EXEMPTION PLANNING

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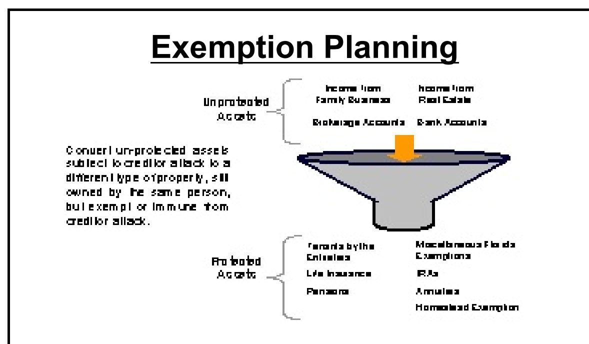
Certain classes of property are exempt from creditors' claims in Florida. These state-specific exemptions are also available to a Florida resident who files bankruptcy because Florida has "opted out" of the federal exemptions scheme and instead provides to its residents the very generous exemptions available under Florida law, as authorized by §522(b) of the federal Bankruptcy Code of 1978 (the "Bankruptcy Code").[1] The public-policy rationale for these exemptions is to protect certain



[1]F.S. § 222.20 ("In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. s. 522(b)), residents of [Florida] shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 U.S.C. s. 522(d)). Nothing herein shall affect the exemptions given to residents of [Florida] by the State Constitution and the Florida Statutes."); see also In re Green, 178 B.R. 533, 536 (Bankr. M.D.Fla. 1995) ("Congress intended that the states participate in determining what the fresh start would entail, and to that end provided that states could provide exemptions which are appropriate to each locale.")

assets so that "owners of exempt property and their families shall not be reduced to absolute destitution, thus becoming a charge upon the public."[2]

"Exemption planning" refers to the conversion of assets not otherwise shielded from creditors under Florida law into one of the creditor-shielded assets discussed in these materials. This type of planning has been explicitly sanctioned by Florida courts – if effectuated legitimately.[3] The defining characteristic of legitimate exemption or "pre-bankruptcy" planning is the absence of a particular creditor the

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[2] Slatcoff v. Dezen, 76 So.2d 792, 794 (Fla. 1955).

[3] See In re Lawrence, 207 B.R. 907, 917 (Bankr. S.D.Fla. 1998) ("When in bankruptcy, debtors may claim exempt property, and they may engage in pre-bankruptcy 'exemption planning.' Indeed, debtors will not be penalized for making 'full use' of available exemptions.") (citing Matter of Smiley, 864 F.2d 562, 567 (7th Cir.1989).) In Smiley, the 7th Circuit summarized the three principal prevailing views among bankruptcy courts with respect to pre-bankruptcy exemption planning as follows:

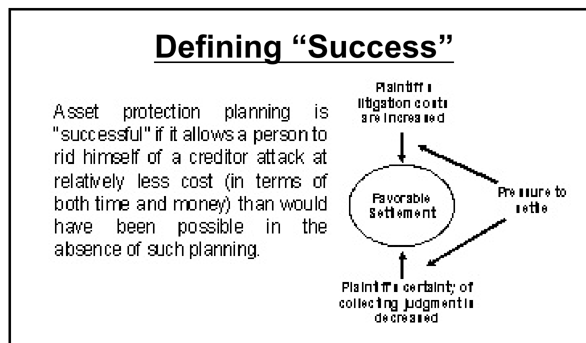
> Courts have come to different conclusions about what constitutes an intent to hinder, delay, or defraud under 11 U.S.C. § 727(a)(2). Some courts have denied discharge upon a finding that at least part of the debtor's motivation for obtaining exempt property was to keep assets away from creditors . . . However, a rule which denies discharge where a debtor's motive is to shield assets rewards debtors for ignorance of the law and penalizes knowledgeable debtors for taking advantage of their full rights under the law. A second group of courts has relied on the policy behind bankruptcy exemptions of protecting debtors from destitution in resolving that the bankruptcy courts should set a limit on the amount of assets which debtors may shield prior to bankruptcy. ***A third group of courts disregards both the actual amount claimed as exempt and any evidence that the debtor is motivated by a desire to shield assets. Those courts deny discharge only where the debtor has committed some act extrinsic to the conversion which hinders, delays or defrauds. We agree with the foregoing decisions that we should not prohibit a debtor's full use of exemptions within the limits of the law.***

Matter of Smiley, 864 F.2d at 566-67 (emphasis added).

debtor intends to thwart or evade.[4] Exemption planning is a subset of asset protection planning. As such, prior to discussing this specific facet of asset protection planning, reviewing a few general concepts should prove helpful.

I. GENERAL CONCEPTS

A. Defining Success. Exemption planning is "successful" if it allows a person to rid himself of a creditor attack at relatively less cost (in terms of both time and money) than would have been possible in the absence of such planning. Exemption planning does not guarantee that a person will be 100% judgment proof. Nor does it guarantee that a person will never be sued. What effective exemption planning can deliver is a set of financial incentives that promote early settlement on terms favorable to the debtor and acceptable to his creditors. The fundamental goal is to convince a creditor at the earliest possible stage in the life of a claim (preferably before the lawsuit is even filed) that the debtor's proposed settlement offer is the largest reasonably obtainable recovery. To the extent a creditor has doubts about his ability



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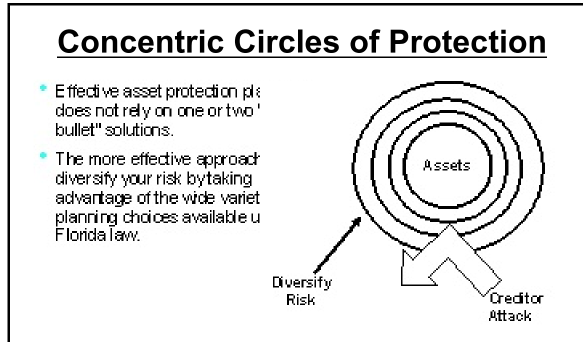
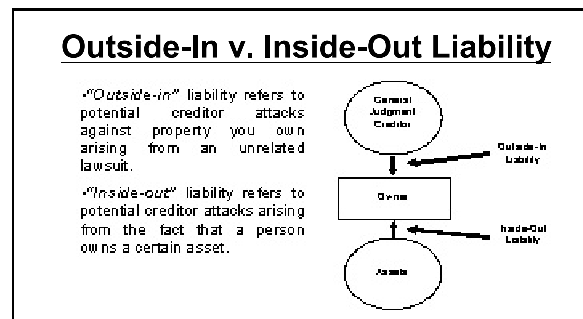
[4]<u>See</u> <u>In re Covino</u>, 187 B.R. 773, 779 (Bankr. S.D.Fla. 1995) ("[T]his Court [has] adopted the reasoning of <u>In re Oberst</u>, 91 B.R. 97 (Bankr. C.D.Cal. 1988) for determining when pre-bankruptcy planning becomes probative of an intent to hinder or delay a creditor. If the transfer is made with ***a particular creditor in mind***, and the debtor has attempted to remove assets from the reach of the creditor, the debtor's discharge will be denied and the debtor's conduct is actionable. However, if the debtor is ***merely looking to his future well-being***, the discharge will be granted, and such conduct not otherwise actionable.") (Emphasis added.)

to ultimately collect on a judgment, he is less likely to file a lawsuit to begin with, and if he does file a lawsuit, he is more likely to settle quickly and for much less than he otherwise would have accepted.



B. <u>Concentric Circles of Protection</u>. Effective exemption planning does not rely on one or two "silver bullet" solutions. If all or most of a client's "eggs are in one basket," a successful creditor attack on that one "basket" could be catastrophic. The more effective approach is to diversify a client's risk by taking advantage of the wide variety of planning choices available under Florida law. In fact, the most effective exemption planning builds concentric circles of protection, so that even if creditors can defeat one device, there are other defenses around the family's nest egg. The "concentric circles" approach also builds flexibility in an asset protection plan. Pro-creditor bankruptcy court judges or new legislation can change the law and make today's commonly accepted planning approaches less effective in the future. Employing various asset protection techniques as part of a cohesive, interlocking plan means the failure of one defensive "circle" exposes only a limited portion of a family's nest egg to creditor attack.



C. <u>Outside-In and Inside-Out Liabilities</u>. "Outside-in" liability refers to the generalized threat of potential

creditor attacks arising from any source. This "sphere" of potential liability is not the product of owning any single asset. Rather, outside-in liability refers to any form of threat that arises out of a debtor's personal liability. For example, if Dr. Smith is sued because she commits medical malpractice or a debt she personally guaranteed is in default, those liability-exposures would be forms of outside-in liability exposure. In contrast, **"inside-out"** liability refers to potential creditor attacks arising from the fact that a debtor owns a single, specific asset. For example, if Dr. Smith is sued because a person slips and falls in a building she owns, that plaintiff can attempt to put a lien only against (1) the building itself and (2) the legal owner of that building. This is a form of "inside-out"liability because the liability exposure arises out of Dr. Smith's ownership of a single asset – not her conduct. Inside-out liability is easily contained by owning liability-producing assets, like real estate, in a stand-alone limited liability company ("LLC") that contains the liability exposure to one asset only, thereby sheltering all of the property owner's other assets from creditor attack.

II. PRE-CONDITIONS TO EXEMPTION PLANNING

A. You must be "domiciled" in Florida. F.S. §222.17 sets forth specific procedures for evidencing domicile in the State of Florida.[5] Florida courts construing the word "domicile" have focused on the debtor's intent to permanently reside in Florida. For out-of-state debtors considering moving to Florida, the State of Florida has a website which provides a Florida residency guide explaining the

[5] See Lindsey v. Board of Regents, ex rel. University of Florida, 629 So.2d 941 (Fla. 1st DCA 1994) (Student was required to file sworn statement under oath with clerk of court evidencing intent to make Florida her domicile before she could establish entitlement to establish resident status for tuition purposes.)

requirements and the processes for obtaining Florida residency.[6] For bankruptcy-protection purposes, a debtor must have been domiciled in Florida for at least 180 days immediately preceding the date of the filing of the bankruptcy petition.[7]

As mentioned above, Florida courts construing the "domicile" pre-condition to the application of Florida's creditor protections have focused on the debtor's intent to permanently reside in Florida. For example, no matter how much time a tourist spends in Florida, he cannot legally formulate the requisite intent to make a Florida residence his homestead.[8] Similarly, debtors who are not U.S. citizens and who do not hold permanent visas or "green cards" will not qualify for Florida's homestead exemption.[9] In In re Dwyer, 305 B.R. 582 (Bankr. M.D.Fla. 2004), the debtor was not physically located in Florida for the majority of the 180 days preceding the bankruptcy filing. The bankruptcy court focused not on the debtor's actual physical location, but rather on evidence showing that the debtor considered Florida to be his home. Domicile was thus defined as "the permanent residence of a person or the place to which he intends to return even though he may actually reside elsewhere .

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[6] See http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=38.

[7] 11 U.S.C. § 522(b)(2).

[8] See In re Cook, 412 So.2d 340 (Fla. 1982) (Florida does not allow foreigners visiting United States as tourists to place residence owned in state beyond reach of creditors under state homestead exemption.)

[9] See In re Walter, 230 B.R. 200 (Bankr. S.D.Fla. 1999) (Chapter 7 debtors, who were Canadian citizens with resident alien cards, were not entitled to any Florida homestead exemption since debtors were non-immigrant aliens without permanent visas they could not claim Florida as permanent residence.); In re Boone, 134 B.R. 979 (Bankr. M.D.Fla. 1991) (Chapter 7 debtor who was non-immigrant alien without permanent visa was legally incapable of forming necessary intent to remain permanently in Florida; therefore, debtor was not entitled to Florida homestead exemption.)

. . his home, as distinguished from a place to which business or pleasure may temporarily call him."[10] In this case, the debtor at all times considered himself to be a Floridian, he was registered to vote in Florida and at all times held a Florida driver's license without ever obtaining another license in other states where he was employed from time to time.

B. Timing Counts – Fraudulent Transfers and Conversions Not Protected. F.S. § 222.29 provides that any exemption claimed under Chapter 222 "is **not** effective if it results from a fraudulent transfer or conveyance as provided in chapter 726." (Emphasis added.) F.S. § 222.30 prohibits "fraudulent asset conversions" and allows the avoidance of any conversion of nonexempt assets to exempt assets with the intent to hinder, delay, or defraud a creditor. F.S. § 222.30 provides remedies to a creditor similar to those provided under Florida's Fraudulent Transfer Act ("FUFTA"). Accordingly, if a property owner fraudulently converts a nonexempt asset to an exempt asset, his creditors may avoid the conversion, "attach" the converted asset, or obtain injunctive relief against further fraudulent conversions. Note, however, that actions arising under F.S. § 222.30 must be brought within four (4) years after a conversion.[11] This area of the law provides creditors with the most effective tools to slice through any protective planning structure. A property owner's best defense against future fraudulent-transfer attacks is to ensure he does not become "insolvent" for purposes of FUFTA as a result of any asset conversions or related transactions.

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[10] In re Dwyer at 585.

[11] F.S. § 222.30(5).

Under FUFTA, a debtor is "insolvent" if the sum of his debts is greater than his assets "at a fair evaluation." F.S. § 726.103(1) . This is referred to as the "balance sheet" solvency test. A key point to consider when preparing a balance-sheet solvency analysis is that, for purposes of FUFTA, the term "debts" includes all pending and even reasonably foreseeable future litigation exposure, both of which are forms of future contingent liability. F.S. 726.102(5) defines "debt" as follows: "'Debt' means liability on a claim;" F.S. 726.102(3) defines a "claim" as follows: "'Claim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[12]

III. SURVEY OF FLORIDA'S CREDITOR-EXEMPT ASSETS

A. <u>Homestead Exemption</u>. Section 4(a)(1) of Article X of the Florida Constitution provides as follows:

> (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

[12] See also Comment (4) to § 1 of the Uniform Act ("[T]he holder of an unliquidated tort claim or a contingent claim may be a creditor protected by [the Uniform Act].")

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) [The homestead exemption] shall inure to the surviving spouse or heirs of the owner.

1. Qualifying Persons; Revocable Trusts. Florida's homestead exemption extends only to "natural" persons domiciled in Florida, it does not extend to businesses, partnerships or corporations. A surviving spouse or heirs of a decedent may claim the homestead exemption as well.[13] With respect to revocable trusts, the conservative approach is to NOT convey the homestead property to the debtor's revocable trust. In In re Bosonetto, 271 B.R. 403 (Bankr. M.D.Fla. 2001), the court held that a debtor could not claim a homestead exemption in a personal residence she owned in her capacity as trustee of her own revocable trust. Note, however, that in a more recent decision the Third DCA came to the opposite conclusion.[14]

2. Qualifying Residences. A declaration of homestead exemption with respect to an existing homestead property must be filed and recorded

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[13] Fla. Cont. Art. X, § 4(b); see also Carl S. Traiger v. Credit First National Association, Etc., 864 So.2d 1188 (Fla. Dist. Ct. App. 5th Dist. 2004); Williams v. Dorrell, 714 So.2d 574 (Fla. Dist. Ct. App. 3d Dist. 1998); Snyder v. Davis, 699 So.2d 999 (Fla. 1997).

[14] See Callava v. Feinberg, 864 So.2d 429 (Fla. 3rd DCA 2003) (Divorced wife was entitled to claim constitutional homestead exemption, in former attorney's action seeking foreclosure of equitable lien on wife's residence for unpaid attorney fees arising out of dissolution of marriage proceeding, even though legal title to residence was held by trustee, and wife had beneficiary interest; wife did not need to hold legal title in order to claim exemption.)

with the circuit court, although it may be before or after levy.[15] In contrast, Florida courts have held that if a creditor records a judgment prior to the time the debtor acquires residential property that he later claims as homestead, the claimed homestead property is subject to levy.[16] In addition to traditional dwellings, the homestead exemption is extended to mobile or modular homes by statute,[17] and has been construed by Florida courts to encompass a 99-year land lease in property used as a residence,[18] co-op apartments,[19] an undivided one-half interest in a residence,[20]

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[15]F.S. §§ 222.01, 222.02.

[16]See In re Whelan, 2005 WL 1330162 (Bankr. M.D.Fla. 2005); In Wechsler v. Carrington, 214 F. Supp. 2d 1348 (Bankr. S.D.Fla. 2002) (Under Florida law, condominium was not owner's homestead at time foreign default judgment against owner was recorded in county in which condominium was located, and thus, the condominium was not exempt from sale to satisfy the recorded judgment, where, although owner purchased the condominium over three months before the judgment was recorded, and moved some of his belongings into that property and spent some of his nights at that residence, he continued to live in an apartment from time he purchased the condominium until two months after the judgment was recorded, and showed no intent to live permanently at the condominium prior to the recording of the judgment.); In re MacGillivray, 285 B.R. 55 (Bankr. S.D.Fla. 2002) (Where judgment creditor had recorded certified copy of its judgment before debtor acquired residential property that he later claimed as homestead, debtor acquired property subject to judgment lien, and lien never attached to interest of debtor in property, as required for debtor to avoid lien on exemption impairment grounds.).

[17]See F.S. § 222.01.

[18]See In re McAtee, 154 B.R. 346 (Bankr. N.D.Fla. 1993) (Chapter 7 debtor could claim Florida homestead exemption for his residence that was situated on public land and subject to long term ground lease.)

[19]See In S. Walls, Inc. v. Stilwell Corp., 810 So.2d 566 (Fla. 5th DCA 2002) (A fee simple estate evidenced by a warranty deed is not essential for a cooperative (co-op) owner to claim the homestead exemption from forced sale under State Constitution; a life estate interest that gives the owner the right to use and possess a co-op as his or her residence may be sufficient); In re Dean, 177 B.R. 727 (Bankr. S.D.Fla. 1995) (Debtor was entitled to Florida homestead exemption in cooperative apartment unit which he held pursuant to

and houseboats.[21] Moreover, a homestead property that is also used for income producing activities remains eligible for homestead protection.[22] Finally, courts have

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proprietary lease which ran in perpetuity, where debtor intended to and actually occupied premises as his principal residence, listed unit as his residence on driver's license, and did not own or occupy any other residential property.)

[20]See Vandiver v. Vincent, 139 So.2d 704 (Fla. 2d DCA 1962) (Court held that husband, who obtained a divorce and moved from the state and remarried, was not the head of a household for exemption purposes and wife, who continued to live in home after husband left and who cared for minor son who was placed in her custody under divorce decree which required husband to pay $25 weekly for support of child, was head of the household and was entitled to homestead exemption.)

[21]See Miami Country Day Sch. v. Bakst, 641 So.2d 467 (Fla. 3d DCA 1994) (Houseboat was homestead for purposes of statutory homestead exemption; houseboat was similar to mobile home which legislature has determined is dwelling house in that although both may be moved, they are self-contained living environments designed for use as residences rather than transportation, was used as sole, permanent residence, was fully equipped for occupancy and supplied with utilities via dock connections, and houseboat could not be used as vehicle.); In re Mead, 255 B.R. 80 (Bankr. S.D.Fla. 2000) (Boat on which Chapter 7 debtor resided with his wife was a "dwelling house" within meaning of Florida homestead exemption statute; boat was equipped and used as a residence, and debtor had no other residence.); for contrary authority on this point, see In re Christie,2003 WL 168656 (Bankr. M.D.Fla. 2003) (The majority of the courts that have considered the issue generally conclude that an ordinary boat does not qualify for homestead exemption under Florida law.); In re Major, 166 B.R. 457 (Bankr. M.D.Fla. 1994) (Chapter 7 debtors' 34-foot motorboat on which they resided could not be claimed as exempt under homestead provision of Florida Constitution, where boat was not designed to serve as permanent dwelling for anybody, and boat was not moveable only because owners did not have funds to repair motor.)

[22]See In re McLachlan, 266 B.R. 220 (Bankr. M.D.Fla. 2001) (Under Florida law, Chapter 7 debtor was entitled to rural homestead exemption not just in parcel of land on which his home was located but in contiguous parcel that he acquired roughly one year later, notwithstanding that he made commercial use of this parcel in maintaining palm grove thereon, from which he from time to time sold palm trees.)

also held that married couples legitimately living apart can occupy two protected homesteads.[23]

3. Exemption Limitations. There is no ceiling on the dollar amount that may be sheltered by Florida's homestead exemption. The claimed homestead property, however, cannot exceed one-half acre in a municipality or 160 acres elsewhere.[24] The acreage limitation may not be reduced without the owner's consent by reason of subsequent inclusion in a municipality.[25] A dissatisfied creditor has the right to undertake a survey on the land claimed as homestead to ensure compliance with the acreage limitations.[26] Moreover, a court may order the sale of a claimed homestead property and the allocation of the net sales proceeds exceeding the limitations to be allocated between the debtor and the creditor if (a) the property exceeds the applicable acreage limitation and (b) the property cannot be practically or legally subdivided.[27] For example, the New York Times reported that John A.

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[23] See In re Colwell, 196 F.3d 1225 (11th Cir. 1999) (Under Florida law, homestead exemption can be established to each of two people who, while married, are legitimately living apart in separate residences, if they otherwise meet requirements of exemption.); Law v. Law, 738 So.2d 522 (Fla. 4th DCA 1999) (Husband, who permanently resided in separate home from wife, was entitled to homestead exemption on that residence from former wife's lien, even though husband and current wife owned another home for which they claimed homestead exemption, where there was no indication that husband and wife were separated for illegitimate reasons.)

[24] Fla. Const. Art. X, § 4.

[25] Id.

[26] F.S. § 222.03.

[27] See In re Quraeshi, 289 B.R. 240 (Bankr. S.D.Fla. 2002) (Under Florida law, in apportioning proceeds from sale of 2.69 acre tract, only one-half acre of which (19%) could be claimed as exempt homestead, mortgages and other encumbrances had to be satisfied from entire proceeds of sale, before amount of exempt proceeds could be determined, as

Porter, the embattled former vice chairman of WorldCom, filed for bankruptcy and claimed homestead protection for his beach-front mansion in Palm Beach (appraised at $16.9 million). Unfortunately for Mr. Porter, his homestead property exceeded the one-half acre limitation for homes located within a municipality. The New York Times reported the resulting forced sale as follows:

> One problem for Mr. Porter is that his mini-estate is just a little too big. While Florida's generosity toward debtors is unlimited financially, it does have physical limits. The largest residential property that is beyond the reach of creditors is a half-acre.
>
> Unfortunately for Mr. Porter, his mansion sits on five-eighths of an acre. That fractional excess opened the gates for [the bankruptcy trustee] to order that the home be sold. The net proceeds of the sale will then be split, with Mr. Porter keeping the 80 percent covered by the homestead exemption and the rest going to creditors . . . [28]

Note that within a municipality, the acreage limitation may be less than a half-acre if the debtor or the debtor's family does not actually reside on all of the claimed homestead property.[29] In In re Estate of Ritter, 407 So.2d 386 (Fla. Dist. Ct. App. 3d Dist. 1981) the court held that a vacant lot owned by the debtor and adjoining his

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representing 19% of whatever remained.); Englander v. Mills, 95 F.3d 1028 (11th Cir. 1996) (When property in which debtor claims Florida homestead exemption exceeds maximum area limitation under homestead law, Florida courts divide property and allow nonexempt portion to be sold for payment of owner's debts.)

[28] Patrick McGeehan, The Agenda: In Florida, No Wolves At the Door, N.Y. Times, Sunday, January 16, 2005, at BU 6.

[29] There shall be exempt from forced sale . . . a homestead . . . if located within a municipality, to the extent of one-half acre of contiguous land, upon which . . . the residence of the owner or the owner's family [is located]. Fla. Const. Art. X, § 4.

homestead was not part of the debtor's homestead property.[30] In contrast, homestead property located outside of a municipality is not subject to the same residency limitations.[31]

4. Abandoning; Waiving Homestead. The general rule is that if a debtor leaves his home due to financial, health or family reasons it is not considered abandoned and the property has not lost its homestead protection.[32] Homestead protection may, however, be waived in favor of certain favored creditors.[33]

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[30] In arriving at its conclusion, the Ritter court noted that "although not totally free from doubt, we have concluded that the adjoining empty lot, Lot 17, was not homestead property for alienation purposes under the aforementioned constitutional provision. This lot was never used as an integral part of the residence located on Lot 18 (which lot was homestead property during the lifetime of the head of the household.) Lot 17 at no time had any structures or improvements built upon it which served the residence on Lot 18 and was never jointly fenced in with Lot 18. It was merely a separate, empty lot which served, at best, as an excess side yard to the aforementioned residence." Id. at 387.

[31] See Davis v. Davis, 864 So.2d 458 (Fla. 1st DCA 2003) (Language in state constitution limiting homesteads within municipalities to residence of the owner or the owner's family did not apply to homesteads located outside municipalities and, thus, portion of homestead not located within a municipality and consisting of no more than 160 acres of contiguous land and improvements thereon that was separate from residence of owner or his family and was used as mobile home park could be part of the homestead.)

[32] See Novoa v. Amerisource Corp., 860 So.2d 506 (Fla. 3rd DCA 2003) (The status of homestead is preserved when the family unit is temporarily removed from the homestead but the homestead remains the permanent abode to which the family unit intends to return.); In re Klaiber, 265 B.R. 290 (Bankr. M.D.Fla.. 2001) (Under Florida law, debtor who leaves his home for financial, health or family reasons, or who is temporarily absent for reasons of business, education and family comfort, does not thereby "abandon" the homestead.)

[33] See Myers v. Lehrer, 671 So.2d 864 (Fla. 4th DCA 1996) (Former husband's waiver, under marriage settlement agreement, of homestead exemption did not violate public policy and, thus, former wife could garnish husband's share of marital home sale proceeds to satisfy outstanding judgments against former husband; husband was represented by

5. Proceeds from Sale of Homestead Are Exempt. Proceeds from the voluntary sale of the homestead held with the intent to reinvest in another homestead within a reasonable time are exempt if the funds are kept in a separate account, not commingled with other funds, and are held for the sole purpose of acquiring another homestead.[34]

6. Homestead Property is Not Subject to Florida's Fraudulent Transfer Statute. In Havoco of Amercia, Ltd. v. Hill, 790 So.2d 1018 (Fla. 2001) the Florida Supreme Court considered the following question certified by the Eleventh Circuit:

> Does Article X, Section 4 of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying, or

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counsel, former wife was also entitled to homestead exemption, and waiver resolved financial matters of marital relationship.); but see Sherbill v. Miller Manufacturing Co., 89 So.2d 28 (Fla. 1956) (Waiver by debtors of the benefit of their homestead exemption as to commercial debt does not constitute an alienation of the homestead and such a waiver is not enforceable under principle of comity, even though the waiver was legal and enforceable in state where contract was made, for the reason that such a waiver is contrary to policy of state exemption laws.)

[34]See Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962) (The "reasonable time" within which proceeds from voluntary sale of homestead must be reinvested in acquiring another homestead in order that such funds be exempt from claims of creditors, must be determined from facts and circumstances of each case.); Sun First National Bank of Orlando v. Gieger, 402 So.2d 428 (Fla. 5th DCA 1981) (In action wherein garnishees sought to dissolve writ of garnishment, trial court did not err in dissolving writ on basis of homestead exemption; however, at some point in time far short of ten years, time for conversion of proceeds into new homestead would expire at which time bank would be entitled to garnish unconverted and uncommitted proceeds, whether cash, notes or otherwise.).

defrauding creditors in violation of Fla. Stat. § 726.105 or Fla. Stat. § § 222.29 and 222.30?

Florida Supreme Court's answer: YES.

In short, the Florida Supreme Court held that Florida's constitutionally-based homestead exemption trumps Florida's statutorily-based fraudulent transfer remedy. Note, however, that if the creditor can show some fraudulent or otherwise egregious conduct by the beneficiary of the homestead protection the court may impose an equitable lien on the homestead property[35] or with respect to bankruptcy proceedings,

[35] See In re Chaunsey, 308 B.R. 97 (Bankr. S.D.Fla. 2004) (Chapter 7 debtor's fraudulent prepetition transfer of proceeds from settlement of personal injury action into her exempt homestead, in deliberately avoiding ever taking possession of proceeds and instructing her personal injury attorney to use her share of proceeds to pay down her home mortgage 13 days before she filed for bankruptcy relief, was sufficient under Florida law to support imposition of equitable lien on homestead in favor of debtor's creditors in amount of settlement proceeds fraudulently transferred.); In re Thiel, 270 B.R. 785 (Bankr. M.D.Fla. 2001) (under Florida law, fraudulent act is sufficient to support imposition of equitable lien, provided that funds can be traced); In re Financial Federated Title & Trust, Inc., 273 B.R. 706 (Bankr. S.D.Fla. 2001) (Imposition of an equitable lien on homestead property belonging to corporate debtor's president and his spouse was warranted under Florida law where funds used by them to purchase the home could be traced back to debtor's fraudulent Ponzi scheme, they gave debtor no consideration for the funds, and they were unjustly enriched by use of the funds.); In re Magpusao, 265 B.R. 492 (Bankr. M.D.Fla. 2001) (Bankruptcy court would impose equitable lien on Chapter 7 debtor-husband's homestead, in favor of his wife's employer, for funds embezzled by wife that were used to make mortgage payments to residential mortgage lenders.); In re Covino, 187 B.R. 773, 780 (Bankr. S.D.Fla. 1995) ("In this case, [Debtor] was over $10 million in debt at the time of the transfer. It is clear to this Court that [Debtor] used the settlement proceeds to pay off his mortgage for the sole purpose of hindering his creditors from proceeding against his $250,000 share of the malpractice settlement. Therefore, . . . the Court determines that it is appropriate to impose an equitable lien in favor of the Trustee against the [Debtor's homestead property] to secure payment to the Trustee of the $250,000.00 fraudulently transferred by [Debtor].")

refuse to discharge the debtor's debts (thus permitting creditors claims to survive the bankruptcy).[36]

7. Federal Tax Liens; Ex-Spouses. A federal tax lien is enforceable against homestead property.[37] Note, however, that the homestead property may only be seized by the IRS as a "last resort" and a judge or magistrate of a United States District Court must approve the levy in writing.[38] Florida courts have also allowed ex-spouses to force the sale of homestead property where the plaintiff can show fraud or "reprehensible conduct."[39]

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[36] See In re Barker, 168 B.R. 773 (Bankr. M.D.Fla. 1994) (Chapter 7 debtors' transfer of stock sale proceeds into exempt annuity on eve of bankruptcy filing, with intent to hinder, delay, or defraud creditor or officer of estate, warranted denial of discharge.); Marine Midland Bank, N.A. v. Mellon, 160 B.R. 860 (Bankr. M.D.Fla. 1993) (To prevail on claim that debtor's discharge should be denied for prepetition fraudulent transfer of property, plaintiff is required to prove that transfer occurred, that property transferred was estate property, that transfer occurred within one year of petition, and that at time of transfer debtor possessed requisite intent to hinder, delay or defraud creditor.)

[37] See In re McFadyen, 216 B.R. 1006 (Bankr. M.D.Fla. 1998) (Homestead nature of debtor-taxpayer's property did not prevent federal tax lien from attaching.)

[38] See 26 U.S.C.S. § 6334(a)(13)(B) and (e); see also the Taxpayer Bill of Rights incorporated into the IRS Restructuring and Reform Act of 1998.

[39] See Partridge v. Partridge, 790 So.2d 1280 (Fla. 4th DCA 2001) (Former wife's failure to show that former husband acted either egregiously, reprehensibly, or fraudulently in failing to pay support, so as to justify forced sale of homestead under exception to homestead exemption, barred wife from enforcing equitable lien on former marital home due to former husband's failure to make support payments.); Isaacson v. Isaacson, 504 So.2d 1309 (Fla. 1st DCA 1987) (Evidence was insufficient to establish that conduct of former husband, whose homestead property was constitutionally exempt from forced sale, was so reprehensible as to overcome constitutional protection and warrant imposition of an equitable lien on homestead for husband's failure to pay child support and alimony arrearages due wife; former wife failed to receive payments because of her inability to prove that former husband could pay, and not because of husband's conduct.)

B. Tenancy by the Entirety. A tenancy by the entirety is a form of property ownership whereby a husband and wife own property as a marital unit. Although this form of property ownership developed out of common law, only about half of the states retain this form of ownership. Florida is one of them.[40] Property held as tenancy by the entirety in Florida is protected from creditors because the marital unit, not the individual debtor spouse, owns the property. Because both spouses own the property and thus must both approve any conveyance of the property, a creditor cannot compel the distribution of tenancy by the entirety property. If the husband and wife are jointly obligated for a debt, however, the subject property will be subject to the claims of the joint-creditor to the extent of the joint debt.[41] Additionally, the creation of a tenancy by the entireties does not shield property from the claims of pre-existing liens that have already attached to the debtor's interest in the property.[42] Finally, as with any other exempt asset, the

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[40] See United States v. One Single Family Residence Without Bldgs., 894 F.2d 1511 (11th Cir. 1990) (Statute governing drug-related forfeitures did not preempt Florida law of tenancy by entireties which effectively prevents forfeiture of any portion of innocent spouse's entire interest in property.)

[41] See Stanley v. Powers, 123 Fla. 359 (Fla. 1936); In re McRae, 282 B.R. 704 (Bankr. N.D.Fla. 2002) (Creditors holding claims jointly against the husband and wife may reach property held in tenancy by the entireties, to the extent of the joint debt.); In re Planas, 1998 WL 757988 (S.D.Fla. 1998) ("While Florida law provides that entireties property is exempt from process to satisfy debts of individual creditors of a spouse, it is not exempt to satisfy joint debts of both spouses.")

[42] See Rosenfield v. Rosenfield, 404 So.2d 188 (Fla. 4th DCA 1981) (Where federal tax lien attached before entireties estate was created, lien attached to estate by entireties.)

creation of a tenancy by the entireties may be challenged by a creditor as a fraudulent conversion.[43]

In Beal Bank v. Almand and Associates, 780 So.2d 45, 51 (Fla. 2001) the Florida Supreme Court provided the following summary of the six unities of title that must be present to hold property as tenants by the entireties:

> Property held as a tenancy by the entireties possesses six characteristics: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property becomes titled in their joint names).

In addition to real estate, any form of personal property may be including real or personal property, bank accounts, automobiles, and stock certificates may be acquired by a husband and wife as tenants by the entireties. The rule in Florida has long been that real estate acquired jointly by a husband and wife will be presumed to be held as tenants by the entireties.[44] In the Beal Bank case the Florida Supreme Court held that the same presumption in favor of finding that a husband and wife

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[43] See Whetstone v. Coslick, 117 Fla. 203 (Fla. 1934) (Where unmarried woman breached contract before her marriage, although judgments for breach were not had against her until after her marriage, and she, together with her husband, conveyed land belonging to her in exchange, wherein husband furnished no consideration for another tract to create estate by entireties beyond reach of her creditors, judgment creditors were entitled to impress lien of judgments upon tract conveyed to spouses.)

[44] See First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d 777 (Fla. 1971).

own property as tenants by the entireties when an ambiguity or uncertainty exists applies to personal property as well,[45] although at least one bankruptcy court has limited the scope of the Beal Bank holding to bank accounts only.[46]

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[45]See Beal Bank v. Almand and Associates, 780 So.2d 45 (Fla. 2001) (bank accounts); see also In re Blais, 2004 WL 1067577 (Bankr. S.D.Fla. 2004) (court held that creditor has the burden of proving by a preponderance of the evidence pursuant to F.S. § 90.304 that a tenancy by the entireties does not exist); In re Daniels, 309 B.R. 54 (Bankr. M.D.Fla. 2004) (Under Florida law, motor vehicle that was titled neither in name of Chapter 7 debtor "or" his nondebtor-spouse nor in names of debtor "and" his nondebtor-spouse, but in both of their names with each name separated by a hyphen, was presumptively held as tenants by the entirety, such that, in absence of any contrary evidence, vehicle was not subject to administration by trustee in bankruptcy case in which there were no joint creditors.); Cacciatore v. Fisherman's Wharf Realty Ltd. P'ship, 821 So.2d 1251 (Fla. 4th DCA 2002) (Where a judgment creditor of one spouse seeks to levy under writ of execution against a stock certificate titled in the name of both spouses, if the unities required to establish ownership as a tenancy by the entireties exist, a presumption of such tenancy arises that shifts the burden to the creditor to prove that the stock was not so held.)

[46]See In re McAnany, 294 B.R. 406 (Bankr. M.D.Fla. 2003) (Under Florida law, presumption that married couple holds property as tenants by the entireties does not extend to all of their personal property, other than joint bank accounts.)

C. Insurance. Florida law provides a number of exemptions for insurance benefits that include life-insurance death benefits,[47] disability,[48] fraternal,[49] and the cash surrender value of life insurance policies.[50] For exemption planning purposes, the cash surrender value of life insurance provides the most opportunities. With respect to this asset class, F.S. § 222.14 provides as follows:

> The cash surrender values of life insurance policies issued upon the lives of citizens or residents of [Florida] . . . shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured . . . unless the insurance policy . . . was effected for the benefit of such creditor.

Note that the cash surrender value of a life insurance policy is only exempt when the insured is the debtor.[51] Note also that at least one Florida court has held that a

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[47] F.S. § 222.13. (allowing exemption if payable to a specific beneficiary and not to the insured's estate) F.S. § 222.13 does NOT shield death benefits from the beneficiary's creditors, rather it only shields death benefits from the insured's creditors See In re Zesbaugh, 190 B.R. 951 (Bankr. M.D.Fla. 1995).

[48] F.S. § 222.18 (exempting all disability income benefits under any life, health, accident, or other insurance contract policy); see In re Dennison, 84 B.R. 846 (Bankr. S.D.Fla. 1988) (Although debtor's right as beneficiary of single incident disability policy to cancel policy and receive prepaid premiums was property of Chapter 7 estate, debtor could claim policy as exempt under Florida statute exempting disability income benefits under any policy or contract of insurance, and trustee could not require debtor to exercise right to cancel policy and receive prepaid premiums.)

[49] F.S. § 632.619.

[50] F.S. § 222.14 (exempting cash surrender value of any life insurance policies).

[51] See In re Allen, 203 B.R. 786 (Bankr. M.D.Fla. 1996) (Chapter 7 debtor could not claim as exempt under Florida law cash surrender value of life insurance policy for which he was owner and beneficiary, inasmuch as policy insured debtor's former law partner and

certificate of deposit purchased with the cash surrender value proceeds of a life insurance policy remained shielded from creditor attack.[52]

D. **Annuities**. Florida allows an unlimited exemption for annuity contract proceeds.[53] With respect to annuities, F.S. § 222.14 provides as follows:

> The . . . proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of . . . the person who is the beneficiary of such annuity contract, unless the . . . annuity contract was effected for the benefit of such creditor.

The annuity exemption benefits not only the annuitant, but third party beneficiaries as well.[54] And there is no requirement that the annuity itself be issued to a resident of Florida, only that the proceeds of the annuity contract be paid to a resident of Florida.[55] Moreover, if the annuity proceeds are placed in a separate bank

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exemption statute required that person claiming exemption be party insured.).

[52]Faro v. Porchester Holdings, Inc., 792 So.2d 1262 (Fla. 4th DCA 2001) (Cash surrender value of judgment debtor's life insurance policies was statutorily exempt from garnishment and continued to be exempt even after debtor took possession of it and converted it into another form by purchasing a bank certificate of deposit (CD) with the proceeds.)

[53]F.S. § 222.14.

[54]In re Ebenger, 40 B.R. 463 (Bankr. S.D.Fla. 1984) (Lump-sum value of annuity contract was exempt from claims of creditors not only of third-party beneficiaries under annuity contract, but also of annuitant.)

[55]In re Benedict, 88 B.R. 390 (Bankr. M.D.Fla. 1988) (Florida statute exempting proceeds of annuity contract issued to citizens or residents of state does not require that annuity itself be issued to resident of a state, but merely requires that proceeds be issued to residents of state.)

account, they may retain their exempt status.[56] Florida courts have construed the protection afforded to annuity proceeds by F.S. § 222.14 expansively. For example, courts have held that private annuity arrangements,[57] single-payment annuities,[58]

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[56]Id. (Debtor's depositing of proceeds of annuity contracts into checking account did not result in funds losing exempt status under Florida law; at all times, monies in account retained identity and were properly traced to annuity proceeds.)

[57]In re Mart, 88 B.R. 436 (Bankr. S.D.Fla. 1988) (Florida statute exempting, from claims of creditors, the proceeds of any annuity contracts was not limited to annuities provided by completely unrelated, public entities, but also applied to annuity purchased by debtors from irrevocable trust created by debtors and administered by daughter.)

[58]In re Alan L. Goldenberg, 253 F.3d 1271 (11th Cir. 2001) (Cash surrender value of debtor-physician's annuity contracts was exempt from claims of creditors, under Florida statute exempting, from attachment, garnishment or legal process, the proceeds of any annuity contract; term "proceeds," as used in Florida statute, included money that debtor could receive by surrendering his annuity contracts prior to maturity.)

structured settlements,[59] and lottery winnings paid via annuity contracts[60] may all fall within the definition of a protected annuity.

E. Retirement Plans & IRAs. Florida provides exemptions for pension-plan payments to police officers,[61] teachers,[62] state and county officers and employees,[63] plus most IRC-qualified retirement plans and IRAs.[64]

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[59] In re McCollam, 612 So.2d 572 (Fla. 1993) (Contract entered into in settlement of wrongful death claim which provided that insurer would make successive monthly payments until debtor's death or a set date was an "annuity" for purposes of exemption statute and proceeds were thus exempt from creditor claims.)

[60] See In re Dixson, 153 B.R. 594 (Bankr. M.D.Fla. 1993) (Under Florida law which exempts annuity contracts from creditors claims in bankruptcy, Chapter 7 debtor's Arizona lottery winnings paid by annuity contract had to be exempt.); but see In re Bruce, 224 B.R. 505 (Bankr. M.D.Fla. 1998) (Installment payments by which Chapter 11 debtor was to receive his Florida lottery winnings were not "annuity" payments within meaning of Florida exemption and, thus, lottery proceeds were not exempt; no annuity contract was ever purchased by the state naming debtor as owner or beneficiary of annuity contract but, instead, funds used to pay holders of winning tickets such as debtor were obtained by lottery administration's redemption of zero coupon bonds.); In re Pizzi, 153 B.R. 357 (Bankr. S.D.Fla. 1993) (Chapter 7 debtor, winner of Connecticut lottery, was not a "beneficiary" of annuity that was purchased by state of Connecticut from insurance company to pay out debtor's winnings, and thus the winnings did not fall within the scope of Florida law requiring that debtor be named beneficiary of annuity for proceeds to be exempt; named beneficiary on annuity was state of Connecticut with debtor only as named as "nominee," and debtor had no rights under the annuity contract.)

[61] F.S. § 185.25

[62] F.S. § 238.15.

[63] F.S. § 122.15.

[64] F.S. § 222.21(2)(a).

From an exemption planning perspective, IRC-qualified retirement plans provide the most opportunities – although they have been the subject of much litigation. This exemption is found in F.S. § 222.21(2)(a), which provides as follows:

> Except [with respect to claims of an alternate payee under a qualified domestic relations order], any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit-sharing plan that is qualified under s. 401(a), s. 403(a), s. 403(b), s. 408 [IRAs], s. 408A [Roth IRAs], or s. 409 of the Internal Revenue Code of 1986, as amended, is exempt from all claims of creditors of the beneficiary or participant.

For purposes of F.S. § 222.21(2)(a), the word "qualified" has been construed by Florida courts to require that the retirement plan be "ERISA-qualified." Florida courts have held that a retirement plan is "ERISA-qualified" if (1) it is subject to Part 2 of Title I of ERISA, (2) it contains the anti-alienation clause required by Part 2 of Title I of ERISA, and (3) it is "tax qualified."[65] Plans that cover only owners or

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[65]See In re Fernandez, 236 B.R. 483, 489 (Bankr. M.D.Fla. 1999) ("Whether or not in a defined benefit plan or in a profit sharing plan the sole participant is the debtor has been considered by the courts in the past. In the case of In re Witwer, 148 B.R. 930 (Bankr.C.D.Cal.1992), affirmed 163 B.R. 614 (9th Cir. BAP 1994), which is a post-Patterson case, the Court analyzed the term 'ERISA-qualified plan.' The plan contained the requisite anti-alienation provision and, facially, complied with the anti-alienation provision and, facially, complied with the anti-alienation requirements of § 401(a) of the Internal Revenue Code. The court, relying on 29 C.F.R. § 2501.3-3, held that the Profit Sharing plan was not subject to ERISA because the debtor was not a participant for the simple reason that the regulation clearly disqualified a sole shareholder as an employee. By disqualifying the debtor as an employee, the plan then had no participants, and therefore, the plan did not meet the definition of an employee Profit Sharing benefit plan. 29 U.S.C. § 1002(2)(A) (ERISA § 3(2)(A)).")

owners and their spouses are administratively excluded from the coverage of Part 2 of Title I of ERISA, and thus are not protected.[66] Also, Florida creditors do not have to defer to the IRS on the issue of determining tax qualification, and may thus attack the tax-qualified status of a plan that has never been disqualified by the IRS.[67] For example, Florida courts have held that an IRA that lost its IRA status due to a prohibited transaction was not protected[68] and that in order for funds rolled over into an IRA from a retirement plan to be protected, the retirement plan must have been tax qualified at the time of the roll over.[69]

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[66] See In re Sutton, 272 B.R. 802 (Bankr. M.D.Fla. 2002) (Chapter 7 debtor's interest in his Keogh plan was not excluded from the estate where debtor was the sole owner and operator of his real estate firm, debtor was the sole beneficiary of the plan, and debtor was the sole administrator of the plan; there were no other beneficiaries and no other administrators, and debtor was not an employee.); but see In re Luttge, 204 B.R. 259, 262 (Bankr. S.D.Fla. 1997) ("[I]t is clear under a plain reading of Fla.Stat. § 222.21 that any plan qualified under sections 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code is entitled to be claimed as exempt property. In addition, there is no justification under either the case law or legislative history of Fla.Stat. § 222.21 which suggests that the exemption is limited only to retirement, pension, or other plans which must be qualified under ERISA. Thus, in the event that a plan does not qualify as retirement plan under ERISA, it may nevertheless be exempt under Fla.Stat. § 222.21 so long as it complies with the applicable provisions of the Internal Revenue Code.")

[67] See In re Fernandez, 236 B.R. at 488 ("Debtor's Defined Benefit Pension Plan is facially ERISA qualified and the record is unrebutted that the Plan's tax exempt status, pursuant to its ERISA qualification, was recognized and never revoked by the IRS.")

[68] In re Hughes, 293 B.R. 528 (Bankr. M.D.Fla. 2003) (Chapter 7 debtor's misuse of funds from his individual retirement account (IRA), in order to make loan to his closely-held corporation, affected status of funds in account and prevented debtor from claiming exemption therein, notwithstanding that debtor promptly repaid loan in same year that it was made; repayment merely relieved debtor from penalty excise tax imposed pursuant to another tax statute.)

[69] In re Bandaras, 236 B.R. 837 (Bankr. M.D.Fla. 1998) (Profit-sharing plan established by physician's professional corporation solely for benefit of physician and no

At least one Florida court has held that retirement plan benefits that are deposited in a separate account and not commingled with other non-exempt assets will retain their exempt status.[70] Note surprisingly, IRS tax liens trump the protections afforded by F.S. § 222.21(2)(a).[71]

F. Wages for Head of Family. F.S. § 222.11 shields up to $500/week in "disposable earnings"[72] of a "head of family"[73] for up to six months if deposited

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other employees, some months after physician had retired and ceased to be an employee, did not qualify for tax exemption under the Internal Revenue Code, so that individual retirement account (IRA) into which funds from profit-sharing plan were rolled over was likewise not qualified, and could not be claimed as exempt under special Florida exemption for interest of any participant in tax-qualified retirement or profit-sharing plan.)

[70] In re Ladd, 258 B.R. 824 (Bankr. N.D.Fla. 2001) (Funds distributed from debtor's 401(k) plan were exempt under Florida law, even though the proceeds had been placed into debtor's checking account, where trustee objecting to the exemption did not challenge the qualification of debtor's plan, nor did she allege an inability to trace the proceeds.)

[71] See Lawler v. Suntrust Secs., Inc., 740 So.2d 592, 594 (Fla. 5th DCA 1999) ("Nor can section 222.21, Florida Statutes, exempt the IRA from the levy. Restraints imposed by state law cannot affect the ability of the IRS to levy on accounts pursuant to federal law. . . . The IRS has a well-grounded reputation for being the King Kong of creditors in terms of its powers to collect tax delinquencies. This case illustrates some of the reasons for that reputation.")

[72] The word "earnings" is defined by F.S. § 222.11(1)(a) as follows: "Earnings" includes compensation paid or payable, in money of a sum certain, for personal services or labor whether denominated as wages, salary, commission, or bonus; the term "disposable earnings" is defined by F.S. § 222.11(1)(b) as follows: "Disposable earnings" means that part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required by law to be withheld.

[73] The term "head of family" is defined by F.S. § 222.11(1)(c) as follows: "'Head of family' includes any natural person who is providing more than one-half of the support for a child or other dependent."

with "any financial institution"[74] in a separate account and not commingled with other non-exempt funds. With respect to a debtor who is not a "head of family," F.S. § 222.11 shields earnings up to the amount allowable under the Consumer Credit Protection Act, 15 USC § 1673 (i.e., generally, no more than 25% of disposable earnings can be garnished). The two areas of contention with respect to this exemption are (1) independent contractors and (2) whether the protection extends to owner-employees of closely held businesses.

With respect to independent contractors, the courts have been inconsistent, with some holding that their earnings do not fall within the wage-exemption provided by F.S. § 222.11,[75] and others holding that they do.[76] For planning purposes, the

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[74]See In re Rutenberg, 164 B.R. 683 (Bankr. M.D.Fla. 1994) (Cash management account with brokerage firm was not "bank account", within meaning of Florida statute protecting wages deposited in bank accounts, and thus Chapter 11 debtor could not claim funds in such account as exempt as wages).

[75]See In re Lee, 190 B.R. 953 (Bankr. M.D.Fla. 1995) (the exemption does not extend to earnings of an independent contractor); Schlein v. Mills, 8 F.3d 745 (11th Cir. 1993) (Florida wage exemption statute does not provide exemption for that part of bank account that consists of earnings of independent contractor.)

[76]See In re Pettit, 224 B.R. 834 (Bankr. M.D.Fla. 1998) (Debtor's commission and bonuses constituted exempt "earnings" under Florida wage exemption where, although debtor was labeled an independent contractor, his activities were essentially a job and not in the nature of running a business; debtor received regular compensation dictated by terms of arm's length, verbal employment agreement, debtor had received regular monthly commissions of $12,500 as well as quarterly bonuses of $10,000 since he began working for company, and debtor was neither an insider nor an owner of that company.); In re Glickman, 126 B.R. 124 (Bankr. M.D.Fla. 1991) (Money owed to judgment debtor by alleged employer stemmed from personal labor and services of debtor, and thus was exempt from garnishment under Florida statute exempting payments for labor or services, whether debtor was employee or independent contractor.)

conservative approach is to assume that the earnings of independent contractors are not protected by F.S. § 222.11.

With respect to owner-employees of closely held businesses, the courts have held that the for the exemption to apply the debtor must not only perform personal services for the business, but he must also receive regular compensation dictated by the terms of an arms-length employment agreement. In Brock v. Westport Recovery Corp., 832 So.2d 209, 211-212 (Fla. Dist. Ct. App. 4th Dist. 2002), the court summarized the current state of the law in Florida applicable to owner-employee debtors seeking to assert the wage-exemption as follows:

> To decide whether monies from employment qualify for the section 222.11(2)(b) exemption, the relevant inquiry is often whether a person's employment is a salaried job or is in the nature of running a business. In In re Manning, 163 B.R. 380 (Bankr.S.D.Fla.1994), the court held that "a debtor that owns or controls a business cannot exempt the funds he distributes to himself from the business simply by calling the money 'wages.' " Id. at 382. There, the debtor's wife owned 100 percent of the stock of a general contracting corporation. Id. at 381. As the president of the company, the debtor was responsible for the corporation's day-to-day operations. He had no written employment contract, and established his own "salary," including commissions and bonuses. Id. Thus, the court concluded that the debtor was not entitled to the exemption where the amount and timing of compensation was determined by the debtor and "essentially constituted discretionary distributions from the family owned business." Id. at 382.

"For the exemption to apply, the debtor must not only perform personal services to the business, he must also receive regular compensation dictated by the terms of an arms-length employment agreement." Id.; see also In re Harrison, 216 B.R. 451, 454 (Bankr.S.D.Fla.1997) (holding that the debtor was not entitled to the exemption where his employment agreement was enforceable only by himself and the other shareholder, and where they controlled the timing and amount of their compensation: "They made all decisions about when they got paid and how much they received; the payment of their wages [was] purely discretionary").

Likewise, in In re Zamora, 187 B.R. 783 (Bankr.S.D.Fla.1995), the court concluded that an attorney's compensation from his own law practice did not qualify as earnings under section 222.11. "[T]he relevant inquiry is whether the debtor's activities were essentially a job or whether they were in the nature of running a business." Id. at 785. There, the debtor had complete control over the amount of his compensation and the terms of his employment. Id. There was no arms length employment agreement between the debtor and his legal practice/corporation, and the debtor was essentially running a business rather than working at a job. Id. The court explained why someone in the debtor's position should not receive the benefit of the exemption:

An employee has regular earnings pursuant to an employment agreement. He or she is paid directly for personal labor or services. By contrast, this Debtor and others similarly situated who run their

own businesses, have control over the timing and amount of their compensation. Certainly, the legislature did not intend to exempt all funds a person chooses to "draw" from a business where the individual has full discretion over what expenses to pay or not pay in order to fund the draw.

G. Other. In addition to the major exemptions, the following asset classes are also exempt under Florida law from creditor claims:

1. Aid to needy[77]
2. Alimony[78]
3. Worker's compensation[79]

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[77]F.S. § 222.201 (exempting public assistance benefits).

[78]F.S. § 222.201, 11 U.S.C. § 522(d)(10)(D) (Exemption is limited "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor").

[79]F.S. § 440.22; see Broward v. Jacksonville Medical Center, 690 So.2d 589 (Fla. 1997) ("Due or payable" language in statute which precludes any assignment or commutation of benefits due or payable under workers' compensation law, and which further exempts such benefits from claims of creditors, did not preclude injured worker or his beneficiaries from maintaining exemption in such benefits once they had been paid, as long as funds claimed as exempt were traceable to the workers' compensation benefits.); In re Harrelson, 311 B.R. 618 (Bankr. M.D.Fla. 2004) (Under Florida law, workers' compensation benefits that were exempt in hands of injured worker from claims of her creditors did not lose their exempt character simply because worker, in order to obtain higher rate of return, withdrew funds from her bank account and allegedly put them at risk by investing them in treasury bonds and mutual fund shares; even after they were invested, funds retained their character as "workers' compensation benefits in the hands of the beneficiary."); In re Green, 178 B.R. 533 (Bankr. M.D.Fla. 1995) (Certificate of deposit purchased with funds from settlement of Chapter 7 debtor's workers' compensation case was exempt "disability benefit" under Bankruptcy Code, where funds from settlement of workers' compensation case used to purchase certificate were traceable to settlement proceeds.)

4. Certain personal property[80]
5. Compensation for crime victims[81]
6. Funeral deposits[82]
7. Hazardous occupations compensation[83]
8. Social Security[84]
9. Unemployment compensation[85]
10. Veteran's benefits[86]
11. Earned income credit granted under IRC[87]
12. Funds invested in Florida's 529 college savings plan or Florida's prepaid college savings plan[88]
13. Funds invested in a Medical Savings Account[89]

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[80]F.S. § 222.25 (exempting health aids and $1,000 for motor vehicles); Fla. Const. Art. X, § 4 (exempting $1,000 for any personal property).

[81]F.S. § 960.14.

[82]F.S. § 497.413 (allowing exemption for all money deposits in Florida's Preneed Funeral Contract Consumer Protection Trust Fund).

[83]F.S. § 769.05.

[84]F.S. §§ 222.21(1), 222.201, 11 U.S.C. § 522(d)(10)(A).

[85]F.S. § 443.051.

[86]F.S. § 222.201, 11 U.S.C. § 522(d)(10(B) (veterans benefits), F.S. § 744.626.

[87]F.S. § 222.25.

[88]F.S. § 222.22.

[89]F.S. § 222.22.