiser’s office.
3. Documentary Stamp Tax.

a. Gifts of Unencumbered Homestead. Generally, a gift of unencumbered real estate, whether or not the real estate is the donor’s homestead, is not the type of transfer which is subject to the payment of documentary stamp taxes. See Fla. Admin. Code Rule 12B-4.014(2)(a).

b. Transfers of Encumbered Homestead.

(1) In General. The gift of real estate which is subject to a mortgage, whether or not the real estate is the donor’s homestead, is subject to documentary stamp taxes based on the amount of the of the principal balance and accrued interest of the mortgage note. See Fla. Admin. Code Rule 12B-4.013(22).

(2) Change in Form of Ownership. In a technical assistance advisement issued on December 20, 1996, the Florida Department of Revenue indicated that the conveyance of encumbered real estate from a husband and wife as tenants in common to themselves as tenants by the entirety would not cause a documentary stamp tax liability to arise. TAA 96(B) 4-019. The Florida Department of Revenue reasoned that there had not be a conveyance of an interest in the real estate from one party to another party.

(3) Transfer to a Revocable Trust. If the individual who transfers the encumbered real property is also the sole grantor of the revocable trust to which the real property is being conveyed, and, as grantor, retained the power to revoke or amend the trust and to revest title of the assets making up the trust in himself or herself, Florida documentary stamps need not be paid on either the value of the real property being transferred or the amount of the remaining principal balance due and owing pursuant to the mortgage note. If another individual is a co-grantor with the transferor, then, depending on the terms of the revocable trust agreement, a gift of an undivided one-half interest in the encumbered real property is being made to the other co-grantor and, therefore, documentary stamps would be payable as to one half of the amount of the outstanding principal balance of the mortgage note. See Fla. Admin. Code Rule 12B-4.013(29)(g). If the donor is not the grantor or co-grantor of the revocable trust to which the real property is being conveyed, documentary stamps would be payable as to the entire amount of the outstanding principal balance of the mortgage note. See Fla. Admin. Code Rule 12B-4.013(29)(c).

(4) Transfers of Encumbered Homestead to a QPRT. Pursuant to the Florida Department of Revenue’s Technical Assistance Advisement (“TAA”) No. 04B4-011, a transfer of encumbered real property from a husband and wife to their respective Qualified Personal Residence Trusts (“QPRT”) is exempt from documentary stamp tax. The facts under review involved a husband and wife who each transferred an undivided one-half interest in their residence to their respective QPRTs (“Residence One”). Husband and wife subsequently purchased a second residence (“Residence Two”), one month prior to closing on the sale of Residence One. The couple financed the purchase of Residence Two with the intent that they would apply the proceeds from the sale of Residence One to the loan. They then planned to sign a warranty deed to the trustee, transferring their interests in Residence Two to their respective QPRTs. After analyzing §201.02(1), Florida Statutes, and Rule 12B-4.013(32)(a), of the Florida Administrative Code, the Department opined that the transfers to the QPRT should be exempt from documentary stamp tax on the grounds that the grantors retained beneficial ownership of Residence Two and there was no consideration for the transfers. Candidly, the author of these materials disagrees with the conclusion of the Florida Department of Revenue in this TAA.

   a. Creditor Protection During the Homeowner’s Lifetime.

      (1) Constitutional Provisions.

      Florida law exempts homestead (as determined pursuant to the area and use limitations set forth in Article X, §4(a)(1) of the Florida Constitution) from forced sale under process of any court, and it provides that no judgment, decree or execution shall be a lien thereon, except for payment of taxes and assessments, and other contractual obligations relating to the purchase, improvement or repair of the property. Article X, §4(b) of the Florida Constitution carries over this protection and states that the exemption shall inure to the benefit of the deceased owner’s surviving spouse and heirs. It is noteworthy to add that certain statutory exemptions do not afford this additional constitutional protection to the owner’s spouse or heirs. See Fla. Stat. §222.05.


On April 20, 2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") (Public Law 109-8) into law. The enactment of BAPCPA has affected planning issues involving the ownership and transfer of ownership of homestead. Although most of the provisions of BAPCPA did not become effective until October 17, 2005, the modifications made by Section 322 of BAPCPA, which, inter alia, modified 11 U.S.C. §522 by adding subsection (p) to limit the amount of the fair market value of the homestead of the debtor that may be claimed as exempt, became effective commencing on the date of enactment.

      (a) Section 322 of the BAPCPA amended Bankruptcy Code Section 522 by adding Section 522(q)(1), which creates a cap on the amount (by value) of the homestead at $125,000 unless the debtor has owned the homestead for more than 1,215 days. Note that this limitation does not apply to family farmers (as defined in the Bankruptcy Code). In addition, even if the debtor owned the homestead for more than 1,215 days, the $125,000 cap may still apply if:

         (i) A court determines after notice and hearing that the debtor has been convicted of a felony which demonstrates that the filing was an abuse of the bankruptcy provisions;

         (ii) The debtor owes a debt arising from—

            (I) Violation of federal or state securities laws;

            (II) Fraud, deceit or manipulation in a fiduciary capacity or in connection with the purchase or sale of securities;

            (III) A civil remedy under RICO laws; or

            (IV) Any criminal act, intentional tort, or willful or reckless misconduct that causes serious injury or death to another individual in the preceding 5 years.
(iii) The $125,000 cap contained in Bankruptcy Code Section 522(q)(1) can be relaxed if it is determined by the bankruptcy court that the homestead is reasonably necessary for the support of the debtor or a dependent of the debtor. 11 U.S.C. § 522(q)(2).

(iv) There are many unanswered questions on the face of the new provisions added by Section 322 of BAPCPA, although case law which has arisen subsequent to the enactment of BAPCPA is beginning to provide some answers.

(I) Does the limitation contained in Bankruptcy Code Section 522(p)(1) limit the unlimited homestead exemption contained in Article X, Section 4(a) of the Florida Constitution in light of the literal language of Section 322 of BAPCPA which imposes the $125,000 cap on debtors who elect under subsection (b)(3)(A) to exempt property under State or local law (see Section 322 set forth in full in the Appendix) in light of the fact that Florida is an opt-out state? A 2005 bankruptcy court decision issued shortly after the enactment of BAPCPA held that the provisions of Bankruptcy Code Section 522(p)(1) do not apply to or otherwise limit a greater state law exemption amount if the state is an opt-out state.

(II) In In re Robin Bruce McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005), U.S. Bankruptcy Judge Randolph J. Haines ruled that the $125,000 homestead cap imposed under Section 522(p) for property acquired by a debtor within 1,215 days of filing bankruptcy applied only to non-opt out states. In contrast to Section 522(p), the court held that the applicability of Section 522(o) was much farther reaching than the scope of Section 522(p). After examining the plain language of the Act, Judge Haines concluded that Section 522(o), which compels a reduction in the value of homestead property to the extent that the value is attributable to any fraudulent transfers of nonexempt property made by a debtor within ten (10) years prior to filing a petition for bankruptcy, unambiguously applied to all states regardless of the state’s status as an opt-out state or non-opt out state. Because Judge Haines found that the provisions of Section 322 of BAPCPA were unambiguous, Judge Haines refused to consider the legislative history of this provision of BAPCPA. Acknowledging the gaps in the application of the court’s holding, Judge Randolph J. Haines, writing for the court, encouraged Congress fix the uncertainty inherent in its decision. To be sure, Judge Haines stated that “it makes little sense to limit the cap to the few remaining non-opt out states, nor to permit debtors to shield assets by obtaining a homestead in some other state merely because that state precludes the alternative of claiming far less generous federal exemptions.” Id. at 791.

(III) Although it first appeared, in the wake of McNabb, that because Florida residents do not elect to apply state law exemptions in connection with a bankruptcy proceeding (because the Florida Legislature by statute imposes the state law exemptions on its residents), the requirement of 11 U.S.C. § 522(p)(1), that the debtor must own the homestead property for more than 1,215 days prior to the filing of the bankruptcy petition in order to receive an exemption greater than $125,000 of the homestead’s value, should not apply to Florida residents, all of the subsequent bankruptcy cases which have been decided in Florida, as well as two cases heard simultaneously in Nevada, each have held that Congress did intend for the new limitation to apply in opt-out states such as Florida. In re Elona Kaplan, 331 B.R. 483 (Bankr. S.D. Fla. 2005); In re Charles Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005); In re Landahl, 338 B.R. 990 (Bankr. M.D. Fla. 2006); In re Buonopane, 344 B.R. 675 (Bankr. S.D. Fla. 2006); In re Wagstaff, 19 Fla. L. Weekly Fed. B192,(Bankr. S.D. Fla. 2006); In re Robert and Odette Virissimo, 332 B.R. 201 (Bankr. D. Nev. 2005); and In re Cheryl Heisel, 332 B.R. 201 (Bankr. D. Nev. 2005).
In re Elona Kaplan, supra, the debtor in connection with her Chapter 7 bankruptcy proceeding, claimed as exempt her condominium located in Sunny Isles, Florida, which was listed as having a value of $280,000, subject to a mortgage debt of $181,000, resulting in an equity of $99,000. The trustee in bankruptcy opposed the debtor’s application based on the trustee’s position that the value of the debtor’s condominium is between $325,000 to $350,000, resulting in an equity of between $144,000 to $169,000, and thus the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, should be applied because the debtor only owned the condominium for less than a 1,215-day period prior to the filing of the petition in bankruptcy. U.S. Bankruptcy Judge Robert A. Mark ruled that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does apply to the homestead owned by the resident-debtor who resides in an opt-out state, notwithstanding the literal language of Section 322 of BAPCPA. After finding that the provision was ambiguous, Judge Mark reviewed the legislative history of the provision and held that Congress did not intend for the limitation contained in Section 322 of BAPCPA to only apply to two states (Minnesota and Texas) and not apply in the opt-out states, such as Florida. Because the difference between the $125,000 exemption contained in 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, and the amount of equity the debtor had in the condominium was relatively small, the court’s ruling with respect to the application of 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, to the debtor in an opt-out state, was not appealed.

In re Charles Wayrynen, supra, the debtor, in connection with his Chapter 7 bankruptcy proceeding, claimed as exempt his home in Port St. Lucie valued at $150,000. The debtor purchased a home on March 16, 2005, and the debtor filed for Chapter 7 bankruptcy relief on April 29, 2005 (after the effective date of BAPCPA and Section 322 thereof). The debtor had previously purchased and sold several different residences between May 19, 1989, and March 16, 2005. The trustee in bankruptcy opposed the debtor’s application based on the trustee’s position that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, should be applied because the debtor only owned the house for less than a 1,215-day period prior to the filing of the petition in bankruptcy. U.S. Bankruptcy Judge Steven H. Friedman ruled that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does apply to the homestead owned by the resident-debtor who resides in an opt-out state, notwithstanding the literal language of Section 322 of BAPCPA. Judge Friedman, like Judge Mark in In re Elona Kaplan, supra, found that the language in Section 322 of BAPCPA was ambiguous. Judge Friedman also reviewed the legislative history of the provision and held that Congress did not intend for the limitation contained in Section 322 of BAPCPA to only apply to two states (Minnesota and Texas), but not in the opt-out states such as Florida. Therefore, Judge Friedman ruled that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does apply to the homestead owned by the resident-debtor who resides in an opt-out state, notwithstanding the literal language of Section 322 of BAPCPA. Judge Friedman also held that the safe harbor for proceeds rolled over from to the present house from a former house pursuant to the provisions of 11 U.S.C. § 522(p)(2)(B), as amended by Section 322 of BAPCPA, applies to all prior homes, rather than merely the most recent prior home. This resulted in Judge Friedman finding that the entre value ($150,000) of the debtors homestead is exempt from his creditor because of the equity from residences owned by the decedent for a period of more than 1,215 days prior to the debtor filing a petition in bankruptcy which was reinvested in the debtors new house in excess of $25,000 ($150,000 reduced by the $125,000 allowed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA). Because of the result of the rulings made by Judge Friedman, no appeal of the issue pertaining to the application of 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, to the debtor in an opt-out state, was taken.
In In re Landahl, supra, the debtor in connection with his Chapter 7 bankruptcy proceeding, claimed as exempt his home which the debtor had inherited less than 1,215 days before filing the petition for bankruptcy. U.S. Bankruptcy Judge K. Rodney May ruled that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does apply to the homestead owned by the resident-debtor who resides in an opt-out state, notwithstanding the literal language of Section 322 of BAPCPA.

In In re Buonopane, supra, U.S. Bankruptcy Judge Alexander L. Paskay ruled that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does apply to the homestead owned by the resident-debtor who resides in an opt-out state, notwithstanding the literal language of Section 322 of BAPCPA.

In In re Wagstaff, supra, U.S. Bankruptcy Judge Steven H. Friedman again ruled that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does apply to the homestead owned by the resident-debtor who resides in an opt-out state, notwithstanding the literal language of Section 322 of BAPCPA. In addition, Judge Friedman confirmed that homestead real property owned by a married couple as tenants by the entirety could only be used to satisfy the joint debts of the husband and wife debtors.

In In re Robert and Odette Virissimo, supra, and In re Cheryl Heisel, supra, each such case was argued and resolved simultaneously before the U.S. Bankruptcy Court for the District of Nevada. The ruling of U.S. Bankruptcy Judge Linda B. Riegle was in accord with the decisions of Judge Mark in In re Elona Kaplan, supra, and Judge Friedman in In re Charles Wayrynen, supra, and thus contrary to the decision of Judge Haines in In re Robin Bruce McNabb, supra, that the $125,000 limitation imposed by 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does apply to the homestead owned by the resident-debtor who resides in an opt-out state, notwithstanding the literal language of Section 322 of BAPCPA. Judge Riegle reasoned that an election is made by the debtor for purposes of 11 U.S.C. § 522(b)(2) or (3) in accordance with 11 U.S.C. § 522(l).

But as learned from In re John Angelo, 19 Fla. L. Weekly Fed. B212, (Bankr. S.D. Fla. 2006), the trustee in bankruptcy must present substantial, competent evidence as to the value of the debtor’s homestead to establish that the debtor’s equity is in excess of $125,000.

It is likely that Congress will pass a technical corrections act to remove the language which applies the limitation contained in Bankruptcy Code Section 522(p)(1) only to debtors who elect under Bankruptcy Code Section 522(b)(3)(A) to exempt property under State or local law. This will clearly make the limitation applicable to opt-out states such as Florida.

If the debtor borrows money to finance the purchase of the homestead, and the debtor does not own the homestead free and clear for a period of 1,215 days, is the value of the homestead affected for purposes of the exemption limitation of Bankruptcy Code Section 522(p)(1)? In the bankruptcy court case of In re Kevin and Susan Blair, 334 B.R. 374 (Bankr. N.D. Tex. 2005), U.S. Bankruptcy Judge Harlin D. Hale ruled that, with
respect to a home which the debtors owned for more than 1,215 days prior to the filing of their petition in bankruptcy, the increase in equity which occurs during the 1,215-day period due to the payment of scheduled mortgage payments and increase in value, is not subject to the $125,000 cap. Judge Hale reasoned that the term “acquire” as it relates to an interest in the debtors’ homestead, as set forth in 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA, does not include an increase in the equity in the homestead due to the regular mortgage payments or to the mere increase in the value of the homestead during the 1,215-day period. Judge Hale indicated that even if a successful argument was made that the term “acquire” was ambiguous in this context, the legislative history of Section 322 of BAPCPA supports his ruling in referring to the comment made which referred to 11 U.S.C. § 522(p) as the mansion loophole. Thus, Judge Hale seemed to view the term “acquire” to mean acquiring ownership by purchase or otherwise.

(vi) If the debtor has owned the homestead for a period of greater than 1,215 days, does the increase in value of the homestead during the 1,215-day period which occurs immediately prior to the filing of their petition in bankruptcy constitute an acquisition of an interest for purposes of the $125,000 cap contained in 11 U.S.C. § 522(p)(1), as amended by Section 322 of BAPCPA? This question was answered in the negative in a well reasoned opinion issued by Judge Arthur B. Briskman relative to the U.S. Bankruptcy Court case of In re Thomas William Sainlar and Sheryl A. Sainlar, 344 B.R. 669 (Bankr. M.D. Fla. 2006).

In Sainlar, the debtors, Thomas William Sainlar and Sheryl A. Sainlar, purchased a single family home in Celebration, Florida (the "Homestead") on March 6, 2001 for $783,000. The Homestead was used by the debtors as their primary personal residence. On October 12, 2005 (the "Petition Date"), the debtors filed a joint chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Middle District of Florida, Orlando Division. The debtors listed the Homestead as an asset in Schedule A of the Bankruptcy Petition and claimed the Homestead as being fully exempt in Schedule C of the Bankruptcy Provision in accordance with the Florida state homestead exemption law. The Homestead was then valued at $809,400, and Schedule D reflected a secured claim which encumbered the Homestead in the amount of $480,094 held by Citicorp Mortgage. Citicorp did not file a proof of claim in the bankruptcy proceeding. It then appeared that the value of the Homestead on the Petition Date was actually $1,400,000. Therefore, the value of the Homestead had increased by at least $617,000, and the debtors had almost $920,000 of equity in the Homestead.

The debtors' largest unsecured creditor, Bank One, Kentucky N.A., ("Bank One") filed an Objection to the Debtors' Claim of Exemption. The thrust of Bank One's argument was that the exemption for the Homestead was limited to $125,000 of the equity acquired by the debtors during the 1,215-day period preceding the Petition Date. In citing to Black's Law Dictionary, Bank One argued that an interest is defined as an advantage or profit, especially of a financial nature. Thus, appreciation in real property is a profit and, therefore, an interest as so defined.

The debtors argued that Section 522(p) of the Bankruptcy Code, as amended by Section 322 of BAPCPA, does not apply to the increase in the value of Homestead during the 1,215-day period because the statute intends that the term "acquisition" applies to the accession to title. The debtors in their brief noted that Black's Law Dictionary defines interest as "the most general term that can be employed to denote a right, claim, title or legal share in something. In its application to lands or things real it is frequently used in connection with the terms "estate", "right", and "title"." It further
defines acquire as "to gain by any means, usually by one's own exertions; to get as one's own; to obtain by search, endeavor, investment, practice, or purchase; receive or gain in whatever manner; come to have; in law of contracts and of descents, to become owner of property; to make property one's own; to gain ownership of." Moreover, the debtors cited In re Blair, supra, in which the U.S. Bankruptcy Court for the Northern District of Texas held that increased equity in homestead property as a result of mortgage payments made during the 1,215-day period was not an interest of the kind sufficient to trigger the cap contained in Section 522(p) of the Bankruptcy Code, as amended by Section 322 of BAPCPA. Furthermore, the policy behind the modification of Section 522(p) of the Bankruptcy Code was to limit homestead exemptions for debtors engaged in misconduct and abuse of the bankruptcy system by purchasing expensive residences on the eve of bankruptcy.

Judge Briskman agreed with the debtors. He determined that the $125,000 cap does not apply to the increase in the equity of homestead property during the 1,215-day pre-petition period if the homestead property had been acquired by the debtors more than 1,215 days before the Petition Date. Judge Briskman found that the word "acquired" in this context should mean to obtain the property as one's own.

(vii) U.S. Bankruptcy Judge Michael G. Williamson in In re Rasmussen also ruled that the increase in the fair market value of the homestead of the debtors during the 1,215-day period immediately preceding the filing of the bankruptcy petition due to appreciation did not constitute the acquiring of an interest in the homestead for purposes of applying the $125,000 cap contained in Section 522(p) of the Bankruptcy Code, as amended by Section 322 of BAPCPA. In re Alfred Thomas Rasmussen and Billie Jo Rasmussen, 349 B.R. 747 (Bankr. M.D. Fla. 2006). Even more notable, however, was Judge Williamson’s ruling that, because the debtors (Mr. and Mrs. Rasmussen) co-owned the homestead, each spouse was entitled to the $125,000 exemption for interests in the debtor’s homestead acquired during the 1,215-day period immediately preceding the filing of the bankruptcy petition contained in Section 522(p) of the Bankruptcy Code, as amended by Section 322 of BAPCPA, thereby enabling the debtors in this case to stack their exemptions for a total of a $250,000 cap. The concept of each spouse being able to receive a separate $125,000 exemption was followed in the case of In re William A. Limperis and Janet L. Limperis, 370 B.R. 859, (Bankr. S.D. Fla. 2007). Furthermore, Judge Williamson, in dicta, appeared to take the position that the pay down of a mortgage encumbering the homestead of a debtor during the 1,215-day period immediately preceding the filing of the bankruptcy petition would constitute the acquisition of an interest even if the funds used to do so were otherwise exempt from the creditors of the debtors, such as the proceeds of an annuity contract. The concept of applying the 1,215-day cap when exempt assets are used to reduce an indebtedness secured by the homestead of the debtors as suggested in Rasmussen appears contrary to established law pertaining to fraudulent transfers. See In re Goldberg, 229 B.R. 877 (Bankr. S.D. Fla. 1998).

(b) Does the conversion of the status of real property owned by a debtor from non-homestead to homestead prior to filing a bankruptcy petition constitute the acquisition of an interest?

In a recent federal bankruptcy case the court addressed the issue of whether merely designating a residential property as one’s residence constituted the acquisition of an interest in such real property within the limitations set forth in 11 U.S.C. §522(p). In re Reinhard 377 B.R. 315 (Bankr. N.D. Fla. 2007). In Reinhard, the debtor and his wife acquired ownership of a residential property in Seaside, Florida in 1995. The
debtor and his wife, however, resided in Tallahassee, Florida until late June, 2005. Thereafter, the debtor and his wife moved into their Seaside, Florida home and designated it as their homestead under Florida law. The debtor filed a petition for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code on November 3, 2006, which was within 1,215 days of designating the Seaside, Florida home as their homestead.

In determining that merely designating residential real property as one’s homestead within the 1,215-day period described in 11 U.S.C. §522(p) does not constitute acquiring an interest for purposes of the limitation on the homestead exemption, U.S. Bankruptcy Judge Lewis M. Killian, Jr., indicated that the acquisition of homestead status does not confer any additional property interest or rights in property. Judge Killian stated that homestead is simply a status, constitutionally defined, which exempts certain property from execution and limits its alienability. It is not a property interest under Florida law. When a Florida resident acquires homestead status relative to his or her real estate, the homeowner does not acquire any of the rights traditionally associated with property interest, such as, the right to possession, the right to use, or the right to transfer. Judge Killian analogized homestead status in Florida as being a protective safe in which the bundle of sticks constituting the property is put.

Judge Killian acknowledged that a bankruptcy court in Nevada had held to the contrary, but favored the holdings of bankruptcy court decisions rendered in Texas and Massachusetts.

Judge Killian also cited to Rasmussen, supra, in which the bankruptcy court equated the phrase “any amount of interest” with the word “value,” indicating that Congress intended to convey a monetary meaning in connection with the term “interest.” Hopefully other bankruptcy courts that consider this issue will rule in accord with Judge Killian’s decision in Reinhard.

(c) Does the transfer of the homestead between spouses or to or from a revocable trust interrupt or otherwise affect the running of the 1,215-day period?

(d) Note that the $125,000 limitation discussed above was recently adjusted to $136,875 due to the inflation.

(e) Note that Section 308 of the BAPCPA modifies Bankruptcy Code Section 522 by adding a new subsection 522(o) that applies a 10-year lookback period for fraudulent conversions into homestead. This new provision applies regardless of whether or not the debtor elected to exempt property under state or local law.

This new provision should, in essence, overrule the holding of the Florida Supreme Court in Havoco of America, Ltd. v. Hill, 790 So.2d 1018 (Fla. 2001), and the Third District Court of Appeal in Conseco Servs, LLC v. Cuneo, 904 So.2d 438 (Fla. 3d DCA March 9, 2005), to the extent that the debtor takes non-exempt assets and uses them to pay down an existing mortgage note or make improvements to the debtor’s homestead.

(f) What if exempt assets are used to pay down an existing mortgage encumbering the debtor’s residence? Dicta in Rasmussen, supra - the “acquisition limitation will apply to the pay down of a mortgage during the 1,215-day period immediately preceding the filing to the bankruptcy petition. As discussed earlier in these materials, the concept
of applying the 1,215-day cap when exempt assets are used to reduce an indebtedness secured by the homestead of the debtors as suggested in \textit{Rasmussen} appears contrary to established law pertaining to fraudulent transfers.

In the recent case of \textit{In re Robert Wayne Burns and Laura Kay Burns}, 395 B.R. 756 (Bankr. M.D. Fla. 2008), U.S. Bankruptcy Judge Karen S. Jennemann issued an Order holding that the making regular mortgage payments is not the equivalent of “acquiring an interest” in real property, thus, ruling that such payments do not fall within the limitation set forth in Section 522(p) of the Bankruptcy Code, as amended by Section 322 of BAPCPA. In addition, Judge Jennemann held that the homestead real property (the “Homestead”), which was situate on 3.67 acres and located within the boundaries of the municipality of Deltona, Florida, was exempt from creditors because when the debtors had first acquired and made the subject real property their Homestead, the Homestead was located in the unincorporated area of Volusia County, and was subsequently annexed by Deltona, Florida.

The debtors, Robert Wayne Burns (“Mr. Burns”) and Laura Kay Burns (“Mrs. Burns”), (collectively “Mr. and Mrs. Burns”) resided in a single family home (the “Homestead”) located in Osteen, Florida, which ultimately was annexed into the City of Deltona, Florida, when they filed their bankruptcy petition on June 4, 2007. Initially, Mr. Burns had acquired the Homestead located on 3.67 acres sometime in 1988 and has resided there ever since. Mr. and Mrs. Burns were married in 1989, and Mr. Burns added Mrs. Burns as an owner of the Homestead in 1991. In 1995, the Homestead was annexed into the City of Deltona, Florida. In 2004, a dog owned by Mr. and Mrs. Burns attacked Kevin Miller (“Mr. Miller”) while Mr. Miller was driving his motorcycle on the road in front of the Homestead causing Mr. Miller significant injuries. A jury verdict was entered in favor of Mr. Miller in the amount of $500,000 on April 18, 2007. Mr. and Mrs. Burns filed their chapter 7 bankruptcy petition on June 4, 2007. Mr. and Mrs. Burns listed the Homestead as an asset in Schedule A of their Bankruptcy Petition and claimed the Homestead as being fully exempt in Schedule C of their Bankruptcy Petition in accordance with the Florida state homestead exemption law. The Homestead was initially valued at $509,000 (although it was later valued by a real estate appraiser at $370,000 as of June 4, 2007), and Schedule D reflected a first mortgage and a second mortgage which encumbered the Homestead in the aggregate amount of approximately $205,000. Thus, the equity which Mr. and Mrs. Burns had in the Homestead was $165,000 on the date the petition was filed.

During the 1,215 day period immediately preceding the filing of the petition, Mr. and Mrs. Burns made regular monthly mortgage payments in the total amount of $45,392.80.

Mr. Miller filed an Objection to the Debtors’ Claim of Exemption. Mr. Miller’s objections were based on (i) the fact that the Homestead comprised 3.67 acres and was located in a municipality, (ii) that the limitation of $136,875 contained in Section 522(q)(1)(B)(iv) of the Bankruptcy Code should apply without regard to the 1,215 period because the injury incurred by Mr. Miller was due to willful or reckless misconduct of Mr. and Mrs. Burns, and (iii) that, if there is not a finding of willful or reckless misconduct of Mr. and Mrs. Burns, the debtors did acquire an interest in the Homestead during the 1,215 period which exceeded the $136,875 limitation.
Mr. and Mrs. Burns argued that (i) they should be entitled to stack the $136,875 exemptions, for a total exemption of $273,750, (ii) the annexation of the Homestead by the City of Deltona does not cause Mr. and Mrs. Burns to lose the exemption as to size and use available to them as when the Homestead was located in the unincorporated area of Volusia County, (iii) the making of regular mortgage payments does not constitute an acquisition of an interest in real property for purposes of the limitation set forth in Section 522(p) of the Bankruptcy Code, and (iv) the injury caused by one of their dogs was not their result of willful or reckless misconduct.

Judge Jennemann agreed with the arguments of Mr. and Mrs. Burns in all instances.

First, Judge Jennemann held, in citing to an old Florida Supreme Court case and a more recent U.S. Court of Appeals for the Fifth Circuit case, that the one-half (½) acre size limitation set forth in Article X, §4(a)(1) of the Florida Constitution, with respect to homestead real property located in a municipality does not apply with respect to homestead real property which was initially located in the unincorporated area of a county and later annexed into a municipality without the consent of the landowner. Morgan v. Bailey, 90 Fla. 49 (Fla. 1925); Manda v. Sinclair, 278 F.2d 629 (5th Cir. 1960).

Second, Judge Jennemann held that Mr. and Mrs. Burns were entitled to stack their exemptions relative to any interests in real property constituting their homestead acquired in the 1,215 day period immediately preceding the filing of the bankruptcy petition. Judge Jennemann cited to the case of In re Rasmussen, 349 B.R. 747 (Bankr. M.D. Fla. 2006), discussed supra.

Third, Judge Jennemann held that merely making regular mortgage payments is not the equivalent of acquiring an interest in real property. Judge Jennemann cited to the holdings in In re Anderson, 374 B.R. 849 (Bankr. D. Kan. 2007); In re Sainlar, 344 B.R. 669 (Bankr. M.D. Fla. 2006), and In re Blair, 334 B.R. 374 (Bankr. N.D. Texas 2005).

Time out here. Note that in the Anderson case, U.S. Bankruptcy Judge Robert E. Nugent (Chief Judge, District of Kansas) held that the debtor, in making a $240,000 payment in reduction of the mortgage on his homestead 3 months prior to filing a petition in bankruptcy (payment made on July 18, 2005, bankruptcy petition filed on October 14, 2005) was not an acquisition of an interest in real property for purposes of the limitation during the 1,215 day period preceding the filing of a bankruptcy petition contained in Section 522(p) of the Bankruptcy Code. Judge Nugent distinguished this case from the facts of the Rasmussen case in which the debtors had purchased (acquired) their ownership in the homestead within the 1,215 day period. Judge Nugent also cited to Sainlar in support of his ruling that the equity gained during the 1,215 day period does not equate to the acquisition of an interest. Interest is equivalent to ownership. Furthermore, Judge Nugent cited to Blair in which the U.S. Bankruptcy Court for the Northern District of Texas held that increased equity in homestead property as a result of mortgage payments made during the 1,215-day period was not an interest of the kind sufficient to trigger the cap contained in Section 522(p) of the Bankruptcy Code.
Finally, Judge Jennemann, in reviewing the evidence determined that Mr. and Mrs. Burns did not have any reason to believe that their dog had violent tendencies, based on the dog’s past behavior; therefore, Judge Jennemann found that Mr. and Mrs. Burns did not act willfully or recklessly relative to the causation of the injuries suffered by Mr. Miller.

This decision gives debtors some comfort that their making of regular mortgage payments relative to a mortgage note encumbering their homestead which is otherwise exempt from the claims of their judgement creditors during the 1,215 day period immediately preceding their filing of a petition in bankruptcy will not be treated as the acquisition of interest in real property for purposes of calculating the limitation of $136,875 contained in Section 522(p)(1) of the Bankruptcy Code. Moreover, the door was left open as to whether the making of a prepayment of all or a portion of the mortgage note, albeit not as a regularly scheduled payment, if the homestead has been owned by the debtors for a period of greater than 1,215 days, will also not be treated as the acquisition of interest in real property. Certainly the reasoning set forth in Judge Jennemann’s ruling is logical and supported by legal interpretations of the word “acquired.” In other words, the phrase *interest that was acquired by the debtor* contained in Section 522(p)(1) of the Bankruptcy Code, as amended by BAPCPA, refers to the acquisition of an interest in ownership as distinguished from an increase in equity in the homestead property already owned by the debtor, even if such increase in the equity is due to the reduction in the amount due and owing pursuant to the provisions of a mortgage note encumbering the homestead.


(a) In *Buonopane*, U.S. Bankruptcy Judge Michael G. Williamson, Middle District of Florida, Ft. Myers Division, determined that the provisions of 11 11 *U.S.C. §522(p), which provide the limitation on the amount of interest acquired within 1,215 days in homestead real property ($125,000 cap), is not applicable to real property owned as tenants by the entirety when only one spouse is the debtor in a bankruptcy proceeding. Judge Williamson noted that there is nothing in the legislative history of BAPCPA which in any way indicates that the new limitations were directed to Florida’s common law on tenancy by the entirety property.

(b) In *Schwarz*, U.S. Bankruptcy Judge John K. Olson, Southern District of Florida, Fort Lauderdale Division, held that real estate purchased by a married couple in Florida as tenants by the entirety, prior to moving to Florida, is exempt from the bankruptcy estate of the debtor husband, who filed for bankruptcy under Chapter 7 after he and his wife later became residents of Florida. In this case, the trustee in bankruptcy contended that because the debtor husband did not live in Florida for 730 days immediately prior to the filing of his bankruptcy petition, 11 11 *U.S.C. §522(b)(3)(A) (as enacted in BAPCPA) mandates that the applicable homestead exemption available to the debtor is based on the debtor’s previous state of residence. Judge Olson determined that the exemption from the bankruptcy estate is based on the fact that the real property in question is held as tenants by the entirety, and not as a result of it being the debtor’s homestead real property. Apparently, the funds used to purchase the Florida real property came from
assets which the debtor and his spouse owned in Maryland as tenants by the entireties, i.e., their Maryland residence. Note that Maryland does not provide an exemption for homestead real property but it does recognize tenancy by the entirety.

(c) Remember that 11 U.S.C. §522(b)(2)(B) provides an exemption for property held by the debtor and his or her spouse as tenants by the entirety if the property is exempt under applicable non-bankruptcy law.

(d) In Mathews, U.S. Bankruptcy Judge Jerry A. Funk, Middle District of Florida, Jacksonville Division, reviewed various assets, including personal property, owned by the debtor and, ostensibly, the debtor’s spouse, as tenants by the entirety. Judge Funk examined how various assets were owned in determining which assets would be viewed as being owned as tenants by the entirety and which assets would not. Judge Funk’s analysis was very thorough and provides good insight as to the right way to title personal property as tenants by the entirety and the way to create a failure of such type of ownership. Judge Funk cited to the decision of the Florida Supreme Court in Beal Bank, SSB v. Almand and Assoc., 780 So.2d 45 (Fla. 2001). One thing which is clear is that if one choice provided in the new account application is “tenants by the entirety,” that box or line better be checked. Moreover, the six unities must be present: (1) Unity of Possession (Joint ownership and control); (2) Unity of Interest (the interest in the account must be identical); (3) Unity of Title (the interests must have originated in the same interest); (4) Unity of Time (the interest must have commenced simultaneously); (5) Survivorship; and, (6) Unity of Marriage (the parties must be married at the time the property became titled in their joint names). Judge Funk also noted that mortgage proceeds from real estate owned as tenants by the entirety are also exempt as tenancy by the entirety property.

(e) In Hinton, U.S. Bankruptcy Judge Karen S. Jennemann, Middle District of Florida, Orlando Division, confirmed that a debtor who held title to his residence with his wife as tenants by the entirety was entitled to the exemption of such property pursuant to the provisions of 11 U.S.C. §522(b)(2)(B) notwithstanding the limitations on homestead property contained in 11 U.S.C. §522(o) or 11 U.S.C. §522(p).

(f) With respect to federal tax liens, the United States government can reach the interest of the debtor in tenancy by the entirety property, even Florida homestead. United States v. Craft, 535 U.S. 274 (Sup. Ct. 2001).

(g) With respect to a forfeiture occurring pursuant to the federal forfeiture laws, tax liens, the United States government can reach the interest of the wrongdoer in tenancy by the entirety property, even Florida homestead. United States of America v. David Emory Fleet, 498 F.3d 1225 (11th Cir. 2007).

(4) Case Law Pertaining to Homestead Owned by Trusts.

Crews v. Bosonetto (In re Bosonetto), Callava v. Feinberg, Cutler v. Cutler, In re: Estate of Edith Alice Cutler; In re Merry Alexander, In re Mary L. Edwards and In re John L. Cocke and Judy D. Cocke

Bosonetto:

There is some uncertainty as to whether homestead property transferred to a revocable trust can be subject to forced sale by a judgment creditor, notwithstanding Article X, §4(a) of the Florida Constitution. In Crews v. Bosonetto (In re Bosonetto), 271 B.R. 403 (Bankr. M.D. Fla. 2001), U.S. Bankruptcy Judge John Proctor held that a debtor could not claim the Florida homestead exemption.
from forced sale for residential real property that she owned, not in her individual capacity, but as trustee of a revocable trust to which that she had conveyed all of her property, including her homestead property. The court reasoned that the trust could not be considered a “natural person” for the purposes of the homestead exemption set forth in the Florida Constitution. Accordingly, the court held that Florida law did not afford homestead protection to the debtor’s property held in trust.

**Callava:**

Three years later, the Florida Third District Court of Appeal rendered an apparently conflicting decision in *Callava v. Feinberg*, 864 So.2d 429 (Fla. 3d DCA 2004). In *Callava*, the court, without citing *Bosonetto*, held that a judgment debtor who sold her homestead and purchased a replacement residence, albeit titled in the name of another individual as trustee without any further description as to the relationship between the judgment debtor and the individual, was entitled to homestead protection from forced sale. In ruling that the replacement residence was protected from forced sale by the judgment creditor by virtue of Article X, §4(a) of the Florida Constitution, the court determined that the judgment debtor’s beneficial interest in the replacement residence was sufficient to enable her to claim a homestead exemption from forced sale and that a judgment debtor is not required to hold a fee simple interest in the real property. Furthermore, a recent decision of the Fourth DCA, in *Engelke v. Estate of Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006), in *dicta*, was supportive of the holding of the Florida Third District Court of Appeal in *Callava*.

**Cutler:**

The Florida Third District Court of Appeal, rehearing a decision of that court *en banc*, withdrew the prior opinion of the court and substituted a modified opinion in its stead. The Florida Third District Court of Appeal held that the decedent’s homestead was subject to devise, and therefore, the provision in the decedent’s Will, which directed that the decedent’s debts be satisfied equally from both the decedent’s homestead (which was to be distributed to the decedent’s daughter) and an adjacent vacant lot (which was to be distributed to the decedent’s son), was enforceable, notwithstanding the provisions of Article X, §4(b) of the Florida Constitution. *Cutler v. Cutler*, 994 So.2d 341 (Fla. 3rd DCA 2008). The decision of the Florida Third District Court of Appeal sitting *en banc*, in essence, reversed the decision of the court entered by the three judge panel in the court’s earlier decision. See *Cutler v. Cutler, In re: Estate of Edith Alice Cutler*, 32 Fla. L. Weekly D583 (Fla. 3d DCA February 28, 2007).

In October 2003, Edith Alice Cutler created a land trust for estate planning purposes. The initial trustees of the land trust were Edith and her two adult children, Edward and Cynthia. Edith, a widow, conveyed ownership of her homestead real property and an adjacent vacant lot to the land trust, subject to a life estate which was retained by Edith, individually. The provisions of the land trust agreement directed that the homestead and the adjacent vacant lot were to be distributed, upon the death of Edith, to Edith’s estate.

Edith’s Will specifically devised her homestead real property to her daughter, Cynthia, and the adjacent vacant lot to her son, Edward. Edith’s Will also provided that all claims, charges and allowances against, and costs of administration of, Edith’s estate were to be paid out of the residuary portion of Edith’s estate. If the assets comprising the residuary estate were not sufficient to satisfy the debts and administration expenses, Edith’s Will directed that the balance of such items were to be paid out and were to reduce equally the devise of homestead to Edith’s daughter, Cynthia, and the devise of Edith’s vacant lot to Edith’s son, Edward.
After Edith’s death on June 6, 2004, the residue of Edith’s estate was insufficient to satisfy all of the estate’s creditors. Edith’s son, Edward, sought to have the homestead and the vacant lot abated, on an equal basis, to obtain the funds needed to pay the balance owed to the creditors of Edith’s estate. Edith’s daughter, Cynthia, objected to any such abatement on the basis that Article X, §4(b) of the Florida Constitution provides that the protection from the claims of creditors available to a decedent inures to the decedent’s surviving spouse and heirs. See Fla. Const. Art. X, §4(b).

The holding of the majority in the Cutler en banc opinion did not disagree with the conclusion reached by both the trial court and by the three judge panel that the real property devised to Cynthia was Edith’s homestead. Rather, the court’s departure from the trial court’s holding, as well as the holding of the three judge panel in its original decision, revolved around the issue of whether the Florida constitutional exemption from creditor’s claims enjoyed by Edith prior to her death inured to the benefit of Edith’s daughter, Cynthia, as a result of Edith’s death.

The general rule, as clearly set forth in Article X, §4(b) of the Florida Constitution, is that the exemption from creditors enjoyed by a Florida resident relative to his or her homestead real property passes to and inures to the benefit of such resident’s spouse or heirs upon the death of the resident.

Another provision of the Florida Constitution restricts the ability of a decedent to devise his or her homestead real property at death if such decedent is survived by a spouse or a minor child. See Fla. Const. Art. X, §4(c); Fla. Stat. §§732.401, 732.4015.

Prior cases have consistently held that when a decedent, who is not subject to the restrictions on the devise of homestead set forth in Florida law Article X, §4(c) of the Florida Constitution and §§732.401 and 732.4015, Florida Statutes), directs the sale of homestead real property, the proceeds from such a sale lose their homestead character and become part of the decedent’s estate and become subject to administration expenses and the claims of the decedent’s creditors. See Estate of Price v. West Florida Hospital, Inc., 513 So. 2d 767 (Fla. 1st DCA 1987); Knadle v. Estate of Knadle, 686 So. 2d 631 (Fla. 1st DCA 1967).

Although Edith did not direct that her homestead real property be sold, she did direct, in what the court held was a specific manner, that her homestead be used to satisfy her debts. In the view of the Florida Third District Court of Appeal sitting en banc, this specific direction was equivalent to ordering it to be sold.

Judge Shepherd, joined by Chief Judge Gersten and Judge Lagoa, wrote a dissent that was thirteen pages in length, which was longer than the majority’s opinion (which was barely eleven pages in length). The reasons cited in dissenting from the majority decision were as follows:

1. Because the decedent’s homestead was specifically devised to the decedent’s daughter, title to the homestead passed to the decedent’s daughter upon the moment of the decedent’s death; it passed outside of the decedent’s estate. Note that Florida law does not empower the decedent’s personal representative to take possession or control of the decedent’s homestead real property. §733.607, Fla. Stat.
2. Because the decedent’s homestead is not a part of the decedent’s probate estate, Florida’s abatement statute (§737.805 of Florida Statutes) does not apply. See Fla. Stat. §733.607(1); Thompson v. Laney, 766 So. 2d 1087 (Fla. 3d DCA 2000).

3. The majority’s reliance on the holding in City National Bank of Florida v. Tescher, 578 So. 2d 701 (Fla. 1991) is not applicable to the matters in the Cutler case. The Tescher case involved the validity and enforceability of a provision in a prenuptial agreement by which the decedent’s surviving spouse waived his homestead rights under Article X, §4(c) of the Florida Constitution. In the Cutler case, the decedent’s daughter’s claim is based on the provisions of Article X, §4(b) of the Florida Constitution, and such a right cannot be waived by the decedent. As an heir of the decedent, the decedent’s daughter, Cynthia, is a constitutionally protected class member under Article X, §4(b) of the Florida Constitution.

4. The cases in which a decedent directed that his or her homestead be sold with the proceeds being distributed to the estate beneficiaries are not applicable in the Cutler case because Edith did not, in her Will, direct that her homestead be sold. In both Estate of Price and Knadle, each decedent specifically directed in their will that the homestead be sold and the proceeds therefrom be distributed to their respective children.

The dissenting opinion also contends that the matters which were to be determined in the Cutler case were indistinguishable from those set forth in the decision of the Florida Fourth District Court of Appeal in Engleke v. Estate of Engleke, 921 So. 2d 693 (Fla. 4th DCA 2006). In Engleke, Paul Engleke and his wife, Judy Engleke, each owned, through their separate respective revocable inter vivos trusts, a one-half undivided interest in their homestead property as tenants in common. Paul Engleke and Judy Engleke each waived their respective homestead rights relative to restrictions placed on each other in Article X, §4(c) of the Florida Constitution, pertaining to the devise of homestead. Paul Engleke’s trust agreement provided that, after his death, his spouse, Judy Engleke, would have the right to live in his one-half undivided interest in the homestead during her lifetime, provided that she pay all of the expenses to maintain the homestead. It further provided that upon the death of Judy Engleke, or her removal from the homestead, Paul Engleke’s children would receive his one-half undivided interest in the homestead real property through the residuary provisions of his trust agreement.

Upon the death of Paul Engleke, his estate did not have sufficient funds to pay the claims filed against his estate. The Florida Fourth District Court of Appeal held that the protection from creditors inured to Paul’s heirs (his children) even though they retained only a remainder interest in the homestead. The Engleke court rejected the attempt to analogize the direction in Paul Engleke’s trust agreement that the trustee is to pay from the trust estate to the extent sufficient assets are not available in Paul’s probate estate, funeral expenses, allowable claims against Paul Engleke’s estate, cost of last illness and cost of administration, as a direction to sell the specific homestead.

Both the majority and the dissent in Cutler acknowledged the policy under Florida law that the provisions set forth in Article X, §4 of the Florida Constitution that provide protection to the owner of homestead and their heirs are to be liberally construed.
The majority in *Cutler* seeks to establish and carry out what certainly appears to be the decedent’s intent that the decedent’s daughter and son bear the financial impact of the decedent’s debts on an equal basis. Certainly, Edith, in her Will, sought to allocate her debts equally between her homestead being specifically devised to her daughter and the adjacent vacant lot being specifically devised to her son.

The dissent, while not disagreeing with the majority’s statement as to what the decedent’s intent may have been, took umbrage with the holding of the majority because the dissent did not believe that the decedent’s attempt to, in essence, allocate debts between the daughter’s devise (the decedent’s homestead) and the son’s devise (the adjacent vacant lot) was effective under the provisions of the Florida Constitution. Rather, the dissent viewed the rationale of the majority as an effort to extend the limited exception arising when the decedent specifically directed that her homestead be sold, which Edith failed to do, to the circumstances existing in *Cutler*.

Although the majority cited in support of its holding the opinion of the Florida Supreme Court in *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005), the facts and holding in *Warburton* do not seem to support the result in *Cutler*. In *Warburton*, the decedent’s Will made several specific bequests, with the residuary estate passing to heirs. The decedent in *Warburton* was not survived by a spouse or minor children. The only significant asset in *Warburton* was the decedent’s homestead. Although the decedent clearly intended to provide some financial benefit to the specific devisees, the Florida Supreme Court held that the decedent’s homestead could not be sold to provide funds to satisfy the specific devises, much less to pay the decedent’s creditors or expenses of administering the decedent’s estate. Therefore, although the decedent’s homestead was subject to devise (because the decedent was not survived by a spouse or minor children), the Florida Supreme Court did not hold that the provisions contained in the decedent’s Will for the payment of specific devises was sufficient to deny the residuary beneficiaries, as heirs of the decedent, the constitution protection provided pursuant to the provisions of Article X, §4(b) of the Florida Constitution. In *Warburton*, as in *Cutler*, the decedent could have provided that the homestead was to be sold so that the proceeds would be available to pay all or a portion of the decedent’s creditors and the specific legatees.

Although not directly addressed in the *Cutler* decision, one issue which has not been adequately addressed or resolved in Florida statutory laws or case decisions is whether the trustee of a revocable inter vivos trust, upon the death of the grantor, may sell homestead real property based on the general statutory authority to sell real or personal property, if the trust agreement directs (whether specifically or generally) that the homestead is to be distributed to the decedent’s spouse or heirs (or a continuing trust for the benefit of the decedent’s spouse or heirs). It is the author’s opinion that the provisions of Article X, §4(b) of the Florida Constitution preclude the trustee from exercising any such authority unless (I) the homestead was subject to devise (the restrictions of Article X, §4(c) of the Florida Constitution not being applicable), and (ii) a specific power directing the sale of the decedent’s homestead (albeit owned by the decedent’s revocable trust) ala *Price* and *Knadle* is present.

**Alexander:**

In 2006, U.S. Bankruptcy Judge Michael G. Williamson, in *In re Merry Alexander*, held that, contrary to *Bosonetto*, the exemption from forced sale or lien by judgment creditors pursuant to
Article X, §4(a) of the Florida Constitution applies even when the debtor has legal title to his or her personal residence held in a revocable trust of which the debtor is both the grantor and the trustee. Judge Williamson specifically declined to follow Judge Proctor’s reasoning in *Bosonetto* because it neither cited to Florida law in support of the ruling made in that case nor has it been followed in subsequent Florida cases. *In re Merry Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006).

**Edwards:**

Later in 2006, U.S. Bankruptcy Judge Arthur B. Briskman issued an Order holding that the exemption from forced sale or lien by judgment creditors pursuant to Article X, Section 4(a) of the Florida Constitution applies even when the debtor has legal title to his or her personal residence held in a revocable trust established by the debtor. *In Re: Mary L. Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006). In *Edwards*, the debtor had conveyed ownership of an interest in certain real estate which was not then her principal residence. Several years later, the debtor sold her principal residence and moved to the residence owned by her revocable trust. The debtor was both the grantor and the sole trustee of her revocable trust. In his Order, Judge Briskman cited to *Alexander* as well as several Florida cases which supported his interpretation of Florida law as it applied in the bankruptcy proceeding. This holding is in accord with the well reasoned ruling made on July 25, 2006, by U.S. Bankruptcy Judge Williamson in *Alexander* and contrary to the ruling made by U.S. Bankruptcy Judge Proctor in *Bosonetto*.

**Cocke:**

Finally, in a 2007 case, U.S. District Court Judge Virginia M. Hernandez Covington in *In re John L. Cocke and Judy D. Cocke*, issued an Order on March 14, 2007, reversing the order entered in the bankruptcy court proceeding by U.S. Bankruptcy Court Judge George L. Proctor (of *Bosonetto* fame) and remanded the case to the bankruptcy court for further proceedings consistent with Judge Covington’s Opinion. Judge Covington, inter alia, held that *In re Bosonetto*, 271 B.R. 403 (Bankr. M.D. Fla. 2001) is not supported by Florida law; rather, the bankruptcy cases decided after *Bosonetto* regarding the applicability of what is commonly referred to as the homestead exemption provided pursuant to the provisions of Article X, §4(a) of the Florida Constitution, i.e., *Alexander*, and *Edwards*, are reflective of applicable Florida law pertaining to the availability of the homestead exemption from forced sale under process of any court relative to the homestead of a Florida resident. The debtors, John L. Cocke and Judy D. Cocke, filed their chapter seven bankruptcy petition on November 22, 2004. The debtors claimed as exempt the real property located at 6652 Cabello Drive, Jacksonville, Florida (the “Residence”). The debtors, along with their granddaughter, resided full-time at and on the Residence. The ownership of the Residence had been deeded to a trust which was created on July 30, 2003. Judge Proctor’s opinion on remand indicates that the debtors and their minor granddaughter were the grantors of the trust, as well as the beneficiaries of the trust. Moreover, the trust appears to be a land trust, rather than a typical revocable inter vivos trust. One of the debtors, Judy D. Cocke, was the trustee. Judge Proctor’s opinion on remand indicates that all three beneficiaries (the debtors and their minor granddaughter) had to act in concert to revoke the trust. The debtors were the court appointed guardians of their minor granddaughter. The principal objection of the Trustee in bankruptcy on remand was that the debtors did not, alone, possess the right to revoke the trust thus, the debtors did not possess a sufficient interest in the Residence for it to be considered the homestead of the debtors. The debtors countered that they retained the right to possess and use the Residence to the exclusion of all others, and they, in fact, have resided at the Residence for several years.

**Cocke On Remand:**

On remand from the U.S. District Court, Judge Proctor issued an order finding that the debtors, John L. Cocke and Judy D. Cocke, satisfied the three requirements needed to avail
themselves of the homestead exemption from forced sale provided in Article X, §4(a) of the Florida Constitution, notwithstanding the fact that legal title to the Residence was held in a revocable *inter vivos* trust, which appears to have been structured as what is commonly referred to as a land trust. *In re Cocke*, 371 B.R. 554 (Bankr. M.D. 2007). Judge Proctor followed the mandate of Judge Covington and examined whether:

1. the debtors have a legal or equitable interest in the Residence which provides them with the legal right to use and possess the Residence as a residence.
2. the debtors have the intention to make the Residence their homestead for purposes of Florida law.
3. the debtors have actually maintained the Residence as their principal residence.

Judge Proctor had quickly determined based on the evidence which had been presented that the debtors had the intention to make the Residence their homestead and in fact had actually maintained the Residence as their principal residence. The remaining issue which was contested at the hearing held subsequent to the Judge Covington ruling was whether the debtors possessed a legal or equitable interest in the Residence which provided them with the legal right to use and possess the Residence as a residence. Judge Proctor summarily found that the debtors retained the right to revoke their interest in the trust and possessed the requisite interest in the Residence to satisfy the requirement that they had the legal right to use and possess the Residence as a residence. Judge Proctor based this legal principle on the position of Judge Covington that the grantor’s power to revoke the trust is sufficient to satisfy the requirement of the legal right to the use and possession based on *Engelke v. Estate of Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006). In rejecting the argument of the Trustee in bankruptcy that the debtors lacked the power to revoke the trust due to the interest held by the debtors’ minor granddaughter without obtaining the approval of the Florida circuit court having jurisdiction of the guardianship proceeding, Judge Proctor refused to deny the debtors the homestead exemption on what Judge Proctor termed “a legal technicality” and stated that the decision of the Florida Fourth District Court of Appeal in *Engelke* does not support the conclusion sought by the Trustee in bankruptcy. In essence, Judge Proctor was of the opinion that the debtors should not be denied the protection provided by the homestead exemption provided pursuant to the provisions of Article X, §4(a) of the Florida Constitution, relative to the Residence, merely because the debtors would need to go through the process of obtaining the approval of the state guardianship court to effectuate a revocation of the trust; such a denial “would produce neither a logical or equitable result, and could open Pandora’s box regarding public policy concerns.” In addition, Judge Proctor acknowledged the policy under Florida law to liberally construe the homestead exemption, as was contained in Judge Covington’s opinion in citing to *Hill v. First Nat’l Bank of Marianna*, 84 So. 190 (Fla. 1920).

(a) Note that two other U.S. Bankruptcy Courts have also addressed the issue which was present in *Bosonetto, Alexander, Edwards* and *Cocke*, i.e., will the exemption from creditors provided to individuals with respect to their homestead real property be extended to the beneficial interest in such homestead real property in which the legal title is owned by a revocable trust established by such individual. In a recent decision with respect to a bankruptcy proceeding involving a resident of Connecticut, the bankruptcy judge held that the exemption is lost due to the transfer of the legal title from the individual to the individual’s revocable trust. *In re Dorothy Estarella*, 338 B.R. 538 (Bankr. D. CT 2006). Note, however, that in another recent case with respect to a bankruptcy proceeding involving a resident of Kansas, the bankruptcy appellate panel in affirming the ruling of the bankruptcy court, held that the exemption is available to the
debtor, notwithstanding the transfer of the legal title from the individual to the individual’s revocable trust. *In re Donald Kenton Keifer*, 339 B.R. 749 (Bankr. 10th Cir. BAP KS 2006).

(b) Although one can certainly criticize the holding of *Bosonetto* and argue that the reasoning of the Judge Williamson in *Alexander*, Judge Briskman in *Edwards*, and Judge Covington in *Cocke*, is correct under Florida constitutional law, the question remains “Whose client wants to be the next test case?” Any volunteers?

(5) Waiver of Creditor Protection. With respect to the creditor protection afforded to Florida residents relative to homestead property by Article X, §4(a) of the Florida Constitution, the Third DCA in its original opinion issued on November 30, 2005, held that the homestead exemption provided in Article X, §4(a) of the Florida Constitution could be contractually waived in favor of a debt not expressly permitted in Article X, §4(a) of the Florida Constitution. *DeMayo v. Heller & Chames, P.A.*, 30 Fla. L. Weekly D2692, (Fla. 3d DCA November 30, 2005). *DeMayo* involved a client of a law firm who signed a fee agreement expressly waiving the protection afforded the client relative to his homestead pursuant to Article X, §4(a) of the Florida Constitution. Then on March 15, 2006, the Third DCA, on rehearing, held that such creditor protection cannot be contractually waived in favor of a debt not expressly permitted in Article X, §4(a) of the Florida Constitution. *DeMayo v. Heller & Chames, P.A.*, 31 Fla. L. Weekly D798 (Fla. 3d DCA March 15, 2006). The Third DCA ruled that the provision in the law firm’s fee agreement was not enforceable against the client relative to the client’s homestead real property and cited several decisions of the Florida Supreme Court in support of its holding. In its third time on appeal, the Third District Court of Appeal withdrew its March 15, 2006 opinion and, while ruling that a party to a contract cannot contractually waive his or her right to a homestead exemption under Article X, §4(a) of the Florida Constitution in favor of a debt not expressly permitted in Article X, §4(a) of the Florida Constitution, the court certified the issue to the Florida Supreme Court. See *DeMayo v. Heller & Chames, P.A.*, 934 So.2d 548 (Fla. 3d DCA 2006). The Florida Supreme Court granted review in *DeMayo* and held oral arguments on September 19, 2007.

In the unanimous opinion of the Florida Supreme Court in *Chames v. DeMayo*, issued December 20, 2007, the Court ruled that a waiver of the exemption from forced sale under process of any court afforded to homestead property pursuant to the provisions of Article X §4(a) of the Florida Constitution is not legally effective or enforceable if contained in an unsecured agreement, rather than a mortgage. *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).

In this case, the Respondent, Henry DeMayo, engaged the services of attorney Deborah Chames and the law firm, Heller & Chames, P.A., to represent him in his quest to modify his child support obligations and abate his alimony payments. Petitioners, Deborah Chames and the law firm Heller & Chames, P.A., had Respondent sign a retainer agreement which, among other things, provided that the Respondent (client) was knowingly, voluntarily and intelligently waiving his rights to assert his homestead exemption in the event that a charging lien was obtained by the Petitioners to secure the balance of attorney’s fees and costs. After the Petitioners ultimately withdrew from representing the Respondent in this family law matter, Petitioners obtained a charging lien and final judgment against the Respondent for approximately $33,000.00. The trial court applied the lien to the Respondent’s homestead. The Respondent appealed the trial court’s ruling to the Florida Third District Court of Appeal, arguing that the waiver of the homestead exemption contained in the retainer agreement was invalid. Although the Florida Third District Court of Appeal reversed the trial court’s decision relative to
the lien, the two Judges who formed the majority of the panel noted that they would have ruled otherwise if not bound by the precedent of the Florida Supreme Court.

In holding that the waiver of the homestead exemption in an unsecured agreement is unenforceable, the Florida Supreme Court reiterated the public policy furthered by the homestead exemption, that is, to promote the stability and welfare of the State by securing the homeowner a home so that the homeowner and his or her heirs may live beyond the reach of financial misfortune under demands of creditors who have given credit. Although recognizing that the homestead exemption can be waived by formally mortgaging one’s homestead, the Court reasoned that the nature of such a transaction implies the exercise of discretion and the contemplation of inevitable consequences. Thus, the sale under a mortgage is not a forced sale because it is a sale under consent given pursuant to an agreement where one irrevocably conveys an interest in the collateral described in the mortgage.

Acknowledging that in its previous decision in City National Bank of Florida v. Tescher, 579 So.2d 701 (Fla. 1991) that homestead may be waived pursuant to a marital agreement signed by the parties, such exception pertains to the rights that a spouse has in homestead property not titled in his or her name.

The Florida Supreme Court rejected the grounds which the Petitioners suggested as justifying the enforceability of the homestead waiver in the unsecured agreement. Those grounds consisted of the argument that the 1985 amendment to Article IV, §4 of the Florida Constitution would substitute “a natural person” for “the head of family” changed the purpose of the homestead exemption from protecting the family home into a personal right that may be waived. The Court stated, in essence, that the 1985 amendment was intended to enlarge the homestead exemption to any natural person, rather than merely have it be enjoyed by a head of a family.

The second ground suggested by the Petitioners was that most states now permit waivers. In rejecting this argument, the Court found that most of the states which permit waivers do so in the context of a mortgage or a deed of trust.

The third ground suggested by the Petitioners is that permitting the waiver of the homestead exemption is consistent with other cases holding that various constitutional rights may be waived. While acknowledging that the Court has held that most personal constitutional rights may be waived, the Court distinguished the issue in this case on the basis that the homestead exemption is a right that is designed to protect both the individual and the public; i.e., the debtor, the debtor’s family and the State. In essence, the Court was not willing to depart from 123 years of precedent which was initially established in Carter’s Adm’rs v. Carter, 20 Fla. 558 (1884). The Court did not find a significant change in circumstances or any analytical error to cause the doctrine of stare decisis to yield. Note that the Real Property, Probate and Trust Law Section was an amicus in this case and filed an amicus brief supporting the concept that the purported waiver of the homestead exemption in an unsecured agreement should not be enforceable. Robert W. Goldman of Goldman, Felcoski and Stone, P.A. and John W. Little II of Brigham and Moore, LLP authored this brief on behalf of the Real Property, Probate and Trust Law Section, and should be commended for their efforts.

(6) Miscellaneous Case Law.

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(a) Note that a court can impose an equitable lien in favor of a judgment creditor in cases in which the judgment creditor can established that the debtor used the fraudulently obtained funds to invest in, purchase or improve the debtor’s homestead. See Zureikat v. Shaibani, 944 So.2d 1019 (Fla. 5th DCA 2006).

(b) The proceeds from the sale of one’s homestead remains exempt from forced sale or lien so long as the owner intends prior to and at the time of the sale to reinvest the proceeds in a replacement homestead within a reasonable time after the sale occurs. Rossano v. Britesmile, Inc., 919 So.2d 551 (Fla. 3d DCA 2005); In re Wechsler, 20 Fla. L. Weekly Fed. B51, (Bankr. S.D. Fla. 2006); In re Juan Castro, 20 Fla. L. Weekly Fed. B148 (Bankr. S.D. Fla. 2006). In Castro, supra, Judge Cristol noted that a reasonable time might be as long as two years, but that any post-petition expenditure of a portion of the proceeds for other than the acquisition of a replacement homestead will render the portion expended post-petition a part of the bankruptcy estate, but the fact that the debtor expended a portion of such proceeds pre-petition does not render the remaining proceeds a part of the bankruptcy estate.

(c) Query: Can each spouse own and reside in separate homesteads whereby the separate homestead of each is exempt from forced sale or lien pursuant to the provisions of Article X, §4(a) of the Florida Constitution? See, Colwell v. Royal International Trading Company, 196 F.3d 1225 (11th Cir. 1999); In re Russell, 60 B.R. 190 (Bankr. M.D. Fla. 1986).


b. Inurement of Creditor Protection to Decedent’s Spouse and Heirs.

(1) Constitutional Provisions. As discussed above, Florida law exempts homestead (as determined pursuant to the area and use limitations set forth in Article X, §4(a)(1) of the Florida Constitution) from forced sale under process of any court, and it provides that no judgment, decree or execution shall be a lien thereon, except for payment of taxes and assessments, and other contractual obligations relating to the purchase, improvement or repair of the property. Article X, §4(b) of the Florida Constitution carries over this protection and states that the exemption shall inure to the benefit of the deceased owner’s surviving spouse and heirs. It is noteworthy to add that certain statutory exemptions do not afford this additional constitutional protection to the owner’s spouse or heirs. See Fla. Stat. §222.05.

(2) Case Law Pertaining to the Inurement of Creditor Protection to Spouse and Heirs.

(a) What is an heir? In determining just whom are the heirs of a deceased owner, the Florida Supreme Court opted for kin, rather than next of kin, based on the continuing policy of interpreting the constitutional exemption in an expansive manner. Snyder v. Davis, 699 So.2d 999 (Fla. 1997).

(b) Direction to sell the decedent’s homestead if decedent is not survived by spouse or minor child. When the decedent is not survived by a spouse or minor child, a direction in one’s Will requiring the personal representative to sell the decedent’s homestead results in the proceeds from the sale of the decedent’s homestead being available to pay
administration expenses and debts of the decedent. See Knadle v. Estate of Knadle, 686 So. 2d 631 (Fla. 1st DCA 1996). Note, however, that a recent decision of the Third District Court of Appeal held that a provision in a trust agreement which allocates, against the testamentary gift of the decedent’s homestead to the decedent’s adult daughter, an equal share of the debts of the decedent and administration expenses of the decedent’s Trust, was not enforceable because it does not negate the inurement of the protected homestead to the decedent’s heir and did not rise to the level of directing a sale of the decedent’s homestead ala’ Knadle. Cutler v. Cutler, 32 Fla. L. Weekly D583 (Fla. 3d DCA February 28, 2007).

5. Medicaid Qualification - Institutional Care Program (ICP).

a. Until the enactment of recent federal legislation, the ownership of homestead, irrespective of the value, did not cause the owner to fail to qualify for the institutional care program (generally, custodial nursing home care) under Medicaid irrespective of the fair market value of the homestead.

b. With the passage of the Deficit Reduction Act of 2005 (“DRA”) by Congress and it being signed into law on February 8, 2006, by President George W. Bush, the exemption of one’s homestead from the assets countable in determining eligibility for Medicaid’s institutional care program will no longer be unlimited if the person is single. DRA contains a provision which caps the fair market value of homestead that is exempt in determining eligibility for the institution care program. Unless increased to $750,000, the cap under DRA is $500,000. It appears that the cap contained in DRA will apply in Florida once the Florida Legislature enacts revisions to Florida law pertaining to Medicaid eligibility in light of DRA. There are other very onerous provisions in DRA which affect the ability of an individual to qualify for the Medicaid institutional care program relative to what might otherwise be viewed as de minimis gifts and other transfers during the sixty (60) month period immediately preceding the date upon which the individual otherwise would have become eligible for Medicaid’s institutional care program. See proposed changes to Fla. Admin. Code Rule 65A-1.712 published in Vol. 33, No. 8, February 23, 2007 issue of the Florida Administrative Weekly.

c. If the decedent’s protected homestead passes to a continuing trust created under the decedent’s revocable trust for the benefit of the decedent’s surviving spouse, rather than a testamentary trust created under the decedent’s Will, the value of the homestead will be considered a countable asset of the decedent’s surviving spouse thereby causing the surviving spouse to fail to qualify for the institutional care program (generally, custodial nursing home care).


Protected homestead, as defined in §731.201(32), Florida Statutes, is exempt from the apportionment of estate taxes. Fla. Stat. §733.817(2). This provision, if not waived, can create challenges in some estates in terms of securing sufficient assets to pay the estate tax liability. Moreover, unforeseen results may occur if the exemption contained in §733.817(2), Florida Statutes, is not taken in account when the estate planning is performed. For example, what if the client wanted to devise her $3 million home to her daughter and bequeath an investment portfolio of $3 million to a trust for her drug addicted son?


a. In General. Section 121 of the Code provides taxpayers, who have
owned residential real property for at least two years and who have resided in such property for at least two of the past five years of ownership, with an exemption from the gain otherwise subject to federal income tax upon the sale of such home.


(1) Basis Adjustment Under Code §1014. Upon the death of the owner of an interest in homestead real property, the income tax basis relative to the decedent’s interest is to be adjusted to its fair market value as of the date of the decedent’s death (or the alternate value date if the decedent’s executor makes an election pursuant to the provisions of Code §2032). IRC §§1014(a)(1) and (2).

(2) Special Rules After Death. If sale of the decedent’s homestead occurs after the date of the death of the decedent, but in same calendar year as the year in which the decedent died, the decedent’s surviving spouse is entitled to exclude up to $500,000 of the gain realized from such sale for a period of two (2) years after the date of the death of the decedent. IRC §121(b)(4). Otherwise, the amount which can be excluded from the gross income of the surviving spouse cannot exceed the standard limitation of $250,000. IRC §121(b)(1). In addition, the surviving spouse can tack on the time during which the homestead was owned by his or her deceased spouse for purposes of satisfying the two years of ownership test pursuant to the provisions of §121(a) of the Code. IRC §121(d)(2).

D. Conclusions.

As made clear in this portion of the presentation, homestead has different meanings in different applications. One must be knowledgeable of the rules and the application of the rules pertaining to homestead in determining (i) the ability of an owner to alienate his or her interest in homestead real property during lifetime or to devise his or her interest in protected homestead at death, (ii) the special ad valorem tax exemptions provided to Florida residents and the impact which the death of the owner of protected homestead has on existing ad valorem tax exemptions or limitations, (iii) the existence of the protection from judgment creditors afforded to Florida residents relative to their homestead and the extent to which the protection which a decedent had from forced sale by judgment creditors inures to the spouse, devises or heirs of the decedent upon the decedent’s death, (iv) the impact which the exemption from estate tax apportionment may have on the other devises, and (v) the federal income tax exemption available pursuant to the provisions of §121 of the Code and the effect which a death has that federal income tax exemption. Moreover, estate planning advisors must also be aware of the effect that the transfer of ownership of homestead to a trust may have relative to the restrictions on devise and descent, ad valorem taxes, documentary stamp taxes, Medicaid qualification and creditor protection, and how best to either use or avoid the application of these rules in advance of death.

In light of some of the traps for the unwary which exist relative to Florida’s current constitutional restrictions on the devise of homestead, it may now be time for those restrictions to be removed from, or modified within, the provisions of Article X, §4(c) of the Florida Constitution; this form of paternalism or maternalism is not needed in our modern society.
V. DISCLAIMER.

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