HOMESTEAD

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The Florida Constitution and statutory law create extensive rights in the surviving spouse and heirs of a decedent. These rights include the right to receive protected homestead, the right of a spouse to elect against the will, the right to exempt tangible personal property and the family allowance. While the laws of intestacy and provisions for a pretermitted spouse or child would also be considered statutory rights, they are beyond the scope of this presentation.

I. PROTECTED HOMESTEAD – CREDITOR EXEMPTION AND DESCENT/DEVISE ISSUES

Homestead (also known as "protected homestead" within the probate world) provides very valuable protection from the claims of creditors of the owner, as well as a "cap" on increases in taxable value each year for ad valorem tax purposes. The exemption from the claims of creditors continues at the death of the owner for the benefit of the owner's spouse and heirs. The protection of the homestead property is also extended to the surviving spouse and minor children of an owner, in the nature of restrictions on the descent and devise of the homestead property at death.

A. Defined. The two relevant sources for defining "homestead" are the Florida Constitution and the Florida Statutes.

1. Constitutional Provision. Article X of the Florida Constitution defines "homestead" and the applicable restrictions on forced sale and devise of homestead property:

Section 4. Homestead; exemptions. —

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

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

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

2. Probate Code Provision. The Florida Probate Code in F.S. §731.201(33) defines "protected homestead" as the property described in §4(a)(1), Art. X of the Florida Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under §4(b), Art. X of the Florida Constitution. For purposes of the Probate Code, real property held as tenants by the entirety is not protected homestead.

B. Restrictions on Devise. The Florida Constitution creates a prohibition on the devise of homestead property if the decedent is survived by a spouse or minor child, but it stops

there. One must then look to the Florida Statutes to determine how the protected homestead is to descend. The decedent's interest must qualify for the exemption from creditor's claims for the restrictions on devise to apply.

1. Constitutional Provision. Section 4, Article X of the Florida Constitution provides:

(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.

Note 1: *Holden v. Gardner, 420 So.2d 1082 (1982) held the same definition of homestead used in (a) also applies to (c).*

Note 2*: The Florida Constitution only says "YOU CAN'T DEVISE"… The Florida Statutes say what happens if you don't properly devise or cannot devise a homestead.*

2. Probate Code Provisions. The rules applicable to descent and devise of protected homestead are contained in F.S. §§732.401 and 732.4015.

a. F.S. §732.401 Descent of homestead. —

(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal 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 by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election.

(d) Once made, the election is irrevocable.

(e) The election **must** 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 death, 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, which 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 **by means of □ physical presence or □ online notarization** this _____ day of (month), (year), by (affiant)

(Signature of Notary Public)

(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 F.S. 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 F.S. 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 in joint tenancy with rights of survivorship.

b. Timing of Election for Tenant In Common Interest.

In *Samad v. Pla*, 267 So. 3d 476 (Fla. 2d DCA 2019), the surviving spouse of the decedent neither made the election to take an undivided one-half tenant in common interest in the homestead property, nor filed such a petition within the six-month period after decedent's death as is required by F.S. §732.401(2). Instead, more than seven (7) months after the decedent's death, the surviving spouse moved, pursuant to Florida Probate Rule 5.042(b)(2), for an extension of time to make the election, claiming excusable neglect. The trial court issued an order that granted the surviving spouse an extension of time to file her election and deemed her homestead election timely. However, by its own terms, Rule 5.042(b) does not apply to acts required to be done within a specified time *by statute*. Thus, in over-ruling the trial court order, the 2nd DCA ruled that because the surviving spouse failed to satisfy the requirements set forth in F.S. §732.401(2) (to make the election within six months of date of death), the trial court erred as a matter of law in granting her an extension of time to file her notice of election under that section and in deeming her election timely.

c. Joint Property and Tenants by the Entireties Property.

Key point: Property owned as tenants by the entirety is not homestead for purposes of the restrictions on devise. Neither is property held as joint tenants with right of survivorship.

In *Marger v. DeRosa*, 57 So. 3d 866 (Fla. 2d DCA 2011), the decedent acquired homestead property as joint tenants with rights of survivorship with his mother. At his death, the decedent was survived by his mother, an adult child and two minor children, but no spouse. The court ruled that the mother became the sole owner of the property at her son's death by virtue of survivorship, despite the fact that there were minor children. Citing their prior opinion in *Ostyn v. Olympic*, 455 So.2d 1137 (Fla. 2d DCA 1984), the court held that the decedent's interest in the property terminated at his death and thus, there was no property interest to be protected for the benefit of his minor children.

***Note**: The holdings were codified in F.S. §731.201(33).*

d. F.S. §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 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.

Key point: Ownership of homestead property by a trust will not avoid the homestead devise restrictions if the decedent has a "right of revocation," as defined in F.S. §733.707.

The ownership of homestead property by the trustee of a revocable trust is essentially disregarded for purposes of determining whether the property can be devised; if the property could not be devised by the settlor as owner then it cannot be conveyed to a revocable trust to avoid the restrictions on devise. See, *In Re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th DCA 1981).

***Note**: Johnson cites to Johns v. Bowden, 68 Fla 32 (1914) holding "that which the law forbids to be done directly cannot lawfully be done by indirection."*

F.S. § 736.0201(7). ***NEW*** - As of July 1, 2021, new F.S. § 736.0201(7) became effective and provides that probate courts have jurisdiction over a revocable trust to determine homestead status of real property owned by a trust. This provision only applies to revocable trusts.

Key point: If devised to a spouse, the devise must be one hundred percent in quality and quantity. *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981); *In re Estate of Cleeves*, 509

So. 2d 1256 (Fla. 2d DCA 1987); *Iandoli v. Iandoli*, 504 So. 2d 426 (Fla. 4th DCA 1987). A devise that grants the spouse only a life estate is not a valid devise.

Key point: A "devise" may include a residuary devise, and need not be a specific devise. *Estate of Murphy*, 340 So.2d 107 (Fla. 1976). ***Note****: In Murphy the residue was devised outright to the spouse and that was sufficient to satisfy homestead.* This holding was essentially affirmed in a 2018 First DCA opinion *Webb v. Blue*, holding the following language constituted a valid devise of a homestead property to a friend in a case where the decedent had no spouse or children: "I leave my entire estate to Judith D. Blue."

C. Inurement: To Whom Does Homestead Protection Inure?

1. Snyder v. Davis.

Note: *INUREMENT IS A HUGE ISSUE AND THE LEADING CASE IS SNYDER V. DAVIS, 699 So. 2d 999 (Fla. 1997). From the case:*

We have for review the decision of the Second District Court of Appeal in Davis v. Snyder, 681 So.2d 1191 (Fla. 2d DCA 1996). The district court held that the testator could not both devise her homestead property to her granddaughter and preserve its exemption from creditors. The court found that while the homestead could be devised, the constitutional exemption from creditors would follow the homestead only if it were devised to the person or persons who would have actually taken the homestead had the testator died intestate. In this case the granddaughter would not have taken the homestead under the intestacy statutes because the testator's natural son was still alive at the death of the testator. See §732.103, Fla. Stat. (1995). The court then certified the following question to be of great public importance:

WHETHER ARTICLE X, SECTION 4, OF THE FLORIDA CONSTITUTION EXEMPTS FROM FORCED SALE A DEVISE OF A HOMESTEAD BY A DECEDENT NOT SURVIVED BY A SPOUSE OR MINOR CHILD TO A LINEAL DESCENDANT WHO IS NOT AN HEIR UNDER THE DEFINITION IN SECTION 731.201(18), FLORIDA STATUTES (1993).

Id. at 1193. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

For the reasons expressed, we answer the certified question in the affirmative and quash the district court's decision. We find that in these circumstances the word "heirs," when determining entitlement to the homestead protections against creditors, is not limited to only the person or persons who would actually take the homestead by law in intestacy on the death of the decedent. Instead, we hold that the constitution must be construed to mean that a testator, when drafting a will prior to death, may devise the homestead (if there is no surviving spouse or minor children) to any of that class of persons categorized in section 732.103 (the intestacy statute). (Emphasis added.) To hold otherwise would mean that a testator, when making an effort to avoid intestacy by drafting a will, would have to guess who his or her actual heirs would be on the date of death in order to maintain the homestead's constitutional protections against creditors.

The homestead provision has been characterized as "our legal chameleon." Our constitution protects Florida homesteads in three distinct ways. First, a clause, separate and apart from the homestead provision applicable in this case, provides homesteads with an exemption from taxes. Second, the homestead provision protects the homestead from forced sale by creditors. Third, the homestead provision delineates the restrictions a homestead owner faces when attempting to alienate or devise the homestead property. (Emphasis added.) This case involves the second and third protections described above.

Homestead law in the United States has evolved over time and it is strictly an American innovation. In Florida, moreover, our case law surrounding the homestead provision has its own contours and legal principles. As a result, it is not susceptible to comparisons with similar provisions in other jurisdictions. Importantly, our courts have emphasized that, in Florida, the homestead provision is in place to protect and preserve the interest of the family in the family home. We recently reaffirmed that general policy by stating:

> As a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.

Public Health Trust v. Lopez, 531 So.2d 946, 948 (Fla.1988). Further, it is clear that the homestead provision is to be liberally construed in favor of maintaining the homestead property. See *Butterworth v. Caggiano*, 605 So.2d 56 (Fla.1992); *Hubert v. Hubert*, 622 So.2d 1049 (Fla. 4th DCA 1993); *Moore v. Rote*, 552 So.2d 1150 (Fla. 3d DCA 1989); *In re Estate of Skuro*, 467 So.2d 1098 (Fla. 4th DCA 1985), approved, 487 So.2d 1065 (Fla.1986). As a matter of policy as well as construction, our homestead protections have been interpreted broadly.

In addition, in 1984, the people further expanded homestead provision to substantially broaden the class of people eligible to take advantage of our homestead protections. While those protections had been previously limited to the "head of a family," they are now available to any "natural person." *Compare* art. X, § 4(a), Fla. Const. (1972) ("There shall be exempt from forced sale under process of any court … the following property owned by the head of a family") *with* art. X, § 4(a), Fla. Const. ("There shall be exempt from forced sale under process of any court … the following property owned by a natural person").

Finally, it is important to note that creditors are aware of the homestead provision and its inherent protections. As we discussed in *Public Health Trust*, we will not narrowly interpret the homestead provision simply because "financially independent heirs" may receive a windfall. 531 So. 2d at 950. There we wrote:

> The homestead protection has never been based on principles of equity, see Bigelow [v. Dunphe, 143 Fla. 603, 197 So. 328 (1940)], but always has been extended to the homesteader and, after his or her death, to the heirs whether the homestead was a twenty-two room mansion or a two-room hut and whether the heirs were rich or poor.

Id. Creditors have been on notice for many years that the plain language of the constitution protects homestead property from most creditors.

2. <u>Summary of Inurement</u>.

a. <u>Protection Inures</u>. Article X, Section 4(b) of the Florida Constitution provides that the creditor exemption in 4(a) <u>inures</u> to the "surviving spouse or heirs of the owner."

b. <u>Definition of heirs</u>. In *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997), the Florida Supreme Court held that "heirs" for purposes of the homestead exemption includes any family member within the class of persons categorized in the intestacy statute (F.S. §732.103). See also, *Moss v. Estate of Moss*, 777 So. 2d 1110 (Fla. 4th DCA 2001) and *Traeger v. Credit First Nat'l Ass'n*, 864 So. 2d 1188 (Fla. 5th DCA 2004).

c. **<u>Key point</u>:** The recipient of the property only needs to be within the class of possible intestate heirs, not the actual heirs if there were an intestate situation. For example, a devise of homestead to a grandchild (even if the children all survive and the children – not the grandchildren – would be the actual intestate heirs) will be protected under the inurement clause since the grandchildren are in the class of "heirs".

d. ***<u>Query</u>***: Would a devise to my stepchildren be protected and benefit from the inurement clause? See F.S. §732.103(5).

Traeger v. Credit First Nat'l Ass'n, 864 So. 2d 1188 (Fla. 5th DCA 2004) held that a devise to the son of the decedent's predeceased husband was exempt, as he was an heir.

Moss v. Estate of Moss, 777 So. 2d 1110 (Fla. 4th DCA 2001) held that a devise to the brother and niece of the decedent's predeceased spouse was exempt, as they were heirs.

e. <u>Ad Valorem Inurement</u>. *Kelly v. Spain*, 160 So. 3d 78 (Fla. 4th DCA 2015) addressed what happens when the homestead is owned as tenants by the entirety but only the deceased spouse applied for the property tax exemption on the property and the surviving spouse did not apply for a new exemption. "Does a homestead exemption originally obtained by a husband alone inure to his wife's benefit after his death, where (1) the property was held as a tenancy by the entireties, (2) the wife never filed for her own homestead exemption, and (3) the wife continuously maintained her permanent residence on the property before and after her husband's death? Under Article VII of the Florida Constitution and statutes implementing the Constitution's homestead provisions, we answer the question in the affirmative." *Id*. The husband acquired the property in 1985 and applied for and obtained a homestead exemption on the property. He married later that year. In 2000, husband conveyed the property to husband and wife, as tenants by the entirety. Wife never applied for her own exemption. Husband died in 2006 and wife continued to live on the property. In 2012, the Martin County Property Appraiser became aware of husband's death, retroactively revoked the exemption, and sent wife a tax bill for $283,070.45 (which included a 50% penalty and 15%

interest per year). The appraiser looked at F.S. §196.011(9)(a) and argued that because the ownership had changed, a new application was required. The court read F.S. §196.011 together with F.S. §193.155, which provides that there is no change in ownership for the SOH benefit when the property is transferred to one spouse upon the death of the other. The court also interpreted F.S. §196.155 to provide that a homestead application by one spouse shall be considered a homestead application by both spouses and focused on the fact that with tenants by the entireties ownership, both spouses are considered to own the whole.

D. Residency and Physical Presence Tests.

1. Aliens and "Near" Residents.

a. Florida case law has generally held individuals without a green card or permanent visa (by definition "nonresident aliens") cannot claim Florida homestead protection against creditors as they cannot form the requisite intent to make the home their permanent place of residence.

b. *In re Cooke* held that tourists cannot qualify for homestead exemption as they can't have the requisite intent to permanently reside. *In re Cooke*, 412 So2d 240 (1982). Cooke was a Canadian citizen who was temporarily visiting Florida as a tourist, when he filed a petition for bankruptcy and claimed a residence, he owned in Fort Myers was his homestead. The bankruptcy court held that as an unregistered alien without a permanent visa, Cooke was a tourist and thus could not have the intent to make the property his permanent place of residence – which is necessary to have an exempt homestead.

c. Similarly, *In re Fodor*, 339 B.R. 519 (Bankr. M.D. Fla. 2006) involved a debtor who was a Hungarian citizen, and he was not a permanent U.S. resident. The debtor was married to a U.S. citizen (10 months before filing bankruptcy) and thus was eligible for conditional permanent residence status. However, the debtor did not obtain his conditional permanent residence until 3 months after filing for bankruptcy. The court sustained the objection to the debtor's claimed homestead exemption, stating that as of the date of filing, the debtor could not legally formulate the requisite intent to reside in the house as a permanent residence. ***Note***: The debtor in Fodor was eligible to and ultimately did obtain his permanent residence status just 3 months after filing for bankruptcy, but the court found that was not enough to support the homestead exemption claim.

d. Along the same lines, homestead status was denied in these cases: *In re Boone*, 334 B.R. 979 (Bankr. M.D. Fla. 2006) (visa granted to former husband of debtor, not debtor). See also, *Juarrero v. McNayr*, 157 So. 2d 79 (Fla. 1963) (no ad valorem tax exemption for resident with temporary visa).

Key point: Recently, the case law on the topic of nonresident aliens and homesteads seems to be developing in favor of homestead protections – at least for nonresident aliens who have family residing with them.

Note: Article X, Section 4(a)(1) of the Florida Constitution specifies that a homestead exemption is available up to certain acreage limitations and also "limited to the residence of the owner or the owner's family."

e. In *Garcia v. Andonie*, 101 S. 3d 339 (Fla. 2012), the ad valorem homestead tax exemption was allowed for Honduran citizens residing in the U.S. on temporary visas. The parents owned a home and resided there with their three minor children - who are all U.S. citizens.

f. *In Grisolia v. Pfeffer*, 77 So. 3d 732 (Fla. 3d DCA 2011), the Third DCA ruled that the homestead protection from creditors was available to a widow and minor child of a decedent where, although the decedent was a Venezuelan citizen living in the U.S. on a temporary visa, the decedent demonstrated the requisite intent to make the property the family's permanent residence. This intent was supported by the fact that the decedent and his wife were actively pursuing permanent residence status, and their minor child was born in the U.S. and was a U.S. Citizen. The child resided with his parents in the property since its purchase. Thus, the court concluded a member of the debtor's family (whom the debtor was legally obligated to support and was in fact supporting) had a legal right to reside in the property permanently; therefore, the property was protected homestead.

g. *In re Oyola*, 571 B.R. 874 (Bankr. M.d. Fla. 2017) also extended the homestead protections to a non-citizen, non-resident property owner. In this case, it was undisputed that the debtor was not a permanent resident as of the date of filing for bankruptcy. However, the debtor argued the property was the permanent residence of her family. The court in *Oyola* analyzed the definition of "family" under Florida homestead case law and found that while some courts ruled adult children were not "family" for homestead purposes, where the debtor lived in the residence with her adult daughter and her minor granddaughter, they constituted her "family" for homestead purposes. Thus, although the debtor could not have the intent to reside in the U.S. permanently, the property was still protected homestead since the debtor intended to make the property her family's permanent residence.

2. <u>Physical presence may not be required</u>.

a. The decedent need not reside at the property for it to constitute homestead, as long as the decedent's family whom the decedent was obligated to support resides there. *Bayview Loan Servicing, LLC v. Giblin*, 9 So. 3d 1276 (Fla. 4th DCA 2009). In *Bayview Loan Servicing, LLC v. Giblin*, the Husband owned property in his own name that he purchased for his wife (from whom he was long separated) and daughter to live in. Interestingly, the Husband himself never lived there and maybe never set foot in the home. When he died, the Husband's creditors wanted to sell the property to satisfy their claims, but the court found it was the decedent Husband's homestead under Art X, § 4 (a)(1) which says that a homestead exemption is "limited to the residence of the owner *or the owner's family*…." This case also illustrates the point that a spouse does not lose his or her entitlement to homestead protection even when living separately from his or her spouse for 28 years.

b. In *Beltran v. Kalb*, 63 So. 3d 783 (Fla. 3d DCA 2011), the Third DCA noted that in determining whether a property constitutes a person's homestead, all that is relevant is whether the person intended to make the property the person's homestead and actually maintained the property as the person's principal residence. The court cited to *In re Alexander*, 346 BR 546 (Bankr. M.D.Fla. 2006) and *In re Lee*, 223 B.R. 594 (Bankr. M.D. Fla. 1998) holding **"Homestead status is established by the actual intention to live permanently in a place coupled with actual use and occupancy."**

c. In a fascinating case, *Friscia v. Friscia*, 161 So. 3d 513 (Fla. 2d DCA 2014), the Second DCA recognized homestead in a case in which the decedent owned a one-half [1/2] interest in a Florida residence which was occupied by the decedent's former wife with the children of the marriage, pursuant to a marital settlement agreement. The court found that the property remained the decedent's homestead property. As a result, the decedent's second wife was entitled to claim homestead protection as to the property; however, the court found that the second wife's interest in the property was secondary to and subject to the marital settlement agreement. In other words, it was protected homestead as to the second wife, but she had to wait for her interests to vest.

d. ***Query:*** Is it possible to have two homesteads if an individual has two Florida residences and the individual lives in one and the individual's spouse and/or minor child lives in the other? This does not seem like the logical result, but neither *Giblin* nor *Friscia* addressed the homestead of the individual.

e. In *Baldwin v. Henriquez*, 279 So. 3d 328 (Fla. 2d DCA 2019), the homeowners sold their residence and purchased another property with a house on it on July 10, 2013. The homeowners demolished the existing house on the property in November 2013, without ever moving into the house. During the construction of the new house, the homeowners resided in a leased condominium unit and rented a storage unit for their furniture and personal items. The homeowners timely applied for a homestead exemption and applied to transfer their homestead assessment differential (i.e., the Save Our Homes portability benefit) to their new property for tax year 2015, but they were not able to move into their new home until June 11, 2015. The Property Appraiser denied the homeowners' application because the property was not the homeowners' permanent residence as of January 1, 2015. The homeowners argued that their inability to physically occupy the premises as of January 1, 2015, was not determinative of their ability to claim the property as their homestead because they manifested an intent to use the property as their permanent residence. The 2nd DCA held that based on the plain and ordinary meaning of the constitutional provision providing the homestead exemption, to "maintain" "the permanent residence" on a piece of property, a taxpayer must preserve and continue in possession of a dwelling that the taxpayer physically occupies as a home and intends to return to whenever absent. Therefore, the homeowners were not entitled to a homestead exemption for their property for tax year 2015 because they did not maintain their permanent residence on the property until June 11, 2015, when they began to physically occupy a house on the property.

f. In *Yost-Rudge v. A to Z Properties, Inc.*, 263 So. 3d 95 (Fla. 4th DCA 2019), the husband sold the property, claimed by the wife to be protected by homestead, without the wife's agreement or signature on the warranty deed. The buyer of the property

claimed that the property was abandoned, and therefore lost its homestead protection, because an injunction for municipal violations prohibited the husband and wife from occupying the property. The wife maintained that her family was "forced off" the property and provided evidence that indicated that even after the family was removed from the property, she was making efforts to remediate it with the intention of returning to the property. The trial court entered partial final summary judgment in favor of the buyer. The Fourth DCA held that the trial court erred in entering partial final summary judgment because the question of the wife's intent to abandon the homestead property was still in dispute.

E. What Property Qualifies for Creditor Protection?

1. *IMPROVEMENTS* on rural homestead, including structures such as a *barn, fences, and even crops*. The fact that is also used for business purposes is irrelevant. *Armour & Co. v. Hulvey*, 74 So. 212 (Fla. 1917). See also, *Davis v. Davis*, 864 So. 2d 458 (Fla. 1st DCA 2004).

2. *APPURTENANT STRUCTURES*. In a municipality, homestead is limited to the personal residence and conventional appurtenances such as a pool. *White v. Posick*, 150 So. 2d 263 (Fla. 2d DCA 1963).

3. *ADJACENT PARCELS* may be included in protected homestead. The Florida Supreme Court, in *Quigley v. Kennedy & Ely Ins., Inc.*, 207 So. 2d 431, 433 (Fla.1968), extended homestead protection to adjacent parcels of rural land to the extent of 160 acres, irrespective of platting or use. If the property is located in a municipality, adjacent parcels may be included in protected homestead if the adjacent parcel is also the residence of the owner or the owner's family. *White v. Posick*, 150 So. 2d 263 (Fla. 2d DCA 1963).

4. PROPERTY HELD IN THE NAME OF A *CORPORATION* MAY NOT BE CLAIMED AS HOMESTEAD, even where the sole shareholder resides on the property. *In re Duque*, 33 B.R. 201 (Bankr. S.D. Fla. 1983) and *Prewitt Management Corporation v. Nikolitis*, 795 So. 2d 1001 (Fla. 4th DCA 2001). In *Dejesus v. A.M.J.R.K., Corp.* (2nd DCA 2018) the 2nd DCA confirmed that there can be no homestead exemption on real property held in a corporation, even if a "natural person" resides on the property.

5. Likewise, PROPERTY HELD IN THE NAME OF A *LIMITED PARTNERSHIP* does not qualify as homestead. *In re Steffen*, 391 B.R. 874 (Bankr. M.D. Fla. 2008).

6. A 3,000 square foot *HOUSEBOAT* qualified as homestead where it was occupied as a permanent residence, supplied with utilities, and did not have a motor. *Miami Country Day School v. Bakst*, 641 So. 2d 467 (Fla. 3rd DCA 1994).

***Note**: In re Mead, 255 B.R. 80 (Bankr. S.D. Fla. 2000) said that a 34-foot cabin cruiser docked and lived in was protected, but In re Hacker, 260 B.R. 542 (Bankr. M.D. Fla. 2000) (also involving a 34-foot boat) disagreed. This issue is not clear.*

7. A *MOTOR HOME* may qualify as homestead depending on factors such as lack of mobility, actual occupancy, access to utilities, and lack of other residence. *In re Yettaw*, 316 B.R. 560 (Bankr. M.D. Fla. 2004). *MOBILE HOMES* used for residences (on leased land) can qualify as well. But the exemption is not available for vehicles used for transportation.

8. A *PARTIAL INTEREST* (as an undivided one-half tenant in common) held in revocable trust was treated as homestead. *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006).

9. *LEASEHOLD INTERESTS* may qualify for homestead protection from creditors' claims. FS 222.05 protects persons owning and occupying dwelling houses (e.g., mobile homes) on land leased but not owned. Also, a cooperative lease interest (condo owned as a 99-year land lease) qualified. *Geraci v. Sunstar EMS*, 93 So. 3d 384 (Fla. 2d DCA 2012).

10. LEASEHOLD INTERESTS AND AD VALOREM TAX BENEFITS - a lease of 98 years or more qualifies for homestead ad valorem tax treatment. *Higgs v. Warrick*, 994 So. 2d 492 (Fla. 3d DCA 2008) and F.S. §196.041. A year-to-year lease does not qualify as homestead for creditor protection. *In re Tenorio*, 107 B.R. 787 (Bankr. S.D. Fla. 1989).

Review Higgs v. Warrick, 994 So. 2d 492 (Fla. 3d DCA 2008).

In a November 12, 2008, opinion, the Third District Court of Appeal affirmed a final summary judgment of the 16th Judicial Circuit Court for Monroe County. On June 4, 2009, the Florida Supreme Court declined to exercise jurisdiction notwithstanding certification of conflict by the Third District, ending the Monroe County property appraiser's fight to revalue the homestead of William L. Warrick as a result of the termination of his qualified personal residence trust (QPRT). The ruling is very helpful to planners who work with clients who funded QPRTs and worry the clients may lose significant built-up tax benefits as a result of a change in owner upon the expiration of the QPRT term.

> F.S. §196.031(1)(a) states, in relevant part:
>
> Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence … is entitled to an exemption from all taxation … on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution.
>
> F.S. §196.041(1) states, in relevant part:
>
> [L]essees owning the leasehold interest in a bona fide lease having an original term of 98 years or more in a residential parcel or in a condominium parcel . . . shall be deemed to have legal or beneficial and equitable title to said property.

Therefore, as stated in F.S. §196.041(1), a lessee under a bona fide 98-year lease is deemed to have legal or beneficial and equitable title to the homestead property subject to the

lease. Further, as stated in F.S. §196.031(1)(a), every person who has legal or beneficial and equitable title to real property and resides thereon as his or her personal residence qualifies to receive a homestead exemption, and is treated for all homestead purposes (including SOH) as a fee simple owner.

The statutes create several benefits for the owner. These benefits include the lessee's entitlement to the annual homestead exemption provided in F.S. §196.031 and the annual assessment increase cap provided in F.S. §193.155.

In *Warrick*, the property appraiser did not argue that the statutes were unclear. Rather, the property appraiser argued that the above-cited provisions of §196.041(1) should be interpreted to apply only to condominiums and cooperative apartments. That argument was based upon the property appraiser's interpretation of the Florida Constitution, particularly the 1968 amendments.

Fortunately for Warrick, the Florida Supreme Court has consistently held that the doctrine of separation of powers precludes executive officers or agencies from challenging the constitutionality of validly enacted statutes they are directed to enforce.[7]

Warrick's counsel argued that the property appraiser's interpretation — that only condominium or cooperative apartment lessees are entitled to take advantage of the 98-year lease provision of F.S. §196.041(1) — was contrary to the plain meaning of that statute. The statute explicitly deals both with condominiums and cooperative apartments and with leases of a "residential parcel," such as the single-family home at issue in the *Warrick* case. The first sentence of F.S. §196.041(1), listing the persons who "shall be deemed to have legal or beneficial and equitable title" to a potential homestead property separately addresses a 98-year lease "in a residential parcel or in a condominium parcel as defined in Chapter 718." The second sentence of F.S. §196.041(1) addresses cooperative apartments separately, stating "[i]n addition, a tenant-stockholder or member of a cooperative apartment corporation" may also claim a homestead. Thus, F.S. §196.041(1) applies to the owners of a "residential parcel," a "condominium parcel," and a "cooperative apartment corporation." In his brief and arguments, the property appraiser apparently ignored the statute's reference to "a residential parcel" as well as the disjunctive "or" in the statute. The court agreed that the plain language supported Warrick's position.

The crux of the legal argument on appeal, and the heart of the legal argument in the summary judgment proceeding, related to the constitutional issue regarding the lack of standing of a property appraiser to challenge a statute. Therefore, the Third District Court of Appeal could have issued a simple per curiam affirmance of the Third District ruling, or it could have issued an opinion along those narrow lines of standing.

However, the court did not rule that way. Instead, the Third DCA went out of its way to write a decision that directly addresses the 98-year lease. The court found:

> On appeal the property appraiser contends that the VAB misinterpreted the applicable homestead exemption statutes. The homeowner, however,

> asserts that the trial court correctly entered summary judgment based upon the homestead statutes. *We agree with the homeowner*. The plain and ordinary meaning of sections 196.031 and 196.041 clearly provides that a 98-year-plus lessee of a residential parcel permanently occupied as a residence qualifies for a homestead exemption. Therefore, both the VAB and the trial court correctly determined that the homeowner should receive a homestead exemption. (Emphasis added.)

The court's focus on the substance of the 98-year lease argument was somewhat of a surprise for the attorneys involved. The lack of standing argument was the focus of the briefs and oral agreement, and it seemed like a virtually unbeatable defense based upon the position the property appraiser took in this case. Therefore, it was an unexpected and yet positive surprise that the Third District Court of Appeal specifically addressed the substantive issue of the 98-year lease and expressly held such leases qualify for homestead exemptions as defined in the relevant statutes.

Warrick is favorable for those who counsel and represent clients seeking homestead and SOH protection via 98-year leases. It now seems clear that holding an interest as lessee under a 98-year lease meets the standards of F.S. §§196.041 and 196.031 to create the requisite beneficial interest in real property to qualify for homestead and SOH protections. Thus, *Warrick* is authority that 98-year leases "work" to create and preserve homestead and SOH protections.

<u>Caveat</u>: The impact of Section 2036, IRC on those who retain 98+ year leases is still unclear and unknown.

The excerpts above were previously published as part of *Higgs v. Warrick: Lessees of 99-year Leases Qualify for Homestead and Save Our Homes Tax Exemption Purposes* by Jeffrey A. Baskies and John H. Pelzer, The Florida Bar Journal, Vol 83, No. 10 (November 2009).

11. A CONDOMINIUM is treated as homestead property. *Weiss v. Stone*, 220 So. 2d 403 (Fla. 3d DCA 1969) and *King v. King*, 652 So. 2d 1199 (Fla. 4th DCA 1995). But be sure that the condominium does not exceed the acreage limitation. See *Braswell v. Braswell*, 890 So. 2d 379 (Fla. 3d DCA 2004) (a case of first impression). In *Braswell*, the wife (Renee) obtained three final judgments against husband (Glenn). Wife tried to enforce the judgments against the husband's four residential penthouse condominium units grouped into a single-level condominium located at 1500 Ocean Drive, Miami Beach, Florida. The condominium documents declared that husband had a 6.7034% interest in the common and limited common elements of the property. Wife argued that the total square footage for homestead purposes was 37,599 square feet. She calculated the total based upon the following: 11,355 square feet for all of the four units, plus 17,559 square feet representing Glenn's share of the common elements (6.7034% of 261,945 square feet), plus 8,685 square feet representing husband's use of the portion of the roof. (A ½ acre is equivalent to 21,780 square feet.) The court rejected wife's calculation but the majority did not offer an alternative. The concurring

opinion written by Judge Fletcher, however, indicated that the calculation would be performed as follows:

> (1) determine the total contiguous ground area of the condominium development, (2) subtract from that the footprint (the ground area) covered by the structure or structures containing the residential units, then (3) multiply the resulting figure by the unit's percentage interest, and (4) add back the square footage of the footprint of the residential unit itself. Thus, a theoretical development on ten acres (425,600 square feet) with a residential structure footprint of four acres (170,240 square feet), provides six acres (255,360 square feet) of non-residential ground area. If a unit owner owns 5% of the common area, his/her square footage of ground not covered by residential structures is 12,768 (255,360 x .05 = 12,768). By now adding back the square feet of the footprint of the unit itself, for say a 3,000 square foot unit (12,768 square feet plus 3,000 square feet) we arrive at 15,768 square feet of the unit owner's contiguous land.

12. CO-OP APARTMENTS are Treated Differently for Different Aspects of the Homestead Exemption – Creditor Protected but not Devise Restricted. The Florida Supreme Court has held that, for purposes of descent and devise, A COOPERATIVE UNIT does not qualify as homestead. *In re Estate of Wartels*, 357 So. 2d 708 (Fla. 1978). However, the Fifth DCA held to the contrary for purposes of exemption from creditors' claims. *Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566 (Fla. 5th DCA 2002). The decision in *Wartels* applied law that pre-dated the Florida Cooperative Act (F.S. Chapter 719, enacted in 1976), so it is arguable that the Act clarifies that a cooperative apartment is an interest in real property.

a. In *Phillips v. Hirshon*, 958 So. 2d 425 (Fla. 3d DCA 2007), the Third DCA certified to the Florida Supreme Court the question of whether *Wartels* was still good law. The Florida Supreme Court took briefs and heard oral arguments but then decided not to rule on procedural grounds. For now, it appears coops are creditor protected (*Southern Walls*) but not devise restricted (*Wartels*) even though the Florida Constitution seems to apply the same definition to both provisions of Article X, Section 4.

b. The commentary of the *Southern Walls* court is instructive:

> The Constitution limits the homestead land area that may be exempted, but it does not define or limit the estates in land to which homestead exemption may apply; therefore, in the absence of controlling provisions or principles of law to the contrary, the exemptions allowed by section 1, article 10 [now Article X, section 4], may attach to any estate in land owned by the head of a family [now natural person] residing in this state, whether it is a freehold or less estate, if the land does not exceed the designated area and it is in fact the [natural person's] home place.

S. Walls, Inc., 810 So. 2d at 570 (quoting *Coleman v. Williams*, 200 So. 207 (Fla. 1941), which was quoting the concurring opinion in *Menendez v. Rodriguez*, 143 So. 223 (Fla. 1932).

c. In *Walters v. Agency for Health Care Admin.*, 44 Fla. L. Weekly D2898a (Fla. 3d DCA 2019), *rev. dismissed* June 23, 2021, the decedent died on August 29, 2017, and left behind, as her sole heir, her adult daughter (the "Appellant"). The Appellant petitioned the probate court for summary administration of the decedent's intestate estate, and listed the decedent's interest in a cooperative apartment as the sole asset of the estate. The Appellant described the cooperative apartment as "PROTECTED HOMESTEAD" on the petition for summary administration. Following the notice to creditors, which included the Agency for Health Care Administration ("AHCA"), AHCA filed a statement of claim against the estate and objected to the Appellant's petition for homestead protection. The trial court relied upon *Wartels* and *Hirshon*, found that a cooperative apartment cannot be considered homestead property (as it does not constitute an interest in realty) and denied the Appellant's petition to declare the cooperative stock as homestead property. The Third DCA affirmed the trial court's decision, and held that the case falls within the devise and descent category. In addition, the Third DCA certified the same question to the Florida Supreme Court as in *Hirshon*. The Court said: "And though our opinion in *Hirshon* questioned the continued vitality of the Florida Supreme Court's decision in *Wartels*, we nevertheless concluded that our proper institutional role obligates us to adhere to *Wartels*…." And the court certified the same question again.

d. **F.S. § 719.103(25)**. ***NEW*** - As of July 1, 2021, new Fla. Stat. §719.103(25) became effective and provides that a unit in a co-op is an interest in real property. As a result, such units now quality as homestead property for any purpose under Article X, s.4 of the Florida Constitution.

13. A SINGLE-FAMILY RESIDENCE that was the decedent's residence at the time of his death qualified for the homestead exemption under article X, section 4, of the Florida Constitution, protecting it from the decedent's judgment creditors even though three bedrooms were being rented to tenants at the time of the decedent's death, so that the residence passed from the decedent to his heirs, intact and undivided. See *Anderson v. Letosky*, 304 So.3d 801 (Fla. 2d DCA 2020). In *Anderson*, the decedent occupied a single-family residence as his homestead during his life and rented three of the four bedrooms to individuals who were also permitted to use the common areas of the residence. After the decedent's death, his creditors filed a caveat and a statement of claim with respect to three judgment liens filed against the decedent. The decedent's son petitioned the probate court for a determination that the four-bedroom residence he inherited from his father constituted exempt homestead property that was protected from forced sale to satisfy the claims of the decedent's judgment creditors. The probate court ruled that the rented portion of the decedent's residence lost its constitutional homestead protection, and therefore, seventy-five percent (75%) of the property was subject to the claims of the decedent's judgment creditors; only the remaining twenty-five percent (25%) passed to the decedent's son as protected homestead property exempt from forced sale. The decedent's son appealed, and the 2nd DCA found that the probate court erred by not affording homestead protection to the entirety of the property.

The 2nd DCA looked to its decision in *First Leasing & Funding of Florida, Inc. v. Fiedler*, 591 So. 2d 1152 (Fla. 2d DCA 1992), which suggested that when a debtor lives on a property and rents part of it to tenants, a two-part analytical framework determines if the constitutional homestead exemption extends to the debtor's entire property:

> First, a court must determine whether the debtor's residence is a fraction of the entire property; and second, a court must determine whether the property can be severed—that is, by using an imaginary line the residence can be severed from the remainder of the property.

The 2nd DCA distinguished the single-family residence at issue in *Anderson* from a duplex or triplex at issue in other cases and found that (i) the decedent resided in the residence and shared the common areas with the tenants, and (ii) the rented bedrooms could not be "severed from the residence by an imaginary line without destroying its utility as a single-family residence."

The 2nd DCA also reviewed the court's decision in *In re Makarewicz*, 130 B.R. 620, 621 (Bankr. S.D. Fla. 1991):

> Noting that it did not intend to remove a homeowner's homestead exemption simply because commercial activity takes place within the homeowner's living space, the *Makarewicz* court held that a homeowner "does not necessarily abandon his or her homestead simply because he or she may rent or lease portions thereof."

Thus, the 2nd DCA held that the renting of three bedrooms did not eliminate the decedent's claim of homestead exemption as to the entire property. In reversing the probate court, the 2nd DCA held that article X, section 4, of the Florida Constitution protected the subject homestead property from the reach of the decedent's judgment creditors so that upon the death of the decedent, the entire property passed, undivided, directly to the decedent's son, protected from forced sale to pay the decedent's judgment creditors.

F. <u>Interest of the Personal Representative or Trustee</u>.

1. Homestead vests on death, even in the absence of a court order confirming homestead status. *Estate of Hamel v. Theodore Parker, P.A.*, 821 So. 2d 1276, 1280 (Fla. 2d DCA 2002). *Aronson v. Aronson*, 81 So.3d 515 (Fla. 3d DCA 2012) (title vests "in the twinkle of an eye").

2. The Fourth District Court of Appeals held in *Buettner v. Fass*, 21 So. 3d 114 (Fla. 4th DCA 2009) that the personal representative has no ownership interest in the protected homestead, and accordingly could not pursue an eviction of the decedent's son who inherited the property.

3. Protected homestead is not a probate asset and may not be used to satisfy estate obligations. The Florida Supreme Court in *McKean v. Warburton*, 919 So. 2d 341 (Fla.

2006) confirmed that protected homestead is not an asset in the hands of the personal representative so it could not be used to pay the estate's creditor's claims, expenses of administration, or satisfy devises, even where it passes as part of the residue of the estate. See also, S*nyder v. Davis*, 699 So. 2d 999 (Fla. 1997). The court in *Engelke* (from 2006) notes that unless the homestead is directed to be sold, it cannot be used to satisfy claims and expenses of an estate. "A homestead devised to an heir is protected from forced sale to pay the expenses of administering the estate. It is only when the testator directs that a freely devisable homestead be sold and distributed to a devisee that the constitutional protection from creditors is disregarded." *Engelke*, 921 So. 2d at 698 (citations omitted).

4. A personal representative may not sell protected homestead if it passes to heirs, either by devise or by operation of law. Earlier decisions indicated that the personal representative could sell the homestead. Then in 2001 F.S. §733.607 of the Probate Code was amended to state specifically that the protected homestead was excepted from the personal representative's general authority to take possession of the estate assets. The Fifth Circuit, in *Harrell v. Snyder*, 913 So. 2d 749 (Fla. 5th DCA 2005), has clearly held that the personal representative has no authority to sell protected homestead that has been validly devised or passes by operation of law to heirs.

5. **Direction to Sell Cases and *NEW* Statute.** A direction to sell devisable homestead, however, overrides the inurement and causes the property to lose its protected status. Thereafter, the personal representative may sell protected homestead if expressly directed to do so in the will (i.e., not via a general power of sale). In *Estate of Price v. West Florida Hospital, Inc.*, 513 So. 2d 767 (Fla. 1st DCA 1987), the court held that when the will contains a direction to sell the homestead and distribute the proceeds, the property loses its protected status and is then subject to the claims of creditors. See also, *Knadle v. Estate of Knadle*, 686 So. 2d 631, 632 (Fla. 1st DCA 1997) (holding that because a will specifically directed that homestead property be sold and the proceeds placed in the residue for distribution along with other assets, it lost its homestead character); *Thompson v. Laney*, 766 So. 2d 1087, 1088 (Fla. 3d DCA 2000) (confirming that where a will directs that homestead property be sold and the proceeds distributed, the proceeds lose their homestead protection). However, it appears that the property being subject to a contract for sale at the moment of the owner's death is not akin to a direction to sell. *In re Estate of Hamel*, 821 So. 2d 1276 (Fla. 2d DCA 2002)

6. A notable progeny of the *Warburton* (supra) decision is *Cutler v. Cutler*, 994 So. 2d 341 (Fla. 3d DCA 2008), where the decedent specifically devised the protected homestead to one child and a vacant lot to the other. In the residuary clause of the will the testatrix directed that if her estate was insufficient to pay all claims and expenses of administration (which of course it was not), then the shortfall was to be borne equally by the specific devises to her children. The court held that even though the decedent did not direct the sale of the homestead property, she did direct that it be used to satisfy her debts and this direction was the equivalent of a direction to sell. The child who received the protected homestead took it "impressed with the obligation to pay the testatrix's debts" and could be forced to contribute to the shortfall from her share. *Id*. at 346. The dissenting opinion in *Cutler* and the initial opinion (later withdrawn) in that case seem more in line with existing law on directions to sell and the inurement of the homestead protection to heirs.

7. In *Mullins v. Mullins*, 274 So. 3d 513 (Fla. 5th DCA 2019), the decedent died testate, leaving behind her three (3) surviving children, Robert, Kenneth and Carla. The decedent's Last Will and Testament devised her homestead property to Robert, Kenneth and Carla, in equal shares, subject to a life estate in the property for Robert and Kenneth. The probate court entered an order determining homestead ("Homestead Order"), wherein it determined that the homestead property was properly devised and exempt from administration of the estate or claims of the decedent's creditors. The Homestead Order reflects that the homestead property was devised in equal shares to the decedent's three (3) children, but fails to mention the life estate in the property for Robert and Kenneth. Kenneth and Carla filed a complaint to partition the property and alleged that the siblings own the property in equal parts as stated by the Homestead Order. The court stated that "the Homestead Order in this case did not create new rights, but rather explained or clarified the rights that already existed by operation of law." *Id.* at 517. Therefore, the probate court's order determining homestead did not eradicate the life estate for Robert and Kenneth. In addition, the consent to the Homestead Order signed by Robert, Kenneth and Carla did not alter the interests, shares, or amounts to which they are entitled under the will. Finally, the court held that the Homestead Order in this case did not constitute a title transaction, as defined by 712.01(3), Florida Statutes (2011), which would have extinguished the life estates in the property. Therefore, the life estates in the homestead property were not eradicated, and the trial court erred in ordering a partition and sale of the real property.

8. **F.S. § 736.1109**. ***NEW*** - As of July 1, 2021, new Fla. Stat. § 736.1109 became effective and applies to revocable and testamentary trusts that hold an interest in a decedent's protected homestead at death. The new section is intended to clarify existing law and applies to the administration of trusts and estates of decedents who died before, on, or after July 1, 2021.

a. **F.S. § 736.1109(1)**. - Ownership of homestead by a decedent in a trust does not violate the constitutional restrictions on a devise of homestead. If there is an improper testamentary devise in the trust, the property will pass to the same heirs who would inherit it as if the decedent died owning the property directly and had attempted an invalid testamentary devise. This means that F.S. § 732.401 of the Probate Code would apply, and the title would pass at death despite being titled in the trust.

b. **F.S. § 736.1109(2)**. - A power of sale or general direction to pay debts, expenses and claims of the decedent within a trust instrument does not subject an interest in the protected homestead to the claims of decedent's creditors, expenses of administration and obligations of the decedent's estate.

c. **F.S. § 736.1109(3)**. - Homestead property owned by a decedent that is protected homestead (directed to pass to an heir) and is devisable, passes automatically at death to the heir and is not included in the probate estate. Under this provision, when a trust owning the property has a direction for sale, the trustee retains title to the property, and it does not pass automatically to the heir. However, if the decedent's last will requires that property be sold and the proceeds to be divided among the decedent's heirs or applied to estate obligations, then it is included in the probate estate.

G. Homestead Held in Further Trust for a Beneficiary May Not be Protected.

Note: This *is a tough issue…if it shows up, hopefully it's an essay so you can explain….* When is homestead devised to a trust not protected homestead? It depends.

1. Not Protected.

In *Elmowitz v. Estate of Zimmerman*, 647 So. 2d 1064 (Fla. 3d DCA 1994), the court held that homestead lost its protected status when the beneficiary had a mere income interest and no specific rights were granted to the use or occupancy of the homestead real property. The beneficiary's use of the property was at the discretion of the trustee, who could sell it without the beneficiary's consent.

2. Protected.

a. Contrast *Elmowitz* to *In re Donovan*, 550 So. 2d 37 (Fla. 2d DCA 1989) (reading the decedent's will and revocable trust together) a devise of homestead to a trust for wife that was to terminate within forty-five (45) days following the husband's date of death or upon the payment of all final expenses and any death taxes assessed against the estate (with such date to be determined by trustee), where wife was sole beneficiary and trustee was okay and exemption inured – because a "just debts" provision did not affect the ultimate devise and under a doctrine of merger analysis (no other beneficiary).

b. In *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1992) (testamentary trust for daughter) and *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006) where the trust provisions gave the spouse or child a specific right to the use of the residence for life with the remainder to children from a prior marriage upon her death, the courts ruled the homestead exemption inured to the trusts as beneficiaries.

c. In *Downing*, the court said the trustee had no more than a supervisory interest in the homestead holding it for the daughter, and the court said "if the facts were otherwise, the result may have been different."

H. Waiver of Protected Homestead Rights by Spouse.

1. F.S. §732.702(1) of the Probate Code provides that a spouse may waive his or her rights to protected homestead, before or after marriage, by a written agreement signed by the waiving party in the presence of two subscribing witnesses.

2. In *City National Bank v. Tescher*, 578 So. 2d 701 (Fla. 1991), the Florida Supreme Court likened the surviving spouse's execution of a valid nuptial agreement to having predeceased the testator. Note that the waiver, to be valid, must be informed and knowing and by statute must include a fair disclosure of each spouse's assets if entered into after the marriage.

3. The scope of the *Tescher* decision was expanded by the Florida Supreme Court in *Hartwell v. Blasingame*, 584 So. 2d 6 (Fla. 1991), to confirm that descendants who

would have inherited the property in the absence of the waiver do not have standing to contest the waiver.

4. The timing of the nuptial agreement and the applicable will (or trust) should be carefully considered. See *Flaherty v. Flaherty*, 128 So. 3d 920 (Fla. 2d DCA 2013).

> After living together for several years, the former husband proposed marriage to the former wife on February 14, 2002. The former husband first mentioned a prenuptial agreement to the former wife in early June 2002. He delivered the first draft of the prenuptial agreement in late June 2002, less than one month before their July 13, 2002 wedding date. Upon delivery of the first draft, the former husband gave the former wife the names of a few attorneys to consult with regarding the prenuptial agreement. The former wife met with an attorney on July 2, 2002, eleven days before the wedding. The attorney initially advised her not to sign the prenuptial agreement because it waived all of her rights to an elective share, required a release of any interest in assets acquired during the marriage, and waived her rights to any form of alimony or award of attorney's fees. Nevertheless, the attorney told the former wife that she would contact the former husband's attorney in an attempt to revise the agreement. Unfortunately, the former wife did not hear from her attorney again until after the wedding. The wedding took place in Las Vegas, and the former wife left a few days early to begin preparations. The next time she saw the prenuptial agreement was when she picked up the former husband at the Las Vegas airport at 11:30 p.m. the night before the wedding. He handed the final draft to her and told her to sign it and get it notarized. She frantically went about searching for a notary in Las Vegas until 2:00 a.m. and did not read the agreement before she signed it. The final draft of the prenuptial agreement signed by the former wife was identical to the first draft except for two revisions that allowed for limited alimony based on the former husband's current net worth and the former husband's agreement to provide her with health insurance. The former wife's attorney received the final executed prenuptial agreement in late July after the wedding. On August 2, 2002, she sent a letter to the former wife wherein she vaguely expressed that the prenuptial agreement remained unfavorable and inequitable. Rather than advise her about any legal recourse against the prenuptial agreement, the attorney requested that the former wife call her if she had any concerns. The former wife filed the letter away and did not pursue the prenuptial agreement further. The former wife's petition for dissolution of marriage did not mention the prenuptial agreement. In his answer, the former husband asserted that the prenuptial agreement should govern and settle issues of equitable distribution and support between the parties. In response, the former wife filed a verified motion to set aside the prenuptial agreement. The motion to set aside the prenuptial agreement was heard in December 2009. The court heard testimony from the parties, their respective witnesses, and their attorneys and ruled that the former wife signed the prenuptial

> agreement under duress and declared it voidable, making it subject to the equitable defenses of ratification and laches. See *Bakos v. Bakos*, 950 So.2d 1257, 1259–60 (Fla. 2d DCA 2007). Thereafter, the court denied the motion to set aside the prenuptial agreement because the former "wife's inaction" after being notified by her attorney of the inequity of the agreement operated as a ratification of the agreement. The court also found that the former wife's more than six-year delay in challenging the prenuptial agreement constituted laches. … Inexplicably, the trial court went where no Florida court has gone before and raised the defenses of ratification and laches, relying on Bakos to support its decision to uphold the prenuptial agreement. Bakos is factually distinguishable because while the parties executed a prenuptial agreement the day before the wedding, they also executed a postnuptial agreement six years into the marriage. The issue before our court was thus whether the voidable prenuptial agreement could be ratified by the postnuptial agreement. Here, there is no such issue…. The parties concede that no case in Florida, nor any case in any other jurisdiction, has held that the equitable defenses of ratification and laches apply to validate a voidable prenuptial agreement on the basis that the disadvantaged spouse did not take some form of legal action during the parties' intact marriage to challenge the agreement. … We … decline to apply the equitable defenses of ratification and laches to validate a prenuptial agreement based upon a spouse's failure to seek revision, amendment, or to set aside a prenuptial agreement during the parties' marriage. … (emphasis added)

5. In *Steffens v. Evans*, 70 So. 3d 758 (Fla. 4th DCA 2011), the decedent created a will that left the majority of his estate to his second wife. A few years, and some marital difficulties later, the decedent and the second wife signed a post-nuptial agreement where they each waived all rights to the other's estate. After confirming that "all rights" does in fact mean what it says, including homestead and elective share rights, the court went on to confirm that the waiver of all rights in the 2007 post-nuptial agreement included a waiver of all benefits that would have passed to the second wife under the decedent's 2002 will. The court broadly construed the waiver under F.S. §732.702 to wipe the slate clean. The decedent would have had to execute a new will to reinstate any gifts to the second wife.

6. In *Rutherford v. Gascon*, 679 So. 2d 329 (Fla. 2d DCA 1996), the surviving spouse (Mrs. Smith) signed a document purporting to waive her elective share in the probate estate and purporting to accept a life estate in the homestead property. The court held that this document was not a valid homestead waiver, stating "In order to find that a survivor spouse has waived/relinquished homestead protection, evidence must demonstrate the survivor's intent to waive the constitutional and statutory claim to homestead property."

7. In *In re Estate of Cleeves*, 509 So. 2d 1256 (Fla. 2d DCA), rev. denied, 518 So.2d 1273 (1987), and rev. denied, *Cleeves v. Jewett*, 518 So. 2d 1274 (1987). The fact that Mrs. Smith treated the condominium as a probate asset by including it in the settlement agreement does not evince her intent to relinquish her homestead rights. As [the personal

representative of Mrs. Smith's estate] aptly argues, "there can be no waiver without knowledge of that being waived."

8. Contrast this with F.S. §732.702, which states in part, "Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver."

9. For an interesting case where the surviving spouse is also a creditor, see, *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006). Paul Engelke and his wife, Judy, owned an individual one-half interest in their homestead property (as tenants in common) in separate inter vivos trusts when Paul died. *Id.* at 694. At the time of his death, he had three adult children from a previous marriage. *Id.* In a prenuptial agreement, Paul and Judy waived their homestead rights under Article X, section 4(c) of the Florida Constitution. Because Judy waived her homestead rights as a spouse and Paul had no minor children, there was no limitation on his ability to devise his individual one-half interest in their home. *Id.* at 696. Paul's trust instrument provided that after his death, Judy would have the right to live in the residence during her lifetime, provided that she pay all of the expenses to maintain the home. Upon her death or removal from the home, Paul's children would receive the property through the residuary provisions of the trust. *Id.* at 694. Judy, as personal representative, unsuccessfully attempted to force a sale of the homestead to pay creditor claims in the estate, including her own claims. In addition to permitting the devise to the trust, the court also found that the exemption from creditors' claims was available since the property was owned by a "natural person", even though in a revocable trust. *Id.* at 696.

I. Waiver By Deed Cases and Statute.

1. **Habeeb v. Linder.** As an interesting side note, in a 2011 appellate decision that has since been **withdrawn** [*Habeeb v. Linder*, 36 Fla.L.Weekly D300c (Fla. 3d DCA 2011)] (and then the case settled, thus no official decision was rendered) the court affirmed the waiver of homestead rights by a spouse who joined in a warranty deed that conveyed title from tenants by the entireties to the wife's individual name. This was a case of first impression on the effectiveness of a homestead waiver other than in the form of a nuptial agreement. The deed, signed in 1979, did not mention "homestead" or "waiver" of the homestead rights, but was a Ramco form warranty deed. The court noted that the conveyance of "hereditaments" by the deed included homestead rights. *Id*. The opinion skirts the issue of full and fair disclosure by finding it in subsequent estate planning documents reflecting the spouses' intent that the husband would only have a life estate in the property if he survived his wife. While not stated as a legal basis for the opinion, one can surmise that equitable estoppel was a factor. The husband survived his wife by only a few months and his nephews attempted to claim the homestead

property for his estate, and their benefit. There was no indication that the husband objected to receiving only a life estate in the property.

2. Stone v. Stone. While many may have thought *Habeeb* was merely a blip on the radar that went away, the logic of its holding reemerged in a Fourth District Court of Appeal decision. *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2015). In *Stone* a husband conveyed his ½ interest in the homestead residence to a Qualified Personal Residence Trust (QPRT) he created and the wife conveyed her ½ interest in the homestead residence to a QPRT she created. They owned the property as Tenants by the Entireties. Each spouse joined in a deed to sever the property into two ½ tenant in common interests and then each spouse joined in the deeds to the QPRTs. Husband did not survive the term of his QPRT and, under the terms of the QPRT, the property reverted to his estate (a standard reversion for tax purposes). The husband's will devised his estate to a revocable trust which then left the property to a trust for the benefit of his wife which provided that upon the wife's death, the assets would be distributed to the daughter of the husband and wife. The son challenged the devise of the property to the trust for the wife and daughter. The court determined that the transfer to the trust for the wife was a testamentary devise which would ordinarily be prohibited under Art. X, §4 of the Florida Constitution. However, the court reasoned, that because the wife had joined in the deed to the husband's QPRT, she waived her homestead rights in the property under F.S. §732.702. ***Note***: The opinion is not yet final. ***Note also***: There are reasons to be critical of both aspects of this holding.

3. Lyons v. Lyons. Another interesting recent Fourth District Court of Appeal opinion involved a homestead and QPRT and arguments regarding standing. *Lyons v. Lyons*, 155 So. 3d 1179 (Fla. 4th DCA 2014). In *Lyons*, a husband and wife owned their homestead jointly. In 1993, they conveyed the homestead (via quit claim deed) to wife individually. The deed conveyed language that the husband "does hereby remise, release and quit-claim unto the said second party [wife] forever, all the right, title, interest, claim and demand which the said first party [husband] has in and to the [property]." On the same day, wife conveyed the residence (also via a quit claim deed) to a QPRT having a QPRT term that ended on the earlier of: 15-years or the wife's death. Husband did not join in the deed to the QPRT. Husband and wife had five (5) children, none of whom were minors, at the time of the conveyances. Husband died in 2007. In 2010, wife executed a quit claim deed purporting to convey the residence to herself and one of her daughters. The sons objected and sought to set aside the 2010 deed on the grounds that wife did not own the residence at the time of conveyance. Wife argued that the deed to the QPRT was void and, therefore, the 2010 deed was valid. The court held that wife did not have the standing to challenge the 2010 deed and that the only person who would have had standing to challenge the 2010 deed was the now deceased husband. "Further, it would be absurd for the party who created the alleged infirmities in the quit claim deed to be able to attack the viability of the same quit claim deed. In other words, Norma should not be able to attack the quit claim deed as void ab initio, where she drafted, relied on, and was the sole signatory to it."

4. F.S. § 732.7025. As of July 1, 2018, Fla. Stat. §732.7025 became effective, adopting a statutory rule for waiver of the homestead devise restrictions by deed. As a result of the statute, it is much easier for a spouse to waive her or his rights as a surviving spouse

with respect to the devise restrictions under Article X, Section 4(c) of the Florida constitution. Now, one spouse only needs to join in and execute a deed that includes specific language – which language is enumerated in the statute – to waive the spousal homestead devise restrictions. If the statutory language is included in a deed and the waiving spouse joins in the deed, then as a consequence the spouse who waived the homestead protections will be treated as predeceased for purposes of determining and applying the devise restrictions – but not the alienation restriction or creditor protections.

While a spouse's ability to waive homestead rights is not new, Fla. Stat. §732.7025 offers an easy way to waive the homestead devise restrictions. On the other hand, the statute does little to ensure that the homestead waiver is made knowingly, intelligently, and voluntarily - except for the fact that the waiver must appear in a deed. Therefore, use caution and do not reflexively use of the waiver-by-deed statute. There are some very old and still sound public policies surrounding the unique Florida homestead devise restrictions which should give planners pause before using it.

J. Limited Authority of Personal Representative.

1. <u>Statutory Authority</u>. Even though the protected homestead may not be "property in the hands of the personal representative," it is possible for the personal representative to handle the protected homestead. F.S. §733.608(2) authorizes the personal representative to take possession of protected homestead property if:

a. It is not in the possession of a person who has an interest in the property (i.e., an ultimate recipient); and

b. The personal representative determines such action is necessary to preserve, insure and protect the property.

2. <u>Powers Granted</u>. The personal representative who assumes responsibility for the protected homestead may collect rents and other revenues, but has no duty to make the property productive. The personal representative may also expend estate funds for the protection of the property, and is entitled to a lien against the property to secure repayment of the amounts advanced.

Key point: The provisions of F.S. §733.608(3) and Rules 5.402 - 5.404 should be followed scrupulously to ensure the validity of the lien.

Key point: Homestead property that it is not "protected homestead" (i.e., it does not pass to heirs at law) *is* property in the hands of the personal representative, as is homestead property that the testator specifically directs be sold by the personal representative.

3. <u>Power of Sale is Not Granted</u>. The statutory authorization to take possession of protected homestead is limited in its scope to protecting the property, and does not authorize the personal representative to sell it.

4. Merely an Authorization. The authority granted to the personal representative is discretionary. The personal representative may choose not to assume responsibility for the protected homestead, and is relieved of any liability for deciding not to act.

5. *Query*: Whether a trustee of a revocable trust holding protected homestead can avail herself of the same protections, or whether the specific authorization for a personal representative to take possession of protected homestead to protect it necessitates the appointment of a personal representative for that reason. Or does title in the name of the trustee and the general fiduciary duties to protect and preserve trust assets negate the need for statutory protections?

K. Spousal Election to Sever Protected Homestead.

In June 2007, the author published an article in the Florida Bar Journal entitled "The New Homestead Trap: Surviving Spouses are Trapped by Life Estates They No Longer Want or Can Afford". The gist of that article was that certain surviving spouses were trapped in homestead life estates they neither wanted nor could afford. As life tenant they could not sell the property or mortgage it, but they were 100% responsible for the property taxes, insurance and upkeep/maintenance.

The article helped to generate a good deal of activity in the RPPTL section, where we worked to find a solution for spouses trapped with life estates. In 2010, the Florida Legislature passed changes to F.S. §732.402 to provide a surviving spouse who otherwise receives a life estate the right to take an undivided one-half tenant-in-common interest with the descendants holding the other one-half tenant-in-common interest. The right of election may be exercised by the surviving spouse, or by an agent or guardian with court approval. The election must be made within 6 months after the decedent's death, and while the surviving spouse is still alive.

Once the election is effective, the surviving spouse is only responsible for one-half of the expenses relating to the homestead, and if the property is sold the surviving spouse receives one-half of the sale proceeds regardless of what his or her actuarial interest in the life estate may have been.

L. Permissible Inter Vivos Conveyance.

1. F.S. 732.4017. The 2010 Legislature also passed a provision that specifically recognizes an owner's right to convey homestead property during his or her lifetime in a way that it will not be subject to the restrictions on devise at death. A qualifying conveyance during life will avoid the restrictions on devise of homestead property at death, even without a waiver of homestead rights by the surviving spouse, because the owner no longer owns an interest at death that is the equivalent of protected homestead.

a. F.S. §732.4017 provides that "devise" does not include an *inter vivos* conveyance of an interest in homestead property if certain conditions are met. These conditions are:

i. There must be a valid *inter vivos* conveyance of an interest to one or more persons other than the homestead owner; and

ii. The homestead owner cannot have the power, acting in any capacity, whether alone or in conjunction with another person, to revoke the interest that is conveyed, or to revest the interest in the owner.

b. Valid Conveyance. A valid conveyance can take the form of an outright transfer or certain transfers in trust. For a transfer in trust, the owner of the homestead property can retain the equivalent of a "limited" or "special" power of appointment, specifically, a power to alter the beneficial use and enjoyment of the interest that is conveyed by any one or more of the beneficiaries of the trust, as long as the power cannot be exercised in favor of the owner, the owner's creditors, the owner's estate, or the creditors of the owner's estate, or in a manner that would discharge a legal obligation of the owner. The power can be only be exercised during the owner's lifetime, and cannot be exercised by will.

c. Retention of a power to alter the beneficial use or enjoyment of the interest conveyed is also critical to avoid triggering immediate gift tax consequences as the transfer is then treated as an incomplete gift under §2511 of the Internal Revenue Code. Note, however, that it may also be necessary to also provide the grantor/settlor with the POWER TO VETO any distributions from the trust to ensure that the transfer is treated as an incomplete gift for gift tax purposes. CCA 2012008026.

2. Interest to be Conveyed (or Retained). If an *inter vivos* conveyance meets the statutory requirements, the owner can retain a life estate in the homestead property, which is critical to keep the Save Our Homes cap on increases in assessed taxable value after the conveyance. The interests to be conveyed can include future interests, such as a remainder interest following a life estate retained by the homestead owner, and interests subject to extinction upon the occurrence of an irrevocably specified event or contingency, such as the owner being alive on a date when all of the owner's children have reached the age of majority (at which time the constitutional restrictions on devise would no longer exist). **BEWARE** however of a reversion, as the *Stone* case (cited above) held that a reversion to the estate of the grantor caused the devise restrictions to apply.

M. Disclaimer by Surviving Spouse.

1. F.S. 732.401(4) and 732.4015(3). An additional change in 2010 codified the treatment of a disclaimer by the surviving spouse of his or her interest in either a life estate or outright devise of protected homestead. F.S. §§732.401(4) and 732.4015(3) clarify that if the surviving spouse disclaims a life estate, the vested remainder beneficiaries then become the owners of the homestead property in proportion to their interests, and if the surviving spouse disclaims an outright devise the spouse will be treated as predeceasing the decedent and the interest will pass as otherwise provided in F.S. Chapter 739.

2. **Prior Case Law.** Formerly there was a mix of rulings from three cases: *In Re: Estate of Joseph T Ryerson, Jr.*, No. 93-307 (Fla. 15th Cir. Ct., June 17, 1993), affd, per curiam, No. 93-2074 (Fla. 4th DCA 1994) and *In re: Estate of Frances N Janien*, 12 Fla. 1. Weekly Supp. 221 (February 28, 2005), Case No. 502004CP000973 (Fla. 15th Cir. Ct., (December 6, 2004) both held that where homestead was invalidly devised, a post death disclaimer of the surviving spouse's life estate in homestead did not divest the decedent's descendants of their vested remainder interests. *In Re: Estate of Harry Sudakoff*, No. 91-87 (Fla. 12th Cir. Ct. March 25, 1994), affd, per curiam, No. 94-02102 (Fla. 2d DCA, March 10, 1995) reached an opposite result, holding that the spouse's disclaimer would divest the decedent's descendants of their interests and give effect to the otherwise invalid devise.

N. Putting It All Together.

Step 1: Determine whether the property qualified as protected homestead of the decedent pre-death.

Ownership by a "natural person" (decedent, revocable trust)
Meets size limitations
Residence or intent to make it one's residence

Step 2: Determine whether decedent was survived by a spouse or minor children and if survived by a spouse and no minor children, is there a pre- or post-nuptial agreement that waives the spouse's rights

Step 3: Determine, if no spouse and no minor children, whether devised to other heirs, including devise by residuary clause

Step 4: Determine whether PR or trustee has power to sell

	Spouse only	**Spouse and minor children**	**Spouse and adult children**	**Minor children only**	**Spouse with valid waiver and no minor children**	**No spouse or minor children**
Exemption from creditor claims	Yes	Yes	Yes	Yes	Yes, if devised to other heirs specified in F.S. §732.103	Yes, if devised to heirs specified in F.S. §732.103
May property be devised?	Only to spouse	No, life estate in spouse and remainder interest in	Only to spouse, outright; otherwise life estate in	No, all to children	Yes	Yes

		children – subject to spouse's power to sever under F.S. §732.402	spouse and remainder interest in children - subject to spouse's power to sever under F.S. §732.402			
Sale allowed by PR or trustee? (with no direction to sell in will)	No	No	No	No	No, if devised to heirs specified in F.S. §732.103; Yes, if devised to non-heirs	No, if devised to other heirs specified in F.S. §732.103; yes, if devised to non-heirs

II. HOMESTEAD - ASSET PROTECTION ISSUES

A. Lengths of and Limits to Homestead Protection.

1. The Constitution imposes limits:

a. Acreage limit – ½ acre in a municipality; 160 acres outside
b. Three Constitutional Exceptions:
   i. Liens for taxes and assessments;
   ii. Liens for obligations contracted for the purchase, improvement or repair of the property; and
   iii. Liens for house, field or other labor thereon.

2. A 4th Exception: Development of the Equitable Lien Doctrine:

a. Generally, homestead property is exempt from 3rd party claimants but case law has carved out exceptions and imposed equitable liens in cases where funds were obtained via fraud, reprehensible or egregious conduct and then were used to invest in the homestead. The courts have held the homestead protection can't be used to thwart the creditor directly aggrieved by the fraudulent or egregious conduct of the debtor.

b. For example, in *Spector v. Spector*, 226 So. 3d 256 (Fla. 4th DCA 2017) a former wife sued former husband for failure to transfer residence to former wife in accordance with final judgment and former husband claimed homestead protections – court found that a former spouse, found to have acted egregiously, reprehensibly, or fraudulently, is not afforded homestead protection from forced sale).

c. A similar ruling was issued in *Partridge v. Partridge*, 790 So. 2d 1280 (2001). The court held: "Although the trial court did not make a specific finding of fraud, it did find that he had acted contemptuously (in refusing to make support payments, which he had the ability to pay). Contemptuous conduct may certainly be the functional equivalent of fraud, and it represents the kind of reprehensible conduct justifying foreclosure."

d. In *de Diego v. Barrios*, 271 So. 3d 1181 (Fla. 3d DCA 2019), a former wife filed for dissolution of marriage from former husband. The trial court awarded $140,000 (one-half of the marital home's appraised value) to former wife in equitable distribution. The former wife filed a Motion to Compel for Contempt and to Enforce Final Judgment (the "Motion to Enforce") alleging that the former husband failed to comply with the Final Judgment and pay former wife her share of the equity in the marital home. In response to the Motion to Enforce, the former husband alleged that he was unable to pay due to lack of assets other than his homestead property, and that the trial court lacked the authority to sell or refinance the marital home, as it would improperly modify the property rights set forth in the Final Judgment and violate the homestead exemption. The Third DCA expressed no opinion regarding whether the former husband's conduct reached the level of egregiousness that warrants the imposition of an equitable lien on his homestead property, but noted that on remand, if the trial court reconsiders imposing an equitable lien on the homestead based on the former husband's

conduct, the trial court should make specific findings based on evidence and testimony procured at a hearing.

e. However, developing case law may be loosening the standard from fraud or egregious conduct. There are a number of cases holding that application of the equitable lien doctrine does not require a finding of egregious conduct prior to imposition of an equitable lien.

f. *Hirchert Family Trust v. Hirchert*, 65 So. 3d 548 (Fla. 5th DCA 2011) held that a surviving spouse as sole successor trustee inappropriately used trust principal and the court held that this breach of fiduciary duty is a "constructive fraud" and thus may form the basis to apply the equitable lien exception to homestead protection.

g. In *In re Bifani*, 580 Fed. Appx. 740 (C.A. 11th Cir. (Fla.) 2014), the court imposed an equitable lien as the result of a fraudulent transfer without any finding of fraud or egregious conduct on the part of the debtor. The opinion seems at odds with *Havoco* (discussed below) and years of Florida jurisprudence under which one may engage in a fraudulent transfer without actually perpetrating a fraud.

h. In *In re Lee*, 574 B.R. 286 (Bankr. M.D. Fla. 2017), a bankruptcy court imposed an equitable lien and constructive trust on a debtor's residence that was purchased, in part, with funds the debtor received as an investor in a Ponzi scheme (the tainted funds had been commingled with untainted funds prior to the acquisition). (Interesting note – the property was actually owned by debtor and debtor's spouse as tenants by the entireties.) Although the court found no wrongdoing by the debtor or the debtor's spouse, the court found that an equitable lien was appropriate to prevent unjust enrichment.

i. Unjust enrichment was the basis to apply the equitable lien exception in *Palm Beach Savings & Loan Ass'n v. Fishbein*, 619 So. 2d 267 (Fla. 1993) held that the bank was entitled to an equitable lien where the husband forged the wife's signature on a mortgage on the residence during divorce proceedings and subsequently the bank sought to enforce the mortgage – the Florida Supreme Court rejected the lower's court's ruling that an equitable lien cannot be imposed where there is no showing of fraud and egregious conduct. It was enough in that case to avoid unjust enrichment.

j. *Gail Flinn v. Kevin Doty, as Personal Representative of the Estate of Robert Flinn*, (4th DCA 2017), relied on *Fishbein* in applying the equitable lien exception to homestead and ruling that the daughter of decedent was found to have received properties from the daughter's deceased father during a period where the decedent did not have capacity, and the daughter used such funds to pay down her mortgage. The court imposed an equitable lien on the daughter's residence to the extent the proceeds from the sale of her father's properties were used to pay down the mortgage on the daughter's residence. In its ruling, the court did not find that the daughter engaged in any egregious conduct; instead, the court imposed the equitable lien to prevent any unjust enrichment.

k. In *Crawford v. Federal National Mortgage Association*, 266 So. 3d 1274 (Fla. 5th DCA 2019), the court held that imposition of an equitable lien on a homestead of the mortgagee's widow, who did not sign the mortgage that covered the homestead, was warranted because some of the loaned funds associated with the mortgage benefitted the homestead and the imposition of the equitable lien was necessary to prevent unjust enrichment. In addition, the court held that a trial court may impose an equitable lien on a homestead, but only in an amount equal to the funds used to benefit the homestead.

3. <u>Use of Property</u>.

In *Furst v. Rebholz, as Trustee of the Rob Rebholz Revocable Trust*, 302 So.3d 423 (Fla. 2d DCA 2020), the homeowner was receiving the homestead exemption on 100% of his residence until the property appraiser was notified that the homeowner was renting one of his bedrooms to a tenant. The property appraiser partially removed the homestead exemption and recorded a tax lien for back taxes it asserted the homeowner should have been paying with respect to the rented portion of the residence. The homeowner challenged the property appraiser's tax lien as unlawful, and the trial court ruled in favor of the homeowner, concluding that:

> Florida law does not authorize the Property Appraiser to deny a homeowner his constitutional homestead exemption for a room rented within his residence while he simultaneously maintains the property as his permanent residence.

On appeal, the 2nd DCA disagreed with the appellants' assertion that the property appraiser had the authority to divide the homeowner's "single-family permanent residence into a residential portion entitled to the homestead tax exemption and a commercial-use portion not entitled to the homestead tax exemption," noting that the appellants could not point to any legal authority granting this power to the property appraiser. In addition to declaring the statute by which the property appraiser sought to reduce the homeowner's homestead exemption as non-applicable to the homeowner (as the homeowner was "neither a permanently disabled person nor a disabled veteran"), the 2nd DCA concluded that:

> [T]he property appraisers of this state are not authorized by law to carve up a homeowner's permanent residence in order to remove the protection provided by the constitutional homestead exemption when that person rents a bedroom or any other space within their home. Any interpretation to the contrary would circumvent public policy and could create financial hardship for countless Florida citizens who reside within their permanent residences while renting bedrooms or working from home to make ends meet.

Accordingly, the 2nd DCA affirmed the portion of the trial court's decision retroactively reinstating the homeowner's homestead exemption on 100% of his residence and awarding a refund for property taxes improperly paid.

4. Fraudulent Transfer and Homestead. In *Havoco of America v. Hill*, 197 F.3d 1135 (11th Cir. 1999) and 790 So. 2d 1018 (Fla. 2001), the court held that assets put into a homestead even with the intent to hinder, delay or defraud creditors are still exempt so long as the funds put into the homestead were not procured by fraud or egregious conduct upon the debtor (e.g., subject to the equitable lien doctrine noted above). The court ruled that the homestead protections in the Florida Constitution trump the fraudulent conversion and conveyance statutes. But see the trend of the Equitable Lien Doctrine restrictions discussed above.

5. Liberal Application of Exemption. Many cases hold that the homestead exemption should be liberally applied so the family has a shelter and is not reduced to absolute destitution. See *Public Health Trust of Dade County vs. Lopez*, 531 So. 2d 946 (Fla. 1988) and *Callava v. Feinberg*, 864 So. 2d 429 (3d DCA 2004).

6. Narrow Application of Exceptions. Other cases say that the exceptions to the exemption must be narrowly construed. See *Butterworth v. Caggiano*, 605 So. 2d 56 (1992).

7. Not a Shield. Where husband and wife executed a contract for sale of homestead property, the homestead exemption will not act as a shield to specific performance. See *Mirzataheri v. FM East Developers, LLC*, 193 So. 3d 19 (Fla. 3d DCA 2016).

B. Sale of Homestead Where It Exceeds Limits.

1. Forced Sale Permitted. The 11th Circuit Court of Appeals affirmed a bankruptcy court order requiring the sale of a debtor's homestead and an apportionment of the proceeds (partially exempt and partially nonexempt from creditors) where the homestead property exceeded the acreage limitations in the FL constitution and the land could not be subdivided (legally or practically). *In Re Englander*, 95 F.3d 1028 (11th Cir. 1996). In Englander, the debtor owned a home on approximately 1 acre in a municipality and the property was not capable of subdivision.

2. Allocation of Proceeds of Sale. *In re Quraeshi*, 289 B.R. 240 (SD Fla. 2002), held that a homestead of a debtor which exceeded the acreage limits be sold and the proceeds allocated between the debtor/owner and the creditors. In that case, the land was 2.69 acres inside a municipality. The ruling was that after the sale a fraction of the proceeds would be exempt the numerator of which equals .5 and the denominator of which equals the total acreage of the homestead (2.69). Thus, the homestead owner was only entitled to exempt about 19% of the net sales proceeds.

C. Multiple Homesteads for Husbands and Wives. Several courts have held that a husband and wife may have separate homesteads so long as they are really separated and living apart/independently.

1. Multiple Homesteads for Separated Couple in Bankruptcy Court. There are at least 2 bankruptcy cases *In re Russell*, 60 BR 190 (1986) and *In re Colwell*, 196

F.3d 1225 (1995) (aff'd 11th Cir), holding that a married couple separated for 3 + years and living apart could each claim homestead exemptions in bankruptcy.

2. <u>Fourth DCA Confirms Multiple Homesteads are Possible</u>. In *Law v. Law*, 738 So. 2d 522 (1999), in a case of supposed 1st impression in Florida state court, the court held there was "nothing inconsistent with our public policy if we extend a homestead exemption to each of two people who are married but legitimately living apart in separate residences …where there is no fraudulent intent or egregious conduct." In this case, Phyllis Law was the former wife of Robert Law and sought to enforce a judgment against him for unpaid support obligations. Robert Law had remarried and owned a home with his present wife, Barbara, as tenants by the entireties. Robert Law also owned a home he inherited from his mother. Robert was separated from Barbara and moved into the home he inherited from his mother at the time of the lawsuit by Phyllis. The court held that Robert's homestead was the home he inherited from his mother and moved into upon separating from Barbara, even though Barbara lived in the home they owned as tenants by the entireties as her homestead.

3. <u>Homestead Ad Valorem Benefits for Separated Couple</u>.

a. *Law* was followed in *Wells v. Hadeos*, 48 So. 3d 85 Fla. 2d DCA 2010) where a husband and wife lived apart and the wife got a New York tax benefit and the Husband was denied the Florida homestead ad valorem tax benefit, but the court held it was legitimate and appropriate to allow the husband his Florida homestead exemption under the circumstances of being separated.

b. However, a 2016 opinion casts doubt on whether spouses can claim separate homestead property tax exemptions, if living apart but still harmonious. See *Endsley v. Broward Cty.*, 189 So. 3d 938 Fla. 4th DCA 2016). In *Endsley*, the county removed wife's homestead tax exemption because her husband was receiving a residency-based exemption for his residence in Indiana during the same period. The court found that wife was still receiving a benefit because the funds of the husband and wife were comingled. "The meaning of the Constitution's command that 'not more than one exemption shall be allowed any individual of family unit' appears clear on the face of the document." *Id.* at 951. In reaching its holding, the court also looked at and relied on F.S. § 196.031(5), which states: 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.

c. The court in *Endsley* summarized the law and stated: "The law is well-settled that a harmonious family unit, even if living apart, cannot claim more than one homestead exemption in the State of Florida. *See Brklacic v. Parrish*, <u>149 So.3d 85</u> (Fla. 4th DCA 2014); *cf. Wells v. Haldeos*, <u>48 So.3d 85</u>, 88 (Fla. 2d DCA 2010) (holding spouses that "have no financial connection with and do not provide benefits, income, or support to each other," yet are still technically married, can establish separate "family units" when their lives are sufficiently attenuated, and both spouses can receive homestead exemptions for their separate primary residences, including one out-of-state residence)."

D. Proceeds of Sale – Exemption Continues.

1. Keeping Sale Proceeds Exempt.

a. *Orange Brevard Plumbing and Heating Co v. La Croix*, 137 So. 2d 201 (1962) is the leading case. In that case, the proceeds from the voluntary sale of the homestead were maintained in a separate account to be reinvested in a replacement homestead. The court found the proceeds continued to be exempted if:

1. The debtor/seller shows good faith intention prior to the sale and at the sale to reinvest the proceeds in another homestead within a reasonable time;
2. The debtor did not commingle the funds from the sale; and
3. The debtor did in fact reinvest the proceeds within a reasonable period of time – the proceeds cease to be exempt if not reinvested in a reasonable period of time or if used for the general use of the debtor.

b. *JBK Associates, Inc., etc. v. Sill Bros., Inc., et. al.*, 191 So. 3d 879 (Fla. 2016) confirmed the factors set forth in *Orange Brevard* for sale proceeds to maintain the same protection from creditors as the original homestead:

1. In 2010, JBK obtained a final judgement against Patrick Sill.
2. On October 28, 2013, Sill and his wife sold their home as part of their divorce. Sill's share of the proceeds was $458,696.67.
3. Sill deposited the funds into a Wells Fargo account entitled "FL Homestead Account" and portions were invested in securities. (It appears that the securities in which the funds were invested were conservative.)
4. JBK tried to assert its rights to the proceeds. The trial court denied JBK's motion. JBK appealed and the 4th DCA affirmed. JBK appealed and the Florida Supreme Court affirmed.
5. The court focused on the facts set forth in *Orange Brevard.*

2. Insurance Proceeds Exempt.

a. *Quiroga v. Citizens Property Insurance Co*, 34 So. 3d 101 (Fla. 3d DCA 2010) held that the proceeds of an insurance recovery in case of damage to a homestead by fire, wind or flood remained exempted provided the funds were segregated for use in repair of the homestead or acquisition of a new one.

b. In *Speed Dry, Inc. v. Anchor Property and Casualty Insurance Company*, 302 So.3d 463 (Fla. 5th DCA 2020), the 5th DCA held that section 4(c), Art. X of the Florida Constitution does not prevent the owner of homestead property from assigning post-loss

insurance benefits due as a result of damage to a homestead property to a third-party contractor. The court specifically distinguished this case from those relied upon by the insurance company:

> Contrary to Anchor's assertion, *Chames* and *Quiroga* stand for the proposition that a homesteader cannot waive, through an unsecured agreement, the homestead exemption set forth in article X, section 4(a). This holding does not apply here because [the homeowner] did not waive his article X, section 4(a) homestead protections. Unlike in *Chames* and *Quiroga*, *Speed Dry* has not tried to lien [the homeowner's] home or force a sale of [the homeowner's] homestead. And, Anchor concedes that its argument is based on article X, section 4(c), which restricts the alienation of homestead property, not section 4(a), which is not implicated in this case.

The 5th DCA reversed the trial court's summary judgment, remanded the matter for further proceedings and certified the following question to the Florida Supreme Court as one of great public importance (citing the large-scale use of assignments of post-loss insurance benefits):

> Does article X, section 4(c) of the Florida Constitution allow the owner of homestead real property, joined by the spouse, if married, to assign post-loss insurance benefits to a third-party contractor contracted to make repairs to the homestead property?

E. Residency Issues in Homestead Exemption Cases.

1. <u>Protection for Florida Resident Debtor with a MA Homestead Exemption</u>. A bankruptcy court analyzed whether a debtor in bankruptcy could maintain a Florida residence as the debtor's homestead when the debtor had filed for the homestead exemption in Massachusetts. *In re Migell*, 569 B.R. 918 (Bkrtcy. M.D. Fla. 2017). In *Migell*, a creditor objected to the debtor claiming the debtor's Florida residence as the debtor's homestead. The court determined that while the debtor may have broken Massachusetts law, the court felt the following facts supported the position that the property was the debtor's Florida homestead: (1) the debtor physically lived in the residence since 2011; (2) the property was listed as exempt on his filings with the court; (3) the debtor maintained a Florida driver's license beginning in 2011; the debtor's minor daughter attended a Florida school near the property since 2011; and the debtor's consistent testimony with respect to the residence.

2. <u>Debtor Determined Not a Resident</u>. In another recent case regarding residency, the debtor had a Florida driver's license, was registered to vote in Florida, and had joined a community church in Florida. However, the debtor only spent 59 days in the state each year from 1998-2013, had executed a reverse mortgage on her residence in Washington, D.C. in 2013, yet was seeking to have two different Florida residences declared her homestead. The court held that while the debtor may have intended to become a Florida resident at some point in the future, she was not yet a Florida resident and, therefore, not entitled to the homestead protection. *Pamela B. Stuart, individually and as Trustee of The J. Raymond Stuart Revocable*

Trust dated January 2, 1990, as amended, and the Marital Deduction Trust and the Non-Marital Deduction Trust created thereunder v. Catherine S. Ryan and Deborah A. Stuart, as Beneficiaries of The J. Raymond Stuart Revocable Trust dated January 2, 1990, as amended, and the Marital Deduction Trust and the Non-Marital Deduction Trust created thereunder, (Fla. 4th DCA 2017).

3. <u>Taxpayers Benefitting from Homestead Exemption in Multiple States</u>. In *Fitts v. Furst*, 283 So. 3d 833 (Fla. 2d DCA 2019), and *Brielmaier v. Furst*, 283 So. 3d 842 (Fla. 2d DCA 2019), both decided on the same day, the Second DCA held that the homestead exemption statute, which prohibits a taxpayer from claiming a Florida homestead exemption if the taxpayer is simultaneously receiving a residency-based exemption in another state and allows for back taxes and penalties for an improper homestead exemption claims, applied to permanent residents of Florida.

III. HOMESTEAD – CONSTITUTIONAL AMENDMENTS AND OTHER CASE LAW AND FLORIDA STATUTE UPDATES

A. Florida Constitutional Amendments Passed in 2020.

1. Amendment 5: Limitation on Homestead Assessments. Prior to the enactment of Amendment 5 to the Florida Constitution, Floridians who moved from one homesteaded property to another had two years from January 1st of the year of the sale of the first home to transfer the "Save Our Homes" tax benefit to a new home. Effective as of January 1, 2021, homeowners have up to three years to transfer "Save Our Home" benefits.

2. Amendment 6: Ad Valorem Tax Discount for Spouses of Certain Deceased Veterans Who Had Permanent, Combat-Related Disabilities. Certain Florida veterans are entitled to a homestead property tax discount, provided they were honorably discharged, are over age 65 and have been permanently disabled by combat. Effective as of January 1, 2021, this discount can be transferred to the veteran's surviving spouse at the veteran's death if the spouse holds title to the property and permanently resides thereon, until such time as the surviving spouse remarries, or sells or otherwise disposes of the homestead property.

B. Other Case Law Updates.

1. In *Department of Revenue v. Bell*, 290 So. 3d 1060 (Fla. 2d DCA 2020), the 2nd DCA focused on the interplay between a constitutional provision and a legislative enactment intended to implement same. Section 6(f)(1) was added to Article VII of the Florida Constitution in 2012 and provides ad valorem tax relief on property that is "owned and used as a homestead by the surviving spouse of a veteran who died from service-connected causes while on active duty as a member of the United States Armed Forces." This provision also granted the Florida Legislature the authority to enact legislation to implement the manner of establishing the right to, and the amount of, the applicable tax relief. Accordingly, the legislature amended F.S. §196.081 to implement the new constitutional provision; however, as amended, F.S. §196.081(4) provided that a deceased veteran had to have been a permanent resident of Florida as of January 1st of the year of death in order for the veteran's surviving spouse to eligible for the ad valorem tax exemption under section 6(f)(1), Article VII of the Florida Constitution. In considering whether the permanent residency requirement of the revised F.S. §196.081(4) "impermissibly alters, contracts, or enlarges the constitutional provision" it was enacted to implement, the 2nd DCA found the class of individuals eligible under the statute to be in conflict with the class eligible under the constitutional provision, and therefore, F.S. §196.081(4) was deemed invalid and unenforceable.

2. In *Warner v. Quicken Loans, Inc.*, 2020 U.S. Dist. LEXIS 77089, 2020 WL 2097981, a married couple own their home as tenants by the entirety. Under Florida law, when a spouse dies such property passes to her surviving spouse by operating of law. Thus, tenants by the entirety property is not an asset subject to the probate court's jurisdiction. In this case, the family agreed to the homestead order in the deceased spouse's probate proceeding that ignored Florida's tenants by the entirety and instead granted a life estate in the home to the

surviving spouse with a vested remainder to the child. Subsequently, the surviving spouse mortgaged the home through Quicken Loans, defaulted on the loan and then died. If the previous homestead order was valid, then the mortgage was extinguished upon the surviving spouse's death. Quicken argued that the homestead order was a "brutum fulmen" (a judgment void upon its face) that did not distribute its mortgage. The court ruled in Quicken's favor on the basis that the homestead order was invalid because the probate judge lacked jurisdiction over the house since it was titled as tenancy by the entirety.

C. Other Florida Statute Updates.

1. F.S. § 196.075. - This statute was amended to remove the requirement to prove income beyond the first year of the exemption in regard to the additional homestead ad valorem exemption for individuals 65 years or older at lower income levels.

2. F.S. § 736.1104(3). – As of July 1, 2021, F.S. § 736.1104(3) became effective and provides that a transfer of homestead interest in a trust where the heir is convicted of neglect, exploitation or aggravated manslaughter is void.