

**STATUTORY EXEMPTIONS, GARNISHMENTS  
AND  
LEGAL PROCESS  
Rev. 4, July 2002  
By John Sims**

**Required Legal Disclaimer:**

**This document consists only of fact, the Florida Constitution, General Laws of Florida, Florida Statutes, Florida Case law, Florida legal processes, numerous case citations of various jurisdictions, and verifiable statements of the author. This document contains information in which anyone can retrieve in the public records. What you do with this information, and how you apply it to your specific legal situation, is at your own risk. This document is not legal advice.**

**Due Process**

**In law, every word has its specific meaning, and being unambiguous, means exactly what it says. I am not going to intimidate you with the millions of comments and opinions of judges, courts, lawyers and administrative agencies, most of which work in your favor, but I will convey to you my statements and findings of those laws, court opinions and judgments regarding exemptions, garnishments and the associated legal processes, mostly originating out of the corporate “State of Florida”. The obvious requirement for judicial “due process” is guaranteed by the Fourth, Fifth, Sixth and Seventh Amendments to the Constitution of the United States. The Fourth Amendment controls pre-judgment searches and seizures and the Fifth controls conversion: “No person shall be deprived of life, liberty or property without due process of law.” This “due process” protection includes exemptions, garnishments, income deduction orders (hereinafter “IDO”), liens, foreclosures, judgments of any type (i.e., administrative, civil, criminal, orders, decrees, etc.), assessments, warrants, and taxes.**

**To understand due process, as we should, we must look to the courts and see how they interpret it. How you or I might interpret it doesn’t mean much, unless you desire to waive your “due process”. There are many researchers and cases available in the public domain on this subject to keep you busy for the rest of your life. Suffice it to say, the courts are not protecting self-represented litigants, as they are required. A recently acquired public domain document entitled the “Relation Back Memorandum” opens with a fantastic discussion of the subject.**

**Consider yourself the “Debtor” in the “Corporate” state of today’s society. The state is a corporation, as is the federal government, like it or not. They say so themselves. How can “property” (i.e. “wages, income, real property, etc.”) and your**

**“home” be taken from you by the “corporation”? Well, many legal and illegal laws and methods exist to do this, but most legislatures are aware of this fact in that they have enacted specific and stringent laws that protect the “public” from the wrath of the courts and from the corporate “state”, while at the same time preventing citizens from becoming a “charge” or a financial burden on the state and it’s citizens. Your specific state, and the federal government, may have similar laws and you must research them, understand them, and apply them properly to your current situation before applying the information herein to your specific legal process.**

## **DESIGNATION OF HOMESTEAD**

### **Homestead Exemptions (Non-Tax related)**

**There are a few “Exemption” and “Garnishment” laws that Florida has incorporated into the General Laws of Florida as codified in the Florida Statutes . There are also more than a few Florida appellate and supreme court case opinions on “homestead” exemptions . We will first address the “supreme law” of the land, the Florida Constitution.**

**Article X, Section 4 of the Florida Constitution provides, inter alia:**

**(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...**

**Let’s read that again...”exempt from forced sale under process of any court” and the word “shall” before it tells us it is a mandatory directive, not just a statement that holds little weight or authority. Then the Constitution goes on to command “and no judgment, decree or execution shall be a lien thereon” except for certain specific contractual items of commerce with others, such as home improvement liens, “the following property owned by a natural person: a homestead”. Wow...Say that again! “Exempt from forced sale under any process of court: a homestead...owned by a natural person...”. You must understand the definition of “homestead” first.**

**A “natural person”... Wow, I thought I’d never see the government regard me as, or even refer to me as a “natural person”. A “homestead” you ask? What is that? You may even say to yourself, I haven’t heard of that term since the old west days. Then, you may ask yourself exactly what does that word “homestead” mean? How does it pertain to my real property and me? It used to mean something to the effect that you had to “lay claim” to your land and stay there for 5 years, among other things. Not any more. You have to “lay claim”, legally, to your homestead, by making a**

statutory claim with the Clerk of the Court or the County Recorder's Office. Florida's constitutional homestead "guarantee" is wholly intended by the Florida Legislature to preserve your "homestead" against involuntary divestiture by the courts, by any process of law, without regard to the technicalities of how the divestiture is accomplished. However, pursuant to section 4, Article X, Florida Constitution, as long as your property maintains its "homestead" status and is not abandoned by you, or is not sold with the proceeds of such a sale not being invested in another homestead property, your property is absolutely protected from forced sale by any process of law in any court.

Thus, the constitutional prohibition of forced sale, or execution of any judgment regarding homestead property, as well as wages of a head of household which we will discuss later, takes priority over any debt or lien and renders the same unenforceable. As codified in Chapter 222, Fla. Statutes, that chapter implements Florida's constitutional protection against forced sale of homestead property to satisfy judgment creditors. Before levy, the law allows a property owner may make a signed, written declaration that certain property qualifies as a homestead and allows the property owner to record this "declaration" in circuit court or in the county recorder's office. This must be done, or your real property is not legally claimed as your homestead. It is well settled that trial courts have correctly determined that the homestead provisions provided in the Florida Constitution do not really "invalidate" any liens created, but merely render the lien completely unenforceable. Accordingly, the mere recording of a lien order, or judgment lien, does not constitute a cloud upon homestead property or title. Also, a homestead cannot be liened or levied upon, or on a monetary obligation obtained by a judgment through forced sale, or be enforced or perfected against a homestead.

Although the statutes merely provide that any lien or judgment created by the courts (i.e., lawful judgment) may not be foreclosed on any real property which is a "claimed" homestead, the Fla. Constitution itself goes much farther: No such lien exists as to such homestead property. Since that is true, the mere recording of a judgment order or lien against your homestead property cannot constitute a cloud against your homestead property title. In other words, no clouded title against homestead property can lawfully exist and is void ab initio. Homestead rights have long been embodied in the organic law of this state interpreting the homestead provision of the Florida Constitution of 1868. The purpose of these "homestead protections" is to preserve a home for the family, even at the sacrifice of just and legal demands, and to protect the family from destitution and want. The homestead protections by the state keep families from becoming a burden upon the taxpayer, the state, the citizenry and keep families from being tossed out on the street with no where to turn. The provisions of homestead laws should always be carried out in the liberal, beneficent spirit in which they are enacted into law. I stress that you should never utilize the law to defraud anyone or any creditor, as the law works to your favor without having to resort to trickery and deceit. Nevertheless, great care should be taken to prevent, and you should think twice, before utilizing homestead protection laws from becoming instruments of fraud, an imposition on creditors, or

a means to escape honest debts. That subject is covered in detail at <http://www.dueprocess.org/1000/>

## **Homestead Property and Land Acreage**

**Homestead protections are not unlimited. In Florida, properly claimed homestead property may consist of up to 160 contiguous acres of qualified land, if located outside of a municipality or one-half acre if located inside of a municipality. In Florida, as well as in many other states, property in excess of the homestead claim, though part of the same tract, may be made subject to the debt or legal obligations of the landowner. This means that any property over 160 continuous (attached or joining) acres, or one-half acre in a municipality, may be levied or a judgment lien may be instituted against such acreage. This rule fulfills the purpose of the homestead laws by preserving the maximum protection available for the landowner under those laws while exercising great care to ensure that those laws do not become a vehicle to avoid just obligations. Generally, the landowner has a right to select and claim his homestead in any contiguous shape from his qualifying lands. Where a homeowner retains the maximum amount of land qualified to be selected as homestead, the landowner, homeowner and the family is afforded maximum homestead protection under the law, provided he has properly claimed such rights. Proper claim is the key. The property tax exemption, also improperly referred to as “homestead exemption” does not protect your “property” (wages, income, real property, etc.) from legal process.**

**Many courts have stated and recognized that the enforceability of contracts to convey homestead has been the subject of some doubt. Where the landowner’s actions have excluded excess land from homestead protections, the homestead laws do not apply and do not bar the remedy of specific performance of any contract in regards to the property such as sale or levy. The issue presented to us is at this point of this discussion is now straightforward: does a “Notice of Homestead” preclude any prior judgments to be rendered unenforceable? As a general rule, a person can file a declaration of homestead at any time before the forced sale date, which until resolved, will protect the property from forced sale. However, it is clear from court opinions that the issue of the homestead status of a homeowner, which was previously litigated and determined by the court, is not usually protected unless special measures are introduced in the legal process. By reason of that final judgment, a lien may attach to the property before a “Notice of Homestead” is filed or claimed. Under such extreme circumstances, an after-acquired status, or claim, of homestead usually does not affect the prior lien. Accordingly, any previous court orders finding that the issue of homestead was determined are normally, but not always res judicata. Should this be the law and outcome of your specific situation or case, you must then look to the law, or Fla. Statute 222.02 for protection. The homeowner at that juncture, is then required to notify the person, or “officer” (i.e., Sheriff, Judge) making the levy, by written notice under oath at any time before the day of the forced sale, of what they regard as his or her homestead, and only the**

remainder (i.e., over 160 continuous acres) may be subject to forced sale under such a levy.

The failure to file a “preventive” pre-levy designation of homestead does not preclude, or bar a homeowner from asserting his or her homestead rights once they receive word that the home is about to be auctioned off to strangers to satisfy a debt or judgment. Absent a formal, public notice that we are all in dire need of this superior protection against forced sale of our homes and property, few of us are likely to travel down to the courthouse and make, or claim a “designation of homestead” just in case it might prove handy some day. Of course, this is exactly what every homeowner should do immediately upon purchasing a home! Ignorance of the law is no excuse. Compliance with the laws recording a pre-levy designation in circuit court or filing a post-levy sworn statement with the levying “officer” is effective enough to “set apart” and “designate” one’s homestead or property and employ the constitutional protections afforded by law and the lawful processes. There is nothing more to do except as noted above. To place a burden on a homeowner to do something more to establish his homestead claim, such as seeking a circuit court judgment declaring that the property is indeed homestead, or enjoining the sale of a homestead through court procedures, is at odds with the laws and the constitution.

Mindful of the special affection and protection afforded by the constitution to homeowners, Florida courts, and the state Legislatures have traditionally bestowed on the “designated homestead”, the proper condition of a homesteader who has filed the required affidavit which should be one of repose and security in the home, a veritable “refuge from the stresses and strains of misfortune.” A sheriff’s continued and regular unlawful practice of selling claimed homestead interests along with nonexempt interests, and leaving homesteaders to unravel their entangled affairs in post-sale litigation, with all accompanying expense and anxiety, is irreconcilable with the constitutionally favored status of the Florida homestead law. Plus it costs a lot of time and money. As the Supreme Court noted long ago, levy and advertisement of sale of exempt homestead property causes “unnecessary anxiety and disquiet to the owner and his family.” To place such a “cloud” on homestead property is unlawful and at odds with the intent of the legislature. That practice violates the letter and spirit of Florida’s statutes exempting homestead property from forced sale. Because of the sheriff’s continued unlawful practices, the issue of unlawful selling of homestead property required just and immediate resolution by the courts because it was “capable of repetition, yet evading review”.

If a homesteader chooses to seek another form of removal of a “cloud” (i.e., judgment, lien or levy) against the property title, they would face legal costs that are, or were entirely unnecessary. Aside from these unnecessary effects and burdens on the family living on exempt homestead property, the sheriff’s traditional unlawful practice requires litigation that the parties might choose to simply avoid. Under Florida law, the sheriff is a mere neutral participant in the legal process of a forced sale. He may sell only the land that is not designated by a properly drawn

**affidavit as a homestead. The law gives him no authority to presume that the homestead claim is unfounded, invalid, not required, or to force the parties into court to sort things out after the sale. When a homestead claim affidavit is filed, the creditor alone has a means to challenge the homestead claim, should he wish to do so. That choice is to be made by the creditor, not by the levying “officer” or sheriff.**

### **Code Enforcement Issues**

**Most state laws, county ordinances or city codes, or “laws”, provide local code enforcement boards with the authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities where a pending or repeated violation exists. Specifically, section 162.09(3) of the Florida Statutes provides:**

**A certified copy of an order imposing a fine may be recorded in the public record and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator.**

**Such an “order” may be enforced in the same manner as any court judgment by the sheriffs of the state, including levy against the personal property, but such type of order shall not be deemed to be a court judgment, except for enforcement purposes only. No lien created pursuant to the provisions of this code enforcement law may be foreclosed on real property, which is a homestead under s. 4, Art. X of the State Constitution. Initially, it must be noted that this type of lien was created pursuant to a “code enforcement board order” rather than pursuant to a “judgment, decree or execution“ of a court of competent jurisdiction, which are prohibited by the constitution. Although the statute merely provides that any lien created pursuant to an administrative fine may not be foreclosed on real property which is homestead, the Constitution itself goes much farther: No such lien exists as to such homestead property. Since that is true, the mere recording of an order against a homestead cannot constitute a cloud against your homestead property.**

**More importantly, the prohibition of the constitutional provision is a prohibition against the use of any code enforcement (or any other) process to force the sale of homestead property but again does not actually invalidate a debt or lien. You should contest the lien within the statutory time period and move to remove any clouded title or lien should the lienor fail to comply with the statutory provisions for responding to the notice of contest of lien.**

**Thus, as mentioned previously, the constitutional prohibition against forced sale of the property, if it is a homestead, takes priority over the debt or lien and renders the debt, levy or lien unenforceable. Most legislatures recognized this fact in determining that an “enforcement board order” should not be considered a judgment except for enforcement proceedings. Because of noncompliance with an order or citation of a City or a County Code Enforcement Board, the City or**

**County may impose a fine or create a lien against your property. The action normally sought to remove a “cloud” from the title of real property, which you may have claimed as homestead, the alleged cloud being a judgment lien against you personally, which is created or claimed by the City or County Code Enforcement Board, is wholly unenforceable. Accordingly, the mere recording of any type of judgment or order does not constitute a cloud upon homestead property. However, if the homesteaded property somehow lost its “homestead status”, the code enforcement boards would be able to enforce any lien or judgment order as a lien against the property.**

**It is arguable that a declaratory type of legal action, which should be filed (assuming, arguendo, that any legal action at all was necessary) should be strictly a declaratory judgment action seeking a determination that the property at issue is, in fact, homestead property. It may very well be, however, that the homestead status of the property is not in factual dispute at this point in the discussion. I point out a note that if the property is, indeed, homestead property, then the owner(s) may sell it and, contrary to the finding by a court to the detriment of the owner(s), there would be no lien on the property then in the hands of the purchaser(s). On the other hand, if the owner(s) failed to invest the proceeds, or money of that sale into another homestead within a reasonable period of time, any creditor(s) such as the County, or City code enforcement board, could reach those proceeds or money. It is also true, of course, that if the owners were to retain ownership of the property but abandoned it as their homestead, the County’s, or City’s code enforcement order against the owner could then be enforced as a lien against the property.**

#### **Criminal Restitution, Forfeitures, Probation and Homestead protection**

**An order, which imposes a lien filed in the public record for any type of “criminal restitution”, i.e., restitution of a party in a criminal case, is considered a valid lien. The lien normally attaches, for purposes of criminal restitution only, to a non-homestead property. But, a court cannot not impose such a “restitution” type of lien under article X, section 4 of the Florida Constitution on homestead property. In a criminal RICO case the courts allow the constitutional homestead protections. In this situation the court looked toward the question of whether forfeiture of a homestead under the RICO Act is forbidden by article X, section 4 of the Florida Constitution.**

**The court answered the certified question in the affirmative. The respondent was convicted of racketeering in violation of the Florida Racketeer Influenced and Corrupt Organization Act (Florida RICO Act), and of bookmaking. Three of the bookmaking incidents occurred at the respondent’s personal residence. The State later sought forfeiture of the residence in separate civil proceedings under the Florida RICO Act on the grounds that the property was “used“ in the course of racketeering activity in violation of the Act. The trial court, relying on *DeRuyter v. State*, 521 So.2d 135 (Fla. 5th DCA 1988), found that the homestead exemption in article X, section 4 of the Florida Constitution did not protect the respondent’s**

residence against RICO forfeiture, and entered final summary judgment for the State. The respondent appealed to the Second District Court of Appeal, which reversed the trial court's entry of summary judgment and held that homestead property is not subject to forfeiture under the Florida RICO Act. The Second District noted conflict with DeRuyter and certified the question, which the court affirmed.

In DeRuyter, the Fifth District Court of Appeal incorrectly held that constitutional homestead property was not exempt from RICO forfeiture. The court reasoned that no appellate decisions on this question have been cited and none have been found by research. However, the DeRuyter court viewed forfeiture of property due to its use in a criminal enterprise, to be entirely different from the "forced sale" language in the constitution. The purpose of the constitutional provision is to protect homestead property from forced sale for debts of the owner. Forfeiture here is not predicated upon debts incurred by the owner but rather is based solely on the illegal uses to which the property is being put. The court ruled that Article X, section 4, Florida Constitution, was simply not designed to immunize real property for use in a criminal enterprise.

The State argued that forfeiture is not a "forced sale" and that the homestead exemption was not intended to apply outside the debtor context, and urged that the Caggiano judges interpret the constitutional provision inapplicable in regards to criminal forfeiture. In light of the purpose and language of the provision, the Caggiano court was unable to do so. A settled rule of constitutional interpretation is that the words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the people who have adopted them usually understand the words. Additionally, Florida courts have consistently held that the homestead exemption in article X, section 4 must be liberally construed. A liberal construction of the homestead exemption is particularly appropriate in the context of forfeiture. Forfeitures are considered harsh penalties that are historically disfavored in law and equity, and courts have long followed a policy of strictly construing such statutes. Applying these principles, the court first noted that all property forfeited under the Florida RICO Act is required by statute to be sold at a state auction. In any event, there is no indication that the word "sale" in article X, section 4 is being used in its technical, legal sense in isolation from the surrounding language. To the contrary, it appears that the homestead exemption uses broad, nonlegal terminology that was intended simply to guarantee that the homestead would be preserved against any involuntary divestiture by the courts, without regard to the technicalities of how that divestiture would be accomplished.

The Iowa Supreme Court has likewise so viewed the protection of a homestead and held forfeiture to be a "judicial sale" within the meaning of its statutory homestead exemption.

In considering whether an order of forfeiture is a judicial sale within the meaning of

Iowa Code section 561.16, the Caggiano court was properly guided by well-established principles. In this state, homestead statutes are broadly and liberally construed in favor of exemption. "Regard should be had to the spirit of the law rather than its strict letter." The homestead exemption is not "for the benefit of the husband or wife alone, but for the family of which they are a part." Further still, Florida has recognized that the exemption is not only "for the benefit of the family, but for the public welfare and social benefit which accrues to the state by having families secure in their homes." The policy of our law is to jealously safeguard homestead rights.

With these principles in mind, the Caggiano court considered that the term "judicial sale" as used in RICO statutes, was intended to encompass any judicially compelled disposition of the homestead, whether denominated a "sale" or not. Although an order of forfeiture is less a sale to the State than a commandeering by the State, it cannot be denied that the benevolent purposes of the homestead statute would be frustrated by giving the term "judicial sale", in the RICO statute, a narrow or technical construction dependent upon finding a true "sale." The term should be given a liberal construction so as to further the purposes of the exemption.

This logic is even more persuasive when the operative language is elevated to the level of a constitutional exemption, as is Florida's homestead provision. Contrary to the State's assertion, the plain import of the constitutional language of article X, section 4 is not limited to the debtor-creditor context. The language of the provision refers to "forced sales," not "forced sales arising from debts." The purpose of the homestead exemption has been described broadly as being to protect the family, and to provide for it a refuge from misfortune, without any requirement that the misfortune arise from a financial debt. Most significantly, article X, section 4 expressly provides for three exceptions to the homestead exemption. Forfeiture is not one of them. According to the plain and unambiguous wording of article X, section 4, a homestead is only subject to forced sale for (1) the payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement or repair thereof; or (3) obligations contracted for house, field or other labor performed on the realty. Under the legal maxim "expressio unius est exclusio alterius"--the expression of one thing is the exclusion of another--forfeitures are not excluded from the homestead exemption because they are not mentioned, either expressly or by reasonable implication, in the three exceptions that are expressly stated.

It makes no difference that the attempted divestiture in the Caggiano case was an adjunct to a criminal proceeding. As the Supreme Court of Kansas declared in construing its state's constitutional homestead exemption, the homestead provision of the Kansas Constitution sets forth the exceptions and provides the method of waiving the homestead rights attached to the residence. These exceptions are unqualified. They create no personal qualifications touching the moral character of the resident nor do they undertake to exclude the vicious, the criminal, or the immoral from the benefits so provided. The law provides for punishment of persons

convicted of illegal acts, but the forfeiture of homestead rights guaranteed by our Constitution is not part of the punishment. Florida law likewise prohibits the implication of exceptions or limitations to article X, section 4.

The courts find no difficulty in holding that the Florida constitutional exemption of homesteads protects the homestead against every type of claim and judgment except those specifically mentioned in the constitutional provision itself and that, therefore, the claim of homestead is good against the demands of a judgment grounded on a malicious tort. The Florida homestead provision clearly contains no exception for criminal activity. Neither the legislature nor the Courts have the power to create one. Consequently, in light of the historical prejudice against forfeiture, the constitutional sanctity of the home, and the rules of construction requiring a liberal, nontechnical interpretation of the homestead exemption and a strict construction of the exceptions to that exemption, the law, under article X, section 4 of the Florida Constitution, prohibits civil or criminal forfeiture of homestead property.

A trial court may not violate probation because a probationer had, or has the ability to pay any restitution because the probationer owns his or her own home. A refusal to waive homestead exemption rights of a probationer does not constitute a “willful refusal to pay restitution.” In determining a defendant’s financial resources in a probation violation case, the court may not consider the probationer’s ownership interest in homestead property. The constitution does not distinguish between the civil court and the criminal court. The purpose of the Homestead Act is to protect the homeplace against financial misfortune. The public policy of this state also prohibits the court from attaching homestead directly through a tort action judgment. It also prohibits the “forced sale” by a judge as a condition for avoiding the consequence of a violation of probation.

Another recent criminal opinion was handed down in which a homeowner was convicted of trespass after warning, a misdemeanor, and was sentenced to forty-five days in jail. The city moved to impose a lien on the alleged perpetrator for \$50 per day for each day of his incarceration, pursuant to section 960.293(2)(b), Florida Statutes that is part of the Civil Restitution Lien and Crime Victims' Remedy Act. The county court found the Act unconstitutional in its entirety, stating that it violated the equal protection and due process provisions of the United States and Florida constitutions, that it is unconstitutionally vague, and that it is unconstitutional because it imposes excessive fines. The Fourth District Court of Appeal reversed the lower court and found the Act constitutional. Although the trial court declared the Act unconstitutional in its entirety, the appellate court reluctantly addressed only those portions of the Act at issue in the case. The appeals court agreed that the statute is constitutional insofar as it relates to (1) the imposition of per diem charges against convicted prisoners as reimbursement for the costs of incarceration and (2) the lien created as a result of the order imposing such charges. Of course the appeals court supported the city’s argument, as usual, regardless of the denials of due process and excessive punishments. This is a typical case of one of three branches of government doing as they please, without regards to the law and rights of the parties.

The accused in this case also argued that the statute violated procedural due process because the Act imposes a lien on the real or personal property of the convicted offender for payment of the incarceration charges. Note that statutorily mandated costs may be imposed on an indigent defendant without a determination of the defendant's ability to pay. Section 960.294(2) provides that an order imposing the incarceration charges shall be enforced in the same manner as a judgment in a civil action. Thus, the lien created upon the imposition of the per diem charge against the defendant's real property has the same effect as the lien created by the entry of a civil judgment. Unlike the Kansas statute, which was struck down in *James v. Strange*, 407 U.S. 128 (1972), the act does not place convicted prisoners in a category different from any civil judgment debtor. Should the city seek to impose the lien against a defendant's property in regards to incarceration charges, he retains the same protections afforded to any civil judgment debtor.

The foregoing rationale also disposes of the defendant's contention that the imposition of the lien contravenes the protection of the homestead provided by article X, section 4 of the Florida Constitution. The legal effect of a statutory lien on homestead property was analyzed in *Demura v. County of Volusia*, 618 So.2d 754 (Fla. 5th DCA 1993) as previously mentioned in this memorandum. In that case, landowners sued to quiet title to a homestead against a lien, which had been imposed by the county for noncompliance with an order of the code enforcement board. The county argued that the constitution only prohibits the forced sale of homestead property and does not prohibit the imposition of a lien. The court properly held that although the statute merely provides that any lien created pursuant to an administrative fine may not be foreclosed on real property which is homestead, the Constitution itself goes much farther: No such lien exists as to such homestead property. In a like manner, the civil restitution lien cannot be a cloud on homestead property.

#### **Money Judgments**

If a party has obtained a judgment against another for expenses paid, voluntarily, for mortgage payments, condominium assessments and maintenance, the "money judgment" does not differentiate between that portion of the debt representing a current benefit to a homestead interest, such as current interest on the mortgage, and that portion of a homesteader's payments ultimately benefiting only remainderman, such as the principal reductions on the mortgage. I would concur in the opinion of the cited footnote, but would also note that the judgment in this case does not involve, and does not purport to be founded on, concepts of equitable lien, equitable subrogation or constructive trust. Nor has Appellant even claimed such relief in the case at hand. Appellant's money judgment was for voluntary payments, and is not based upon a claim of fraud or a contract obligation between the parties. I also note that there is no reason to apply a different principle here than in a circumstance where an owner of homestead property borrows funds which are subsequently applied to repairs or mortgage payments by the debtor.

#### **Exempt Homestead Property and Divorce with comments on Fraud and Dishonesty**

**One of the issues in this situation would be whether the constitutional homestead exemption could be waived by a provision in a settlement agreement adopted by a divorce final judgment. If a husband and wife enters into a property settlement agreement that was later incorporated into a final judgment dissolving their marriage then the settlement agreement is a “judgment”. The agreements are usually for the sale of the marital residence. Most divorce provisions of a settlement agreement provide that one of the parties will satisfy any and all outstanding judgments pending against them from their share of the proceeds received from the sale of the marital property. That party is also usually responsible for any and all potential claims, lawsuits or judgments pending against them individually or in connection with their profession if self-employed.**

**In a controlling case named “Myers” , at the closing on the sale of the marital home, the husband did not take steps to pay off the appellee’s judgments. Instead, he entered into an escrow agreement with the buyers’ attorney. Pursuant to the agreement, moneys from the appellant’s share of the sale proceeds were placed into an escrow account held by the buyers’ attorney and appellant had six months to obtain a court order declaring that the funds were protected by homestead from appellee’s judgments. If appellant failed to obtain such an order, then the agreement authorized the buyers’ attorney to release the funds to appellee. Appellee sought to garnish the funds held in escrow by the buyers’ attorney. Appellant moved to dissolve the writ of garnishment, contending that the homestead provision of the Florida Constitution shielded the proceeds of the sale from garnishment. After an evidentiary hearing, the trial court denied appellant’s motion to dissolve the writ and entered a final judgment in garnishment ordering that the escrowed funds be paid to appellee against the outstanding judgments.**

**Based on the evidence at the hearing, the trial court could properly have concluded that appellant failed to carry the burden of proof required by Orange Brevard Plumbing : that he had an “abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time.“. The trial court need not have reached the factual, subjective question of appellant’s intent, because appellant’s conduct in the divorce proceeding amounted to a “waiver of homestead” as a matter of law.**

**Historically, the purpose of the homestead provision was to protect the family, to “provide it a refuge from the stresses and strains of misfortune.“ The 1985 amendment to article X, section 4 extended the protection to a “natural person,“ without regard to status as head of a family. The homestead exemption is liberally construed for the benefit of those whom it was designed to protect. In light of these general principles, the appellant relied on a case for the proposition that the homestead exemption cannot be waived. The waiver in the Sherbill case arose as part of a debtor-creditor transaction. The debtors signed a note, which waived the “benefit of the homestead exemption“ as to the debt created by the note. The debtor defaulted. The creditor sued on the note, obtained a judgment and sought to levy on the debtors’ homestead property. The Supreme Court held that the waiver**

contained in the note was contrary to public policy. As authority, Sherbill cited a case, which also invalidated a waiver of homestead exemption contained in a note. Expressing the nineteenth century view of a paternalistic, social safety net, Carter's Administrator makes it clear that the type of waiver offensive to public policy is one given by a debtor as part of the consideration for a loan:

**“The object of exemption laws is to protect people of limited means and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasion of others. . .It would be mischievous to encourage such agreement in which by the mere scratch of a pen the whole policy of the exemption laws would become nugatory. . . . . few men would mortgage their household goods and their children's clothes to a hard creditor with the inevitable result brought vividly to their understanding, but many thoughtless and improvident people might be induced to obtain credit by merely “waiving the benefit of exemption,” and thus placing the last blanket and bed and their own and the children's clothing at the mercy of a hard creditor, if an agreement like this should be sustained.”**

Unlike the impermissible waiver in Sherbill, the provisions of the settlement agreement in the Myers case did not arise as part of a transaction with a creditor. The public policy values implemented by Sherbill and Carter's Administrator were not offended by the Myers appellant's agreement with his wife to satisfy judgments from his share of the proceeds from the sale of the marital home. In negotiating the agreements, the appellant in Myers was represented by counsel. The husband's promise was given not to benefit a “hard creditor,” but to appellant's wife, a person entitled to the protection of the homestead provision as to the marital home. In the context of the divorce, the husband's pledge served the purpose of resolving the financial matters of the marital relationship. The divorce final judgment incorporated the settlement agreement, making appellant's promise enforceable by the wife in that proceeding. Once appellant's promise acquired such legal significance it was akin to those written, informed homestead waivers that have been approved by the courts. To allow appellant in this type of situation to disavow the clear language of the settlement agreement incorporated in the divorce decree is to permit the homestead exemption to be an instrument of dishonesty. The final judgment in garnishment was eventually affirmed.

It is well settled that equitable liens may only be imposed against homestead real property where the beneficiary of the homestead protection is guilty of fraudulent, dishonest or otherwise egregious conduct. In the seminal case of *Jones v. Carpenter*, 90 Fla. 407, 417, 106 So. 127, 130 (1925), the Court permitted the trustee of a bankrupt bread company to have an equitable lien against the house of the company's former president, which had been improved by funds embezzled from the company. While explaining the nature of equitable liens, the Court cited *Capen v. Garrison*, 193 Mo. 335, 92 S.W. 368 (Mo. 1906), for the proposition that the doctrine of equitable liens followed the doctrine of subrogation and that they “are

**applied only in cases where the law fails to give relief and justice would suffer without them.“ In rejecting the defense that the lien could not be imposed on a homestead, the court observed that organic and statutory provisions relating to homestead exemptions should be liberally construed in the interest of the family home, they should not be applied so as to make them an instrument of fraud or imposition upon creditors.**

**Clearly, it could not be said that the lien imposed in that case fell within the literal language of the constitution which excepted from homestead protection against creditors only “the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same.“ The homestead exemption is intended to be a shield, not a sword.**

**The other issue in dissolution actions worth consideration and full discussion is a judgment order authorizing the sheriff’s sale of the husband or wife’s undivided one-half interest in the former marital residence. In *Cain vs. Cain* the trial court entered an order awarding the wife attorney’s fees and costs. The husband failed to make any payments and the wife’s attorney levied against the husband’s one-half interest in the marital residence. The sheriff’s sale upon the levy was scheduled to be held. The husband filed an affidavit of homestead, which stayed the sale pending determination of the homestead issue. The wife, thereafter, filed a motion to determine the validity of appellant’s affidavit. At a hearing, the wife testified that she resided at the former marital home with her new husband and the children from her former marriage with the ex-husband. Testimony showed that the husband had not resided at the marital home, and that his support obligations had not been maintained and that he was three months in arrears in child support. The ex-husband testified that he had been living at his mother’s address, even though he did not call this address home. The trial court concluded that the former marital residence was not the husband’s homestead since he was not the “head of the family.“ The trial court authorized and directed the sheriff to proceed with the sale. The husband appealed. On appeal and after oral argument, the appellate court relinquished jurisdiction to the trial court in order that it make a determination of the homestead issue in light of the 1985 amendment to article X, section 4(a), of the Florida Constitution and subsequent cases interpreting the amendment. No further proceedings resulted. We find that the trial court erred when it applied the “head of the family“ standard and authorized the sheriff’s sale.**

**The 1985 amendment to the Florida Constitution, article X, section 4, deleted the “head of the family“ requirement and was amended to read in pertinent part:**  
**(a) There shall be exempt from forced sale . . . the following property owned by a natural person...Recent opinions of the Florida Supreme Court have given guidance on the interpretation of the 1985 amendment. In *Public Health Trust of Dade Co. v. Lopez*, 531 So.2d 946, 948 (Fla. 1988), the court concluded that until 1985, the homestead protection was limited to those persons who qualified under the constitutionally designated term “head of family.“ In 1984, however, the people of**

**Florida approved an amendment changing the term “head of family“ to “a natural person.“ The amendment thus expanded the class of persons who can take advantage of the homestead provisions and its protections. As Representative Hawkins, who sponsored the amendment in the House of Representatives, explained, the purpose of the revision was “to give protection against forced sale for the homestead of a single person, a divorced person, any person who has a homestead, rather than just a head of a family.“ The 1985 amendment, therefore, expanded protection rather than limiting it as the “head of family“ standard did. An award of possession of the marital residence to a wife does not extinguish the husband’s homestead. Once homestead status is acquired, it continues until the homestead is abandoned or alienated in the manner provided by law. To show abandonment, both the owner and his family must have abandoned the property.**

**In the Cain case, the husband left the former marital residence pursuant to an order of the trial court awarding possession of the residence to the wife. The husband’s children still resided at the former marital residence. The husband continued ownership of the former marital residence and the record reflected neither alienation of his interest nor intent on his part to establish a homestead elsewhere. Thus, it was error for the trial court to order the levy on the husband’s one-half interest.**

### **Survey of Exempt Homestead Property**

**If a creditor in any legal execution, judgment or process regarding exempted homestead property sought to be levied, is not satisfied with the quantity of land selected and “set apart” as exempt, he is required, by himself or through his or her agent or attorney, to notify the levying “officer” that he is indeed dissatisfied with the selected exemption of land. The “officer” is then required to have the property ordered to be surveyed. If the exempted land or homestead is not within the “corporate limits” of any town or city, the person claiming the property exemption then has the right and option to exempt or “set apart” that portion of the land belonging to him or her which includes the residence, or not. If the first tract or parcel does not contain the maximum 160 acres, the “officer” is required to set apart the remainder from any other tract or tracts claimed by the debtor, but in every case they may claim all of the continuous land until the whole quantity of 160 acres is made up.**

**The person claiming the exemption has the option, and is not required to be forced to take as his or her “homestead” any tract or portion of a tract of land, if any defect exists in the title. The expense of any such survey required by law is usually chargeable against the execution as “costs” unless the person claiming such exemption does not own more than 160 acres. If that is the situation, the expenses of any requested or required survey is then required to be paid by the person or “officer”, directing the survey to be made. After a requested or required land survey has been made, the officer making the levy may then sell the property levied**

upon but he cannot include in the sale, the property “set off” or “exempted” in such a manner as afforded by the law and constitution.

### **Leases and Exemptions**

**In regards to a lease or similar situation, any person owning and occupying any dwelling or house, including a mobile home used as a residence, or a “modular” home, on land not his or her own which he or she may lawfully possess, by lease or otherwise, and properly and lawfully claiming such house, mobile home, or modular home as his or her “homestead”, is entitled to the exemption of such house, mobile home, or modular home from levy and sale as previously mentioned in this discussion. This portion of the exemption law effectively protects any structure or dwelling that you “designate” as your homestead even if you do not own the land that it sits upon.**

**In the Meadow Groves case the appellant sought a ruling on a non-final order temporarily enjoining it from selling a mobile home owned by a former tenant. The tenant rented a space for his mobile home in The Groves’ mobile home park. He failed to pay rent and The Groves obtained a final judgment for possession of the rental space. The Groves then obtained a writ of possession, commanding the sheriff to “remove all persons and property from the . . . mobile home lot.” The sheriff removed the tenant from the premises but his mobile home remained. The Groves then proceeded to follow the statutory summary procedure, by advertising to sell the tenants mobile home for unpaid rent. The tenant then asked the circuit court to enjoin the mobile home park from conducting the sale because the mobile home was exempt as homestead property pursuant to law. The trial court arrived at the correct result by granting the injunction.**

**The tenants claim that his mobile home is exempt from sale because it is homestead property fails since the exemption was extinguished when the county court determined that The Groves was entitled to possession of its mobile home lot, due to the tenant’s failure to fulfill his contractual obligation to pay rent in return for lawful possession of the lot. At that time he was no longer in lawful possession of the mobile home lot occupied by his mobile home as required by law. The court recognized that the tenant’s counsel argued that he, the tenant, was prevented from removing his mobile home from the rented space at some point in time. However, the record did not reflect evidence of the prevention. Upon remand, the trial court was to consider evidence of any attempt to defeat the tenant’s homestead exemption by preventing him from removing his mobile home while he was in lawful possession of the rental space. The order enjoining the mobile home park from conducting a sale was affirmed because the record did not reflect that mobile home park qualifies as an entity entitled to use the sale procedure set forth in the law. Because the trial court reserved jurisdiction over the claim for unpaid rent, the court remanded for further proceedings.**

If the majority opinion's view in the "Groves" case, of Florida's homestead exemption for mobile homes is correct, then as the song goes, one can truly ask, "Is that all there is?" Because it isn't very much. It is only as good as one's ability to pay one's rent. I don't think that the Legislature intended to create such an ephemeral right if it went to the trouble to create a homestead exemption for mobile homes in the first place. Surely more was intended. If not, then the most that can be said for it is that it is an effective tool for owners of mobile home parks to extract prompt rent payments from their renters/lessees.

Florida is heavily populated with mobile homes. They provide relatively inexpensive, quality shelter for Florida's large population of retirees, as well as families with children. A majority of mobile homes in this state are located in rental parks, where the mobile home renter rents space from the owner of that park. Thus, the impact of the Groves decision is considerable. In this case, the owner of a mobile home park rented a lot to a tenant. The tenant placed his mobile home on the lot. He lived there. But he defaulted on his rent. The owner evicted the tenant, and sought to seize the mobile home to satisfy the unpaid rent obligation. The majority opinion held that the mobile home park owner couldn't do this, solely because it resorted to the incorrect statutory procedure to do so. But the message is clear. There was another, and better way to seize and levy on the tenant's mobile home. It was just a matter of time until the lawyers figure out how to do it right. The tenant has no homestead exemption for his mobile home for his rent obligation, or for any other obligation owed to any other creditor for that matter, because he was no longer in "lawful possession" of his mobile home lot.

### **Personal Property Exemptions**

When a levy is made by writ of execution, writ of attachment, or writ of garnishment upon any personal property which is allowed by law or by the State Constitution to be exempt from levy and sale, the debtor must then lay claim to that personal property, which is sought to be exempt from forced sale by making a detailed inventory of that exempt property within 15 days after the date of the levy. The inventory is required to show the fair market value of the property listed in the inventory and is required to have an affidavit attached to the inventory certifying that the inventory contains a correct list of all personal property owned by the debtor, and that the value shown is the fair market value of the property. The debtor is required to "designate" the property listed in the inventory that he or she claims to be exempt from levy and sale. No inventory or schedule to exempt personal property from sale can be accepted or filed by the court prior to a levy on the property.

The original copy of the inventory and affidavit is then required to be filed with the court that issued the writ, judgment or attachment. The debtor, by mail or hand delivery, is required to promptly serve a copy of the inventory and affidavit on the judgment creditor and furnish a copy of the same to the sheriff who executed the writ. If the creditor desires to object to the inventory, he or she is required to file an objection with the court that issued the writ within 5 days after service of the inventory, or he or she will be considered by law to admit the inventory as true,

correct and complete. If the creditor does not file an objection, the clerk of the court is required to immediately send the case file to the court, or judge issuing the writ, and the court is required to promptly issue an order exempting the items claimed on that inventory. Such a court order is then required to be promptly sent by the court to the sheriff or “officer” directing him or her to promptly redeliver to the debtor any exempt property under the levy and to sell any nonexempt property under the levy according to the law.

If the creditor files an objection to the inventory or affidavit, he or she is required to promptly serve a copy of the objection on the debtor and furnish a copy to the sheriff who executed the writ. Upon the filing of an objection by any creditor, the clerk is required to immediately send the case file to the court or judge issuing the writ, and the court is required to automatically schedule a prompt evidentiary hearing to determine the validity of the objection by the creditor and is required to enter an order describing, and ruling on the exempt and nonexempt property. Upon its issuance, the order is again required to be promptly sent by the court to the sheriff directing him or her to promptly redeliver to the debtor any exempt property under the levy and to sell the nonexempt property under the levy according to law.

The court is required to appoint a disinterested appraiser to assist in the evidentiary hearing unless the debtor and creditor mutually waive the appointment of the neutral appraiser. The appraiser is required to take and file an oath that he or she will faithfully appraise the property at its fair market value and that he or she will file a signed and sworn appraisal with the court as required by law. Notice of the time and place of the inspection of the property for the purpose of its appraisal is required to be given by the appraiser to the debtor, creditor, and sheriff, at least 24 hours before the inspection is made. The appraiser is entitled to a reasonable fee as determined by the court for his or her services. The appraiser’s fee is required to be taxed as costs, but no costs can be assessed against the debtor for these types of proceedings if the debtor prevails on his or her claim of exemption. The court may require the creditor to deposit a cash bond, a surety bond, or other security, conditioned on the creditor’s obligation to pay any reasonable appraisal expenses. When the inventory is completed, the person entitled to the exemption may select from the inventory, an amount of property not exceeding, according to the appraisal, the amount of value exempted; but if the person entitled to the exemption does not appear and make the required “selection”, the “officer” is then required make the selection for him or her, and the property not “selected” as exempt may then be sold.

During the pendency of the legal proceedings under this law, the sheriff is required to safeguard the property seized under any writ, judgment or levy, and the creditor is required to deposit sufficient moneys with the sheriff to pay the cost of safeguarding the exempt or seized property until the property is sold or redelivered to the debtor. When the sheriff receives a copy of a court order identifying which property has been declared exempt and which property has been declared not exempt and ordering the sale of the property not exempt from levy, he or she is then free to go ahead and sell the non-exempt property.

The debtor or creditor who then successfully wins his or her exemption claim at the

time of the aforementioned evidentiary hearing may be entitled to reasonable attorney's fees and those attorney fees are required to be taxed as costs. The costs may also include, but not be limited to, appraisal fees, storage fees, and other costs incurred as a result of the levy. Other personal property that can be claimed as exempt from legal process is your interest as a debtor, in a motor vehicle, in refunds or credits received or deposited in a bank or financial institution, and in prescribed health aids for yourself or a dependent. Of that claimed exempt interest in the motor vehicle, the interest may not exceed one thousand dollars (\$1,000.00) in value. In regards to the deposits and refunds, or credits in a bank, the claim is fashioned pursuant to s. 32 of the Internal Revenue Code of 1986. The exemptions claimed on the specific refunds and deposits clause does not apply to a debt owed for child support or spousal support.

#### **Survivors of Exempt Property and Homesteads**

A life estate in homestead property is exempt from forced sale. A surviving spouse of an exempt property or homestead, whom after the death of the other spouse, is not required to have a court issue an order that declares exempt the homestead or property from forced sale under homestead provisions of the Florida Constitution, Article X, section 4. The surviving spouse's right to homestead protections as the head of the family, descends to the surviving spouse even though the surviving spouse changes or "takes" title to the property or homestead in his or her name alone. Record of a title is not a prerequisite to a determination that a property is a homestead. Homestead status may derive from the husband's or wife's beneficial interest as head of the family in a marital home titled in the other spouse's name. That way, upon the death of a spouse, the surviving spouse may obtain the benefits of the laws in the form of exemption from forced sale. The surviving spouse is also entitled to demonstrate that the deceased spouse retained a beneficial interest in the property or homestead sufficient to have the property designated as a homestead even though the surviving spouse's name appears on the deed. If the property qualified as homestead on the date of a spouse's death, the surviving spouse is entitled to the homestead exemption. A forced sale of homestead property by an impending execution of judgment cannot be deemed voluntary for the purpose of constituting a waiver of the exemption. An appeal of such judgment or execution is not necessarily moot merely because a party failed to obtain a proper stay and the judgment has already been enforced.

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 kin 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.**

**The court answered the certified question in the affirmative and quashed the district court's decision. The court found that in those 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, they held 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 person's intestate. 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 trustee of the estate sought to sell the homestead property to satisfy creditors' claims, to fund specific bequests, and to pay the costs of estate administration. The residuary beneficiary, asserted that the testator's homestead passed to her free of claims because she was protected by article X, section 4, of the Florida Constitution (the homestead provision). There was no dispute in this case that the estate home was homestead property for the purpose of distribution or that the property was properly devised in the residuary clause of the will. The sole issue was whether kin, may be properly considered an heir under the homestead provision, qualifying kin for protection from the forced sale of the homestead property when a surviving spouse, the next-in-line heir under statutory intestate succession, is still living.**

**The circumstances under which a homestead may be devised while still retaining its protections against creditors present a significant issue for both the legal profession and the public in general. All Floridians need to fully understand how their homestead property might be properly devised while still maintaining its protections against creditors when there are no surviving spouses or minor children**

**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 the above referenced 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. This case involved 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. Courts have repeatedly 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.”**

Further, it is clear that the homestead provision is to be liberally construed in favor of maintaining the homestead property. 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 the court discussed in *Public Health Trust* (see footnote citation), the courts will not narrowly interpret the homestead provision simply because “financially independent heirs” may receive a windfall. There the court opined:

**“The homestead protection has never been based on principles of equity, 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.”**

Creditors have been on notice for many years that the plain language of the constitution protects homestead property from most creditors. It is with these policy considerations in mind that the court addressed the two major issues in the *Davis* case. The first question the court resolved is whether the protection against creditors found in the homestead provision can be transferred, with a will, to a devisee. The Court had never addressed whether the term “heirs” in the homestead provision includes devisees.

Under the common law, an heir was a person designated to inherit in the event of intestacy at the death of the decedent. Now, however, “the term is frequently used in a popular sense to designate a successor to property either by will or by law.” *Black’s Law Dictionary* 724 (6th ed. 1990)(“Word ‘heirs’ is no longer limited to designated character of estate as at common law.”) If we define the term “heirs” in the homestead provision by its strict common-law definition, the very act of devising the homestead would abolish the homestead protections against creditors. The court refused to construe the homestead provision in such a narrow way. In reaching this conclusion, the courts are persuaded by the reasoning of the Third District Court of

**Appeal, sitting en banc, in *Bartelt v. Bartelt*, 579 So.2d 282 (Fla. 3d DCA 1991). That court addressed the situation in which the decedent, who died without a surviving spouse but with two surviving adult children, a son and a daughter, devised his homestead only to his son. There, the district court held that the homestead exemption passed to the devisee through the will even though the omitted child would have been entitled to an equal share of the homestead had the decedent died intestate. In so holding, the *Bartelt* court stated:**

**“When the decedent’s homestead is devised to his son--a member of the class of persons who are the decedent’s “heirs“--the constitutional exemption from forced sale by the decedent’s creditors found in Article X, Section 4(b) of the Florida Constitution, inures to that son. The test is not how title was devolved, but rather to whom it passed.”**

**Heirs, as defined in law, are simply those persons entitled to receive property under the laws of intestacy; the decedent’s children, as his lineal descendant, is a member of that class. The class designated as “heirs“ does not exclude those who, but for the decedent’s foresight in executing a will, would have taken by the laws of intestate succession... Article X, section 4 of the Florida Constitution defines the class of persons to whom the decedent’s exemption from forced sale of homestead property inures; it does not mandate the technique by which the qualified person must receive title. An academic commentator on this subject wrote approvingly of the result reached by that district court:**

**“The constitutional exemption from forced sale by creditors, as found in article X, § 4(b) of the Florida Constitution, inures to the surviving spouse or heirs of the owner. *Bartelt* includes within the term “heirs“ devisees who but for the will would have been heirs. It properly takes a broad gauged approach to the constitutional terminology. It places substance over form. The persons involved as takers are the same whether there is a will or there is not a will. The court points out that without such a determination, with respect to homestead, Florida residents would be discouraged from making wills and would be encouraged to let the property in issue pass by intestate succession. Such a result would be an anathema.”**

**The court correctly agreed that, in cases in which there is no surviving spouse or minor children, the protections against creditors found in the homestead provision may inure to the benefit of the person to whom the homestead property is devised by will. As explained below, though, the class of persons to which such protections may be devised is limited.**

**Having found that the protections against creditors found in the homestead provision may be devised by will, we now must define the scope of the class of persons to which those protections may be so devised. The *Davis* court and the *Walker* court presented us with two alternatives. First, the *Davis* court defined the word “heirs“ narrowly and found that, in order to preserve the protection against creditors, a devisee had to be entitled to inherit the homestead property under the intestacy statute. The *Walker* court applied a broader definition of the term “heirs.“ It held that the protections against creditors could be devised to any of the class of**

**potential heirs under the intestacy statute. It found no occasion to require that a testator leave the homestead property to the actual person or persons who would have actually inherited under the intestacy statute. These two views of the term “heirs“ can be characterized as the “entitlement definition“ and the “class definition,“ respectively.**

**The final decision was persuaded by the Walker court’s view. In a situation almost identical to that in this Davis case, the First District Court held that a decedent’s grandson was entitled to the homestead protection even though the grandson was not the closest consanguine heir. In doing so, the court found that any person categorized in the intestacy statute was an heir for the purpose of the homestead provision. In particular, it wrote:**

**“Article X, section 4(b) of the Florida Constitution provides that the exemptions and protections established for homestead property under article X, section 4(a) “shall inure to the surviving spouse or heirs of the owner.“ As this court explained in State Department of Health and Rehabilitative Services v. Trammell, 508 So.2d 422 (Fla. 1st DCA 1987), the term “heir“ under article X, section 4(b) means “those who may under the laws of the state inherit from the owner of the homestead.“ Id. at 423, quoting Shone v. Bellmore, 75 Fla. 515, 78 So. 605, 607 (Fla. 1918). Because Bavle, as the decedent’s grandson, was a lineal descendent of the decedent, he is a member of the class of persons entitled to receive property under the laws of intestacy, and accordingly, is an “heir“ for the purposes of article X, section 4(b). A remainderman is entitled to claim a homestead exemption.**

**The Walker court expressly rejected the holding of the Davis court. It wrote:**

**“We find the Davis opinion contrary to the purpose of the homestead exemption from forced sale. We start with the well-established principle that the laws regarding homestead exemption are to be liberally construed. Although the constitution is silent as to the intent of the drafters with respect to the rights of creditors of estates, we conclude that, as amended in 1984, article V, section 4(b), however, does reflect the intent that the exemption is to inure to whomever the homestead property passes.”**

**The Walker court grounded its conclusion on the following policy consideration:**

**“It seems clear to us that the intent of the homestead exemption is to protect the decedent’s homestead from the decedent’s creditors for the benefit of the decedent’s heirs. To deny the exemption for a homestead property simply because the person chosen by the decedent to receive the property under the will, even though that person is within the class of persons entitled to take under the laws of intestate succession, is not the closest consanguine heir, is contrary to that constitutional intent.”**

**The Walker court announces the correct view of our homestead provision. Indeed, the approach used by the Davis court would force a testator to guess as to his or her survivors in order to successfully devise, by will, the homestead property with the protections against creditors intact. That reading of our constitution is, in the**

**court's view, is unreasonable. If a severe limitation is to be placed on the ability of Floridians to keep the homestead within the family, it should not be done by a narrow judicial construction of the homestead provision. Under the Davis court's reasoning, an attorney would be faced with giving the following illogical advice to a potential testator with no surviving spouse or minor children: You have two bad choices. You can devise your homestead to any person you choose. If you do, though, the homestead provision's protections against creditors will be inapplicable and your homestead may be subject to forced sale. On the other hand, you can guess as to which family members will survive you. After we have established the list of your guesses, I can tell you which of those family members would inherit under our intestacy statute. If you leave your homestead to those family members and they really do survive you, the homestead provision's protections against creditors will remain intact. If you guess incorrectly, though, the protections against creditors will be inapplicable. The point is this: If you want to ensure protection of the homestead property against creditors under our constitution, you have no choice as to which family member might best maintain your homestead property. The law requires that in order to utilize the homestead provision's protections against creditors, the homestead property must pass to the person or persons dictated by the intestacy statute.**

**Creating a system, by engaging a narrow judicial construction of the homestead provision, in which this type of advice must be given is unreasonable. Will will-making, in these circumstances, become an act of prophecy? Clearly, as a policy matter, the courts should not be encouraging intestacy as a means of distributing one's property. In many instances where there is no surviving spouse or minor children, the homestead property is the most significant part of a testator's estate. If a testator loses control over the disposition of his or her homestead property, the need for a will is effectively eliminated. Such an approach takes away from the testator any ability to make a choice as to which family member will best preserve and maintain the family homestead. Instead, it promotes absolute adherence to the strict priorities found in the intestacy statute without paying any respect to the needs of individual testators and their families.**

**The whole purpose of the homestead provision is to protect and maintain the family homestead. The testator is likely in the best position to know which family member is most likely to need or to properly maintain the homestead. A plain reading of the homestead provision establishes that it only prohibits devising the homestead property when a spouse or minor children survive the testator. There is no prohibition against devising the homestead property to any of that class of persons who could potentially receive the homestead property under the intestacy statute. I must emphasize, however, that this court ruling does not authorize a testator to devise homestead property to any person not categorized by our intestacy statute with any expectation that the protections against creditors will survive such a devise.**

Florida jurisprudence has consistently made it clear that the homestead provision must be given a broad and liberal construction. In the context the courts have repeatedly rejected the narrow entitlement definition of the term “heirs“ that includes only those people who would inherit under the intestacy statute at the death of the decedent. Instead, they continue to hold that the homestead provision allows a testator with no surviving spouse or minor children to choose to devise, in a will, the homestead property, with its accompanying protection from creditors, to any family member within the class of persons categorized in our intestacy statute.

Accordingly, the court answered the certified question in the affirmative, quashed the decision of the district court in Davis, and properly approved the district court’s opinion in Walker.

#### **Jurisdiction of the Courts**

The circuit courts in the instant discussion normally would have equity jurisdiction to order and decree the “setting apart” or “designation” of homesteads and exemptions of personal property from forced sales. The circuit courts also normally would have equity jurisdiction to enjoin, or stop the sale of all real and personal property that is exempt from forced sale. The circuit courts may even, and have shown, that they have equity jurisdiction to determine whether any real or personal property claimed to be exempt when a “bill” is filed in court by a creditor or any other person interested in enforcing any unsatisfied judgment or decree, is actually exempt, and in case that the property is not exempt, the court is then required to order that portion of non-exempt property or so much thereof as may be necessary to satisfy the judgment lien, levy or decree. The courts may also enjoin the sheriff or “officer” from “setting apart” real or personal exempt property, or real or personal property which is not exempt, and may annul all exemptions made or “set apart” only by the sheriff or “officer.” It does no good to you to challenge jurisdiction in the instant situation. The court is there to protect you, and must do so by law. In fact, the court may see your challenge as a method to stall and frustrate the proceedings and award sanctions or attorneys fees to the other party if necessary.

#### **GARNISHMENTS AND INCOME DEDUCTIONS**

##### **Exemption of Wages or Earnings from Garnishment**

In this section we will utilize the term “earnings” and “wages”, or “income” in the traditional, corporate sense. What we mean by this is that you should not refer to these terms in the “typical”, non-legal sense, but we must refer to them by the legal or statutory definitions set forth in the codifications and statutory definitions of the law.

In Florida all of the “disposable earnings” which is defined below in subsequent paragraphs, of a “head of family” whose earnings or wages are less than or equal to five hundred dollars (\$500.00) a week are fully exempt from attachment or garnishment, provided that the garnishee is actually a “Head of Family” and has laid claim to such status and claim by filing an affidavit in the office of the clerk of the court. “Disposable earnings” of a “head of a family”, which are more than five hundred dollars a week, may not be attached or garnished unless that person, commonly referred to as the “garnishee” has agreed to the garnishment in writing. In no case can the amount attached or garnished by the court exceed the amount allowed under the Consumer Credit Protection Act.

**“Disposable earnings” of a person other than a “head of family” may not be attached or garnished in excess of the amount allowed under the Consumer Credit Protection Act. The Consumer Credit Protection Act places a federal “restriction” on garnishments. The maximum allowable garnishment by that Act may not exceed 25 per cent of the disposable earnings for that week, or exceed thirty times the Federal minimum hourly wage, whichever is less.**

**Exceptions to the above include, and do not apply in the case of any order for, the support of any person (i.e., specifically Child Support and alimony. Suit monies and attorneys fees are not included ) issued by a court of competent jurisdiction or in accordance with an administrative procedure which affords substantial due process, which is established by State law, or any order of any court of the United States having jurisdiction over cases under Bankruptcy chapter 13 of title 11, or any “lawful debt due” for any State or Federal tax. Notice I said lawful debt! The maximum portion of the wages or earnings of an individual for any work week, which is subject to a garnishment when only intended to enforce any court order for the support of any person (i.e., spousal or child support), when that garnishee is supporting another spouse or dependent child other than the spouse or child with respect to whose support such order is intended to support, cannot exceed 50 per centum of such individual’s disposable earnings for that week; or if the garnishee is not supporting a spouse or dependent child, then the maximum garnishment is 60 percent of that garnishee’s disposable earnings for that week. The rate of garnishment maybe increased by 5 percent if those earnings are subject to a garnishment to enforce a support order, which orders payments of support not paid for a previous period of twelve weeks before the beginning of that specific work week.**

**Execution or enforcement of a garnishment order or any court process in excess of the federal statute is absolutely prohibited. No court of the United States or court of any State, and no “officer” or “agency” of any state, may make, execute, or enforce any court order or process in violation of the Consumer Credit Protection Act. Any earnings or wages that are exempt from garnishment and are credited or deposited in any type of bank or financial institution are exempt from levy, attachment or garnishment for 6 months after the earnings are received by that financial institution, only if the funds which were deposited can be traced back to, and properly identified as earnings or wages. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings. As used in this portion of the law, the term “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. “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.**

**Process to claim your Exemption from Wage Garnishment and Income Deductions**

Whenever any money, wages, income, etc., or “other thing” that is due to a person for labor or services, is attached or garnished by a valid court order, judgment, levy, lien or another legal process, the person, usually an employee in the traditional sense, may make an oath or file a “Head of Family” affidavit in front of the “officer” or judge who issued the IDO or garnishment, or make an oath or “Head of Family” affidavit before a notary public, which must state and allege that the money attached, levied, garnished, etc., is due for the personal labor and services of that person or employee, and she or he is the head of a family (see footnotes) currently living in the state.

When a “Head of Family” affidavit, or oath is made and filed in the Office of the County Recorder or with the Clerk of the Court, a copy is then required to be immediately given to the opposite party who sued out the process, and if the facts sworn to in that “Head of Family” affidavit are not denied under oath within 2 business days, the service of process must be returned, and all proceedings under the court in the matter is required to immediately cease and desist. If the facts stated in the “Head of Family” affidavit are denied by the party who sued out the process within the time limits set forth by the law , and are denied under oath, then the matter is required to go to trial in the court which issued the garnishment writ. This is usually done in the same type of manner, as are claims or exemptions previously mentioned in this discussion in regards to property levied upon by writ of execution. The money or “thing” attached or garnished is then required to remain subject to the garnishment order or judgment process until released by a subsequent favorable judgment of the court.

As a predicate for any type of garnishment proceeding, or garnishment legal action, a “defendant” must promptly submit the “Head of Family” affidavit in which it avers under oath that he or she was, or is the head of a family residing in the state. This averment or oath, is made in order to satisfy the interdiction of statute, which provides that no writ of garnishment shall issue from any court of this State to attach or delay the payment of money due to any person who is the head of a family residing in this State, when the money is due for the personal labor or services of such person. Pursuant to the usual and normal commands of a court order or a writ of garnishment, the wages earned by and payable to a person by the “garnishee” employer are considered “attached” and thus that person is now deprived of the use of those wages, property or income. Any complaint or defense to such a garnishment writ should allege that at the time of the execution of the writ and the previous filing of a person or employee’s “Head of Family” affidavit in a garnishment proceeding, the contesting party knew that the employee or person was the head of a family under the laws and that the averments of the affidavit executed by it were true and not denied under oath. A complaint or defense should also allege that the other party, or “garnishor” maliciously invoked the legal process of garnishment to unlawfully and wrongfully coerce the application of the garnishee’s wages to the judgment or court order. The complaint or defense should also allege in conclusion that as a result of the garnishor’s unlawful act, the employee or person has suffered damages for which they should claim a judgment.

## **Wrongful Garnishments**

**A cause of action in tort for the wrongful and malicious seizure of property under a writ of garnishment or attachment is generally recognized by most jurisdictions of this country. Although in some states the rule is, independent of statute, that the mere fact that an attachment was wrongfully issued and levied gives rise to a cause of action for damages, even though the plaintiff was not actuated by malice or had probable cause for the belief that ground for attachment existed, in the majority of cases, malice and a want of probable cause are required. Acting upon the principle of the common law which guarantees a remedy for the enforcement of every right, 'ubi jus, ibi remedium,' the courts have declared that the malicious suing out of the writ of attachment, without probable cause, should give rise to a cause of action equally with, and analogous to, the malicious prosecution of a criminal prosecution. Thus, it has become established that generally the principles governing a common-law action for the wrongful issuance of an attachment are those common-law principles applicable to actions for malicious prosecution.**

**In Corpus Juris Secundum, it is stated that a garnishment is wrongful where the grounds on which it is obtained do not in fact exist, even though the person who secured the writ or made the affidavit believed, or had reasonable cause to believe, that the alleged facts were true. An action for damages will lie for wrongful garnishment; it may be in trespass (trover) or case, or, more specifically, for malicious prosecution or abuse of process. Except in the case of an action for malicious prosecution or abuse of process, malice and want of probable cause are not essential elements; of an action for damages for wrongful garnishment, although they affect the right to recover exemplary damages.**

**The principle is restated in Florida Jurisprudence as follows:**

**"It is settled that one has a common-law cause of action against the creditor for the wrongful and malicious seizure of his property without probable cause under a writ of attachment or garnishment. Originally, this action was commenced as an action of trespass, but is now more nearly analogous to an action for malicious prosecution."**

**The only ruling I know of, of an appellate court in Florida concerning the question of abuse of process and malicious prosecution was considered is the Nash case, decided by the Supreme Court in 1955. The case was cited and detailed in Strickland vs. Commerce Loan Co., 158 So.2d 814 (Fla. 1st DCA, 1963). That case involved a counterclaim by the defendant debtor by which damages were claimed as a result of the plaintiff creditor having willfully and maliciously procured a writ of garnishment attaching counterclaimant's bank account upon a false affidavit for the purpose and with the intent of forcing the counterclaimant to pay an unjust obligation. A jury verdict rendered in favor of the debtor counterclaimant was reversed by the Supreme Court on the procedural ground that the cause of action alleged in the counterclaim should have been brought in a separate suit and not combined with the suit by which plaintiff creditor sought judgment for its claim against defendant on a trade account between them. In reaching its decision, the Supreme Court said:**

**"Although we have concluded that the giving of the bond by the defendant did not have the effect of so completely discharging the writ of garnishment that there could**

be no liability on the part of the plaintiff, we cannot agree that a counterclaim for injury to the defendants' 'personal and financial reputation' should have been entertained in this case. The cause of action did not fall in the class of compulsory counterclaims. In the first place it arose out of an ancillary proceeding not 'out of the transaction or occurrence that [was] the subject matter of the action.' In the second place we do not think such a claim, in tort, is properly triable with the issues...the confusion from mixing these issues with one relative to damage by reason of maliciously obtaining the writ of garnishment is obvious."

The "garnishee" has a fiduciary relationship to the garnishment defendant (i.e., employee or garnishor). The garnishee must notify the garnishment defendant promptly and in writing of the service of a garnishment writ or IDO. The garnishee, usually the employer, may not voluntarily submit to the jurisdiction of the court or waive defects in process, service or procedure. The garnishee must raise all defenses and objections that are available by law, unless the garnishment defendant consents to waive them. Otherwise, the garnishee may be liable to the garnishment defendant for the failure to do so. Of course you would never knowingly waive your rights, defenses and objections would you? Again, remember that if a garnishment debtor (employee) has an exemption, you may claim it by filing an affidavit, the "Head of Family" affidavit, to this effect. If it is not controverted or denied by affidavit within the statutory time period of two days, the garnishment writ is returned and the proceeding terminates. Thus the wages of a head of family are exempt from garnishment, "executions" or income deductions.

A little bit of information on "executions" of judgments at this point is helpful in understanding the process. When a judgment is for recovery of money, the process for enforcement is an execution. It was formerly called a writ of fieri facias or writ of execution. If a second execution is issued, it is called an alias execution. Subsequent executions are called pluries executions. An execution cannot be issued unless a valid final court order, decree or judgment has been rendered. The execution is always issued from the court entering the judgment. The court can issue executions on outstanding judgments of courts that have been abolished. Alias and pluries executions are issued on proof to the clerk of the loss or destruction of the original execution. This may be done by affidavit. An execution cannot be issued if a motion for new trial or for rehearing is timely filed until the motion is determined unless the court orders issuance. The judgment must be recorded before issuance. After entry and recordation of the judgment and expiration of the time for a motion for new trial or for rehearing or disposition of the motion, whichever applies, the clerk must issue the execution. No paper need be filed as a predicate for issuance. An oral request is sufficient. An execution must have the caption of the action with the designation as an execution, run in the name of the State, be directed to the sheriffs of the State, command the sheriff to levy on property subject to execution in the amount of the judgment and costs with the applicable rate of interest, be dated when issued and be signed and sealed by the clerk. Defects in form can be amended.

**An execution may be issued during the 20 year life of the judgment on which it is based. The common law principle that the right to an execution became dormant a year and a day after entry of the judgment is not in effect. Executions cannot be issued on judgments against the State, its subdivisions or municipalities, except in condemnation actions when the property has been taken and the condemning authority does not pay an award. After issuance the attorney must deliver an execution to the sheriff. It can be levied on lands, tenements, chattels, goods, equities of redemption in land, corporate stock, and equitable interests under security agreements and money. The lien of an execution is distinct from that of the judgment on which it is based. The distinction is important in connection with real property because a judgment lien must be obtained by actually recording a certified copy of the judgment. The lien of the execution is all-important as it affects personal property since no judgment lien is given on personal property. A lien attaches when the execution is delivered to the sheriff, but some kinds of intangible personal property must actually be seized as discussed earlier in this section. The delivery to the sheriff establishes the priority of execution liens for levy, sale and collection. Like other liens, the execution lien does not divest the judgment debtor of title. It is a right to levy on and sell the property of the judgment debtor that was also discussed earlier. Ordinarily an execution lien takes priority with other liens in accordance with the time that each attaches. The exceptions to this principle depend on substantive law and are beyond the scope of this discussion. The sheriff maintains an execution docket in which he lists all executions delivered to him, all money received by him as a result of a levy, to whom he disburses it and when.**

**The sheriff must levy on any property assessed against the judgment debtor on the current tax roll of the county or registered in the debtor's name under any federal or state law. Most sheriffs will not levy on other property unless the judgment creditor directs the sheriff in writing to levy on specific property. Most sheriffs will accept a letter from the judgment creditor's attorney to this effect. Others have a form that must be completed describing the property to be levied on and directing the sheriff to make the levy. The instructions to the sheriff must state the balance due under the execution. If anyone other than the judgment debtor claims ownership or possession of the property, the sheriff may file a petition to determine if the property is subject to the levy. If the levy concerns the title or boundary to real property, the petition must be filed in circuit court. Otherwise it is filed in the court issuing the execution in the original action. A copy of the petition and notice of hearing on it must be served on all persons interested in the levy and property. If it is filed in the original action, new service of process on the parties to the action is not required. Interested persons who were not parties to the original action must be served with process. The parties may serve motions and answers as in any other proceeding. The court determines if the property is subject to levy and enters an appropriate order. If the property is adjudged subject to levy, the sheriff levies on and sells it. If the determination is otherwise, no levy is made. If the sheriff has levied on the property under executions delivered to him after delivery of the judgment creditor's execution, the priority of the judgment creditor's execution is preserved if the court decides that the property is subject to levy. The sheriff can be**

compelled to levy an execution by mandamus. The propriety of the levy can be tested in the mandamus action.

The sheriff, by taking tangible personal property into his custody, levies an execution. Usually he does this by taking possession of it and by placing it in storage as discussed before this paragraph. The levy may be accomplished by securing the property at its location so that only the sheriff can dispose of it. The sheriff endorsing the execution to that effect levies on Land. Serving the custodian of the money and taking it into custody places a levy on money. Corporate securities are levied on by seizing the security. If it has been surrendered to the issuer, it may be seized from the issuer. The old procedure of levying on all partnership property for the debt of a partner has been replaced by a receivership or foreclosure procedure. An execution under a judgment against principals and sureties must be levied first on property of the principal. An execution against a person in an official or representative capacity can be levied only on property held by him in that capacity. A levy cannot be made on property that is in legal custody, is exempt from levy by law, or is held adversely to the judgment debtor. A creditors bill can reach property that is not subject to levy, such as an equitable interest. If the clerk issues an execution prematurely or the execution is otherwise irregular, the clerk can recall the execution and reissue it properly. Attorney fees and costs can be awarded for collecting on an execution. A factor in setting the fee is the judgment debtor's attempt to avoid or evade payment.

### **The Garnishment Process**

There are two categories of garnishment, before and after judgment. Garnishment after judgment is a continuation of the main action as a collection proceeding. Garnishment before judgment has been declared unconstitutional. Garnishment after judgment was not affected. The Federal Wage Garnishment Law specifically talks about garnishment before judgment. In *Sniadich vs. Family Finance Corp. of Bay View*, 395 US 337 (1969), the U.S. Supreme Court held that wage garnishments before judgment constituted taking property without procedural due process. The Fifth and Fourteenth Amendments to the United States Constitution clearly stipulate that no person shall be deprived of life, liberty or property (wages or income) without due process of law. Garnishment of wages is limited as discussed previously and later in this section. In this discussion the party seeking a garnishment writ is called the garnishment plaintiff and the opposing party is called the garnishment defendant.

Garnishment is a proceeding by which the garnishment plaintiff is subrogated to the garnishment defendant's rights against the garnishee by making the garnishee directly liable to the garnishment plaintiff for the garnishee's liability to the garnishment defendant. Questions about the priority of writs of garnishment and other writs or liens, when an obligation passes from the control of the garnishee so that it is not subject to the writ and the liabilities of the garnishee to third persons are matters of substantive law and are beyond the scope of this discussion.

**Garnishment is a statutory proceeding that is ancillary to a civil action, called the main action. It is available to every person who has recovered a money judgment. The use of the writ in chancery after entry of a money judgment is consistent with legal theory because a money judgment is a common law debt. Before judgment it is available only in actions seeking to enforce a debt as defined at common law. It is available in some chancery actions before judgment by statute. It is not available before judgment in tort actions.**

**Any debt due a defendant by a third person and all tangible or intangible personal property of a garnishment defendant that is in the possession or control of a third person are subject to garnishment, except the property and persons specified in this section and as provided by statute. Privity of interest between the garnishee and the garnishment defendant and actual possession of the debt or property by the garnishee are necessary for the writ to attach to the debt or property. Some property is exempt from garnishment by statute as discussed previously and further on in this paper. Real property is not subject to garnishment. Personal property up to \$1000.00 in value and part of the wages of the head of a family are exempt. While a debt remains contingent, a writ of garnishment will not reach it, except continuing writs for wages, alimony and child support.**

**A person liable to the garnishment defendant on a negotiable instrument cannot be garnished unless the instrument or some installment on it is due. Property in the custody of a court is not subject to garnishment. A garnishment defendant's claim against a third person is not subject to the writ if the garnishment defendant assigned it to another before service of the writ. In that event the debt is no longer due to the garnishment defendant. The defendant is a party to the garnishment proceeding and must be served with copies of the garnishment papers unless a default has been entered against him. Any third person may be the garnishee, except the personal representatives and debtors of the principal defendant and another jointly.**

**After judgment and after the time for a motion for new trial or rehearing has expired, unless otherwise ordered by the court, the judgment holder may obtain a writ of garnishment. The levy mentioned in the statute refers to an execution levy. No bond is required. Before issuance of the writ the party applying for it must deposit the statutory attorney fee into registry of court to be paid to the garnishee on demand after service of the writ of garnishment to pay any attorney fee that he expends or agrees to expend in responding to the writ. The writ of garnishment is issued from the court in which the action is pending. The motion may be filed and the writ of garnishment issued before or after the return of an execution.**

**The effect of the United States Supreme Court decisions on prejudgment seizure of property has not yet reached post judgment garnishment. It is foolish to predict that court's future course in view of its propensity to determine cases without regard to precedent. A lower federal court ruled that post judgment garnishment is subject to the same restrictions in spite of the fundamental difference because an opportunity**

to be heard on the merits has already been afforded and the merits determined.

After the motion and attorney fee deposit are filed, the court or the clerk on court order issues the writ of garnishment. It has the caption of the main action, runs in the name of the State directed to each sheriff of the State, commands them to serve the writ on the garnishee and states the amount specified in the motion and is signed and sealed by the clerk. The writ requires the garnishee to serve an answer saying whether he is indebted to the garnishment defendant at the time of the answer or was indebted to him at the time of service of the writ or during the period between the two times and, if so, in what amount, except for the continuing writs discussed below. The garnishee must also say what tangible or intangible personal property of the garnishment defendant the garnishee has in his possession or control for the same period of time and whether he knows of any other person indebted to the garnishment defendant or who has any of the garnishment defendant's property. The writ must be delivered to the sheriff and is served on the garnishee as other process is served. A copy of the writ and motion must be given to the sheriff to give to the garnishee. Copies should also be served in the usual manner on all other parties not in default. Service of the writ does not create a lien, but creates a personal liability of the garnishee to the garnishment plaintiff. The garnishee may not dispose of garnisheed property even under a court order.

A development in garnishment is the extension of continuing writs of garnishment to all post judgment collections. Formerly such writs were available only for alimony and child support. Continuing writs are subject to the federal Consumer Credit Protection Act and Florida exemptions, as are other writs, but the effect on form is different because of the continued withholding requirement. Formal parts of this writ are the same as other writs, but the body differs by specifying generally the amounts to be withheld periodically by the employer of the garnishment defendant. The motion is the same as for garnishment after judgment, but asks for the writ to be continuing. The clerk must issue by the court or, on court order, the writ. The State has waived sovereign immunity on these writs. The garnishee is required to compute the proper amount and withhold it, subject to the directions of the court. The garnishee is allowed an administrative fee for making the collection. The effect of the writ is the same as other garnishment writs.

The garnishment defendant may serve a motion to dissolve the writ within the statutory time period (usually 20 days) after service of it, denying any allegation of the motion for writ of garnishment. The issue raised by the motion is tried. The court determines questions of law and issues of fact are tried by the court unless a jury trial is demanded within ten days after service of the motion denying garnishment motion. If the allegation in the motion for writ of garnishment is not proved, an order must be entered dissolving the garnishment. A motion denying garnishment motion is unnecessary when the only dispute is a question of law. A motion to dissolve the writ of garnishment can raise questions of law.

The part of the statute concerning a denial of the debt is not applicable to garnishment after judgment. Before judgment the prompt determination of the issue of the debt is intended so the propriety of the garnishment can be determined. The decision is binding in the main action and thus may decide the action. If the motion denying motion for garnishment is successful, an order must be entered dissolving the writ of garnishment. 6 The statutory terminology is poor. The motion denying the motion for garnishment should be called a response. The answer of the garnishee must be served within 20 days after service of the writ of garnishment. It should be served as soon as possible since the garnishee is not liable for any property of the garnishment defendant coming into his hands after service of the answer, except in continuing writs. Except for continuing writs, the answer must specify what debts the garnishee owed to the garnishment defendant when the writ of garnishment was served, when the answer to it was served and for the period between the two times. It must state what tangible and intangible personal property of the garnishment defendant is in the garnishee's possession or control or was in his possession or control during the same time period. It must name any other person known to the garnishee who owes the garnishment defendant a debt or who has any of his property and give the names and addresses of the other persons having an interest in the debt or property.

In continuing writs the answer of the garnishee must say what amounts of compensation are payable, when and how much will be retained. A motion to dissolve is available to the defendant and to others who may have an interest in the property held by the garnishee. Within five days after service of the garnishee's answer on the garnishment plaintiff or after the time for the garnishee's answer expires, the garnishment plaintiff must serve a notice on the garnishment defendant and on each person named in the garnishee's answer as having an interest in the garnisheed property stating that the recipient must move to dissolve the writ or be defaulted within 20 days from service of the writ and that any exemptions must be asserted in the motion. A copy of the writ and the garnishee's answer must be served with the notice. The service of the notice does not make the other persons parties because it is not process. The party obtaining the writ of garnishment should implead the other persons forthwith so their claims can be adjudicated.

The defendant and each other recipient may move to dissolve the writ within 20 days after the date of the certificate of service in the notice by denying any allegation in the motion for the writ. The court tries the issue unless a jury is demanded.

A garnishee that has a good faith doubt about whether to include a debt or property in his answer may do so without liability to any person. Doubtful items should be included to protect the garnishee from liability for failure to disclose them. The former requirement to verify the answer has been repealed. To protect himself against double liability, the garnishee must allege any facts that show he is the debtor of a third person, rather than the garnishment defendant. He may interpose any defense that would be available in an action between himself and the

**garnishment defendant or between himself and the garnishment plaintiff. The defense should be affirmatively pleaded. A general denial can be made, but it is better practice to follow the statutory requirements in the answer precisely. The form of the answer follows that of answers generally with the body containing the responses required by the writ in addition to any other defenses.**

**If the garnishment plaintiff is not satisfied with the garnishee's answer, he must reply to any allegation in it within 20 days after service of the answer. The court tries the issue thus framed since the statute does not grant a jury trial. A reply is unnecessary when the only question is one of law. A question of law can be raised by a motion to strike the answer, or the deficient part of it, or by motion for judgment on the pleadings.**

**The garnishee may apply a setoff or counterclaim against the garnishment plaintiff to the same extent that he could against the garnishment defendant at the time of service of the writ. The garnishee may not acquire setoffs or counterclaims after service of the writ on him nor may he hold specific chattels as a setoff or counterclaim. The garnishment defendant may likewise move or answer in response to the writ. The garnishee stands in the place of the garnishment defendant to the extent of his liability to the garnishment defendant. He has a duty of reasonable care to preserve the garnisheed property. The garnishee's position cannot be made less favorable than it would be if the garnishment defendant were enforcing the claim against the garnishee. The general principle is that the garnishment defendant against the garnishee for the garnisheed property may plead a satisfaction by the garnishee of a judgment in the garnishment proceeding as a pro tanto bar to an action.**

**As mentioned previously, the garnishee has a fiduciary relationship to the garnishment defendant. The garnishee may retain the garnishment defendant's property until determination of the garnishment proceedings, but usually finds it convenient to deposit any property in the custody of the court as soon as the proceedings permit. A successful motion to dissolve a writ of garnishment, effects dissolution of the writ. A hearing after notice must be held on the motion to dissolve. The motion may raise questions of law or issues of fact. If the motion raises issues of fact, it must be a speaking motion. An order must be entered after the hearing denying the motion to dissolve, dissolving the writ or permitting an amendment to the motion for writ of garnishment or the writ, if appropriate.**

### **Foreign Judgments**

**Moneys due based upon a foreign judgment against a debtor are exempt from garnishment if the debtor has claimed the "Head of Family" exemption. A motion to dissolve a writ of garnishment must allege, as aforesaid, that the monies subject to garnishment represent wages, which were exempt from garnishment under law. Along with his motion, exempt persons must file affidavits, and if married by**

**himself and his spouse alleging that he is, or was at the time of receiving the wages, a Florida resident and the head of a household.**

**A motion to enjoin continuance of garnishment proceedings and enforce exemption should be filed if the garnishor has failed to deny the exemption claimed by the debtor, and should allege that the writ of garnishment has to be dissolved. In a foreign judgment, or if the debtor has since moved from the state, the motion should allege that the debtor no longer resides in Florida and he should move to dissolve the writ of garnishment on the grounds that the court previously determined that the monies were exempt from garnishment. The debtor or garnishee should always contend that the money garnished, or to be garnished, constitutes or constituted his wages as head of a household and are/were thus exempt from garnishment.**

**Florida law exempts from garnishment the wages of a head of a household. Moreover, it is irrelevant that a garnishee no longer resides in Florida, since at the relevant time, the garnishee's wages were made and the garnishee was a Florida resident and the head of a household. The purpose of section 222.11 is to protect wages earned by one who at the time relevant is a resident or citizen of Florida. A Garnishee does not need to refile the required affidavits in subsequent legal proceedings, because his exempt status is already a matter of record. The Third District Court of Appeal has previously held that the exemptions afforded by law must be strictly construed in favor of the debtor. "The exemption is for the benefit of the debtor, and its benefit may only be accorded to him by the statutory termination of the proceedings."**

**The question presented in the Elvine case was whether the trial court properly entered judgment against the garnishee when there was pending an affidavit by the debtor for exemption of wages from garnishment (i.e., "Head of Family" affidavit). The affidavit was made pursuant to statute and was filed 15 days before the entry of the judgment appealed. The court held that the judgment was erroneously entered and reversed. By law, when the garnishor fails to deny the garnishee's head of a family affidavit within two days after his notice is served upon him, the continuing writ should be returned and all garnishment proceedings should cease.**

### **Dischargeability of Domestic Obligations and Federal Bankruptcy Exemptions**

**A debtor may obtain a general discharge under Chapter 7 of the Bankruptcy Code from "all debts that arose before the date of the order for relief." 11 U.S.C.A 727(b). The Code makes exceptions for certain obligations, however, among which are alimony and support payments. The language in the Code that provides this treatment states that a discharge under section 727 does not discharge a debtor from any debt: (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social**

Security Act); or such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support; 11 U.S.C.A. 523(a)(5) (West 1979 & Supp.1984). The effect of the statute, then, is that a given domestic obligation is not dischargeable if it is "actually in the nature of" alimony, maintenance, or support. Florida has recently changed its laws regarding judgments, liens and the statutory definitions of "support". First, the language of 523(a)(5) does not refer to a particular state law legal duty of support. If Congress had intended dischargeability to be determined by whether an obligation could be imposed under state law, it might have addressed dischargeability in those terms. Congress chose instead to describe as not dischargeable those obligations in the "nature" of support. The federal courts believe that in using this general and abstract word, Congress did not intend bankruptcy courts to be bound by particular state law rules.

This conclusion is directly supported by the legislative history of 523(a)(5). The committee reports that accompanied the new bankruptcy code provide that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law." The federal courts take this legislative history as another indication Congress did not intend dischargeability to be determined by reference to a state law legal duty of support.

Most circuit courts of appeal that have considered the question have likewise concluded that state law does not determine whether a domestic obligation is dischargeable in bankruptcy. In *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir.1984), for example, the court considered the effect on dischargeability of a provision under Indiana law that allowed alimony only when a spouse was incapacitated or when the parties agreed in writing to an award of alimony. The court did not follow the state law but looked instead to the substance of the obligation in question to determine if it was one for support. The court concluded that the parties intended to provide support "and therefore . . . the obligation was 'in the nature of alimony, maintenance, or support' under federal law." Having determined that the obligation was in the nature of support under federal law, the court held that it was not dischargeable in bankruptcy.

Similarly, in *Williams v. Williams (In re Williams)*, 703 F.2d 1055 (8th Cir.1983), the court observed that it was "not bound by the characterization of an award under state law." The court in *Williams* affirmed that a debtor's agreement to pay his wife's attorney's fees was "in the nature of support," even though under applicable state rules, the agreement would not be considered support. The court observed that "whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law."

In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978, residents of Florida are not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code. Nothing in the statutes and laws shall affect the exemptions given to residents of Florida by the State Constitution and the Florida

**Statutes. An individual debtor under the federal Bankruptcy Reform Act of 1978 may exempt, in addition to any other exemptions allowed under state law, any property listed in subsection (d)(10) of s. 522 of that act.**

### **Garnishment in Child Support, Attorney Fee, Trust Account and Alimony Actions**

**The entry of the income deduction order solely for the payment of attorney's fees is unauthorized by law. An income deduction order must be entered when there has been an order establishing or modifying child support or alimony, and this order is effective immediately unless the trial court finds good cause to delay entry of the order until there is a delinquency in an amount equal to one month's support. There is also no statutory or rule authority permitting the courts to impose income deductions as part of restitution in juvenile cases. *Bacardi v. White*, 463 So.2d 218 (Fla. 1985), controls the issuance of income deduction orders against spendthrift trusts. In *Bacardi*, the Florida Supreme Court held that spendthrift trusts were subject to garnishment to enforce support orders and judgments.**

**For Florida court cases referring to garnishments in regards to other issues, such as monies "in the nature of support", basic support, child support or alimony, which is beyond discussion in this paper, one needs to look no further than the following court cases: 623 So. 2d 577, 18 Fla. Law W. D, 1871, *REICHENBACH v. CHEMICAL BANK OF NEW JERSEY*, Dist. Ct. App. 3rd Dist. 1993); 566 So. 2d 844, 15 Fla. Law W. D, 2155, *VETRICK v. HOLLANDER* (Dist. Ct. App. 4th Dist. 1990); 546 So. 2d 107, 14 Fla. Law W. 1603, *COOPER v. COOPER* (Dist. Ct. App. 4th Dist. 1989); 504 So. 2d 503, 12 Fla. Law W. 849, *NICHOLS v. SCHWARZ* (Dist. Ct. App. 4th Dist. 1987); 422 So. 2d 61 *SCHWARZ v. WADDELL* (Dist. Ct. App. 4th Dist. 1982); reh. Den. 434 So. 2d 889 *SCHWARZ v. WADDELL* (S. Ct. 1983); *SWEETEN v. ANDERSON*, 414 So.2d 258 (Fla. 4th DCA 1982); 405 So. 2d 978, *WADDELL v. SCHWARZ* (S. Ct. 1981); 405 So. 2d 975, *IN RE KUHN* (S. Ct. 1981); *SCHWARZ v. WADDELL*, 389 So.2d 210 (Fla. 4th DCA 1980), rev'd, 405 So.2d 978 (Fla.1981); 358 So. 2d 541 *MIAMI HERALD PUBL. CO. v. PAYNE* (S. Ct. 1978); *ELVINE v. PUBLIC FINANCE CO.* 196 So.2d 25, 3rd DCA 1967.**

### **Manifesting and Evidencing Domicile**

**Any person who has established a domicile in the state of Florida, may manifest and evidence that domicile by filing in the office of the clerk of the circuit court in the county in which they live, a sworn statement showing that he or she resides in and maintains a place of abode in that county which he or she recognizes and intends to maintain as his or her permanent home. Any person who has established a domicile in the State of Florida, but who maintains another place or places of abode in some other state or states, may manifest and evidence his or her domicile in Florida by filing in the office of the clerk of the circuit court for the county in which he or she resides, a sworn statement that his or her place of abode in Florida constitutes his or her predominant and principal home, and that he or she intends to continue it permanently as such.**

**Any person who has or who will be domiciled in a state other than the State of**

Florida, and who has or who may have a place of abode within the State of Florida, or who has or may do or perform other acts within the State of Florida, which independently of the actual intention of such person respecting his or her domicile might be taken to indicate that such person is or may intend to be or become domiciled in the State of Florida, and if such person desires to maintain or continue his or her domicile in such state other than the State of Florida, may manifest and evidence his or her permanent domicile and intention to permanently maintain and continue his or her domicile in such state other than the State of Florida, by filing in the office of the clerk of the circuit court in any county in the State of Florida in which the person may have a place of abode or in which the person may have done or performed such acts which independently may indicate that he or she is or may intend to be or become domiciled in the State of Florida, a sworn statement that the person's domicile is in such state other than the State of Florida, as the case may be, naming such state where he or she is domiciled and stating that he or she intends to permanently continue and maintain his or her domicile in such other state so named in said sworn statement.

Such sworn statement shall also contain a declaration that the person making the same is at the time of the making of such statement a bona fide resident of such state other than the State of Florida, and shall set forth therein his or her place of abode within the State of Florida, if any. Such sworn statement may contain such other and further facts with reference to any acts done or performed by such person, which such person desires or intends not to be construed as evidencing any intention to establish his or her domicile within the State of Florida.

#### **Exempting Disability Income and Benefits from Legal Processes**

Disability income benefits under any policy or contract of life, health, accident, or other insurance of whatever form, cannot be made liable to attachment, garnishment, or legal process, in favor of any creditor or creditors of the recipient of such disability income benefits, unless such policy or contract of insurance was effected for the benefit of such creditor or creditors.

#### **Exemptions of Life Insurance Policies and Proceeds**

If any person residing in Florida who dies leaving insurance on his or her life, the said insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy (the beneficiary), and the proceeds of that policy are exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment of those proceeds or benefits provides otherwise. Whenever the insurance, by designation or otherwise, is payable to the insured or to the insured's estate or to his or her executors, administrators, or assigns, the insurance proceeds are required to become a part of the insured's estate for all legal purposes and is required be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in the same manner as other assets of the insured's estate. The exemption of cash surrender value of life insurance policies and annuity contracts from legal process is slightly altered. The cash surrender values of life insurance policies issued upon the lives of citizens or residents of Florida and the proceeds of annuity contracts issued

to citizens or residents, upon whatever form, cannot in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected and drafted for the benefit of the creditor.

#### **Exemption of Pensions, Annuities and Retirement or Profit Sharing Benefits from Legal Processes**

Money received by any debtor as a pensioner of the United States within 3 months before the issuing of an execution, attachment, or garnishment process may not be applied to the payment of the debts of the pensioner when it is made to appear by the affidavit of the debtor that the pension money is necessary for the maintenance of the debtor's support or a family supported wholly or in part by the pension money. The filing of the affidavit by the debtor, or the making of such proof by the debtor, is prima facie evidence; and it is the duty of the court in which the proceeding is pending to immediately release all pension moneys held by such attachment or garnishment process upon the filing of such affidavit or the making of such proof. 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, s. 408A, or s. 409 of the Internal Revenue Code of 1986, as amended, is exempt from all claims of creditors of the beneficiary or participant.

Any plan or arrangement is not exempt from the claims of an alternate payee under a "qualified domestic relations" order. However, the interest of any alternate payee under a qualified domestic relations order is exempt from all claims of any creditor, other than the Department of Children and Family Services, of the alternate payee. As used in this section of the law, the terms "alternate payee" and "qualified domestic relations order" have the meanings defined to them in s. 414(p) of the Internal Revenue Code of 1986.

The pensions, annuities, or any other benefits accrued or accruing to any person who is a state or county employee and the accumulated contributions and the cash securities in the funds created under law are exempted from any state, county or municipal tax of the state and are not subject to execution or attachment or to any legal process whatsoever and are unassignable. Deferred Compensation funds are also unavailable for execution and are exempt from garnishment under the "Government Employees' Deferred Compensation Act". The state or local government employees department may, upon written request from the [retired] employee, deduct premiums for group hospitalization insurance from the retirement benefit paid to the employee.

#### **Exemption of Social Security or Veterans Benefits-Guardianship**

Except as provided by federal law, payments of benefits from the United States Department of Veterans Affairs or the Social Security Administration to or for the benefit of a disabled veteran or the veteran's surviving spouse or dependents are exempt from the claims of creditors and are not liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after the receipt of the payments by the guardian or the beneficiary.

## **Exemption of Prepaid College Trust Funds and Medical Savings Accounts from legal process**

**Money paid into or out of a Prepaid College Trust Fund by or on behalf of a purchaser or qualified beneficiary pursuant to an advance payment contract, which has not been terminated, are not liable to attachment, garnishment, or legal process in the state in favor of any creditor of the purchaser or beneficiary of such advance payment contract. Money paid into or out of the Prepaid College Trust Fund by or on behalf of a benefactor or designated beneficiary which agreement has not been terminated, are not liable to attachment, garnishment, or legal process in the state in favor of any creditor of the purchaser or beneficiary of such participation agreement. Money paid into or out of a Medical Savings Account by or on behalf of a person depositing money into such account or a qualified beneficiary are not liable to attachment, garnishment, or legal process in the state in favor of any creditor of such person or beneficiary of such Medical Savings Account.**

## **Fraudulent Transfers of Property and Fraudulent Asset Conversions**

**An exemption from attachment, garnishment, or legal process is not effective if it results from a fraudulent transfer or conveyance. As used in this portion of the law, "conversion" means every mode, direct or indirect, absolute or conditional, of changing or disposing of an asset, such that the products or proceeds of the asset become immune or exempt by law from claims of creditors of the debtor and the products or proceeds of the asset remain property of the debtor. Any conversion by a debtor of an asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the definition afforded to the creditor, whether the creditor's claim to the asset arose before or after the fraudulent conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor. In an action for relief against a fraudulent asset conversion, a creditor may obtain avoidance of the fraudulent asset conversion to the extent necessary to satisfy the creditor's claim and an attachment or other provisional remedy against the asset converted in accordance with applicable law.**

**An injunction may be applied for against further conversion by the debtor of the asset or of other property or any other relief the circumstances may require, only subject to the applicable principles of equity, and in accordance with applicable rules of procedure. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset converted or its proceeds. A cause of action with respect to a fraudulent asset conversion is extinguished unless an action is brought within 4 years after the fraudulent asset conversion was made. If an asset is converted and the converted asset is subsequently transferred to a third party, the provisions of fraudulent transfer laws apply to the transfer of the asset to the third party.**

## **Caveat-Disclaimer**

**The information herein only applies to Florida residents and is only suitable to use to research the applicable laws and to gather additional information in regards to other states and the federal laws. You are urged to search your state laws, statutes**

**and codes for exemptions, garnishments, levies, and homestead issues to learn the specific details required in the jurisdiction in which you are subject. This document shall not be considered legal advice. The doctrine of equivalents applies to this document and this is to serve as public notice that intellectual property rights and standardized protections of creative works, and protections under the law are in full force and effect. All intellectual property laws are hereby enforced.**

**Order a CD-ROM**

**If you would like a CD-ROM consisting of this memorandum, complete research of all applicable laws, statutes and codes, full text appellate court case opinions regarding “designation of homestead” and “head of family” issues, including all of the required, up-to-date forms, affidavits, notices, memorandums along with specific instructions on processing the information and documents, (saved in Word.doc and Adobe.pdf file formats) please send a \$50 donation to cover costs, handling and shipping, by check, money order or cash to: John Sims, 8708 S.W. 55 Street, Cooper City, Florida, 33328. Your research CD-ROM will be immediately shipped free of charge by priority mail. Please include your mailing address. If you prefer an e-mail attachment containing the above, or for any questions, please contact me at [c3i@netside.net](mailto:c3i@netside.net) Thank you.**