Using Exemptions in a Florida Bankruptcy

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A. Two Year Domicile Necessary to Claim Florida Exemptions Other Than Tenancy by the Entireties

If a Debtor has been domiciled in Florida for at least 730 days prior to filing for bankruptcy, then he is entitled to use Florida's exemptions. 11 U.S.C. §522(b)(3)(A). The relevant parts of 11 U.S.C. 522(a) and (b) state:

> § 522. Exemptions
> (a) In this section—
> (1) "dependent" includes spouse, whether or not actually dependent; and
> (2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.
> (b) (1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.
> (2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.
> (3) Property listed in this paragraph is—
> (A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;
> (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and
> (C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.
> If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).
> (4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:
> (A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that

determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.
(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that—
(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and
(ii) (I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or
(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.
(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.
(D) (i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.
(ii) A distribution described in this clause is an amount that—
(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and
(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount..

A review of this section shows that the two year domicile requirement does not apply to the property by the entireties exemption. See *In re Zolnierowicz,* 380 B.R. 84, (Bankr. M.D. Fla. 2007)(Judge Glenn); *In re Cauley,* 374 B.R. 311 (Bankr. M.D. Fla. 2007) (Judge Funk). Likewise, retirement funds are separately exempted by 11 U.S.C. § 522(b)(3)(C), so retirement funds are exempt as long as they are also tax exempt. *In re Maxwell*, 2009 Bankr. LEXIS 3298 (Bankr. M.D. Fla. Oct. 5, 2009) Although it has been argued that cases decided before BAPCPA that also require that exempt retirement accounts comply with ERISA are no longer applicable, this may not be the case. *In re Willis,* 411 B.R. 783 (Bankr. S.D. Fla. 2009). See also *Baker v. Tardif (In re Baker),* 590 F.3d 261(11th Cir. 2009) which determined that Keogh plan did not have to qualify under ERISA based on state law with no mention of 11. U. S. C. § 522 (b)(3)(C).

If the debtor was not domiciled in Florida for 730 days prior to filing for bankruptcy, the debtor must use the exemptions of the state he was domiciled in for the 180 day period just prior to the 730 day period. If this 180 day period includes multiple states, then the state in which the debtor was domiciled for the larger portion of this 180 day period will control the debtor's exemptions. If that state does not allow non residents to use its exemptions, then the debtor uses the Federal bankruptcy exemptions in 11 U.S.C. § 522. *In re West,* 352 B.R. 905 (Bankr. M.D. Fla. 2006)(Judge Paskay), *In re Crandall,* 346 B.R. 220 (Bankr. M. D. Fla. 2006)(Judge Williamson) For a list of which states allow non-residents to use their exemptions, see www.exemptionexpress.com.

Domicile is not always the same as residency, as clearly set forth by Judge Cooke:

> "'Domicile' is not necessarily synonymous with 'residence,' and one can reside in one place but be domiciled in another." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989) (citations omitted); see *Jaisinghani v. Capital Cities/ABC, Inc.*, 973 F.Supp. 1450, 1453 (S.D. Fla. 1997) ("The concept of 'domicile' must be distinguished from that of 'residence;' a person can have only one domicile, but may have many residences.") (citing *Holyfield*, 490 U.S. at 48). "A person is not necessarily a citizen of, or domiciled in, the state in which he resides at any given moment." *Jones v. Law Firm of Hill & Ponton*, 141 F. Supp. 2d 1349, 1355 (M.D. Fla. 2001). To establish domicile, there must be physical presence in a place with the concurrent intent to remain there indefinitely. See *Scoggins v. Pollock*, 727 F.2d 1025, 1026 (11th Cir.1984).
> *Vujasin v. Chef Vincent, Inc*, 2009 U.S. Dist. LEXIS 29612 (S.D. Fla. Mar. 24, 2009)

A member of the military can maintain a domicile although transferred to another state. Once in a state, a member of the military can change his domicile to that state and notify the military of this change of domicile by filing a DD Form 2058, "State of Legal Residence Certificate". Many members of the military change their domicile to Florida as soon as they are stationed here because Florida does not have a state income tax.

B. Constitutional Exemptions - Article X, sec. 4

Fla. Const. Art. X, § 4
§ 4. Homestead; exemptions

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

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

(2) personal property to the value of one thousand dollars.

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

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

the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

To understand some of the older homestead cases, as well as some of the more recent cases interpreting homestead, one must be familiar with the historical changes in Florida's constitutional protection for a homestead. Prior to 1984, the homestead and $1,000.00 personal property exemptions were limited to the head of a family. Prior to the 1968 adoption of our current constitution, the 1885 constitution's provision protecting a homestead read as follows:

Article X
Section 1. A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes or assessments, or for 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 exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article.

C. Bankruptcy Limits on a Homestead

In a bankruptcy, the homestead protection is limited by 11 U.S.C. § 522(o), (p) and (q), which provide:

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in—
(1) real or personal property that the debtor or a dependent of the debtor uses as a residence;
(2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
(3) a burial plot for the debtor or a dependent of the debtor; or
(4) real or personal property that the debtor or a dependent of the debtor claims as a homestead;
shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.

(p) (1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $160,375 *[as of April 1, 2016]* in value in—
(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;
(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a

residence;
(C) a burial plot for the debtor or a dependent of the debtor; or
(D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

(2) (A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.
(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

(q) (1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $160,375 *[as of April 1, 2015]* if—
(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or
(B) the debtor owes a debt arising from—
(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;
(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;
(iii) any civil remedy under section 1964 of title 18; or
(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

The 10 year look back period in § 522(o) for intentional fraudulent transfers into a homestead does not apply to the tenancy by the entirety exemption. *Dillworth v. Hinton (In re Hinton)*, 378 B.R. 371, 380-81 (Bankr. M.D. Fla. 2007); *In re Davis*, 403 B.R. 914, 919 (Bankr. M.D. Fla. 2009) (Both cases involved transfers more than four years prior to the petition date.)

Attack of motorcyclist by debtors' dog was not willful or reckless misconduct. No § 522(q) limit on homestead. *Miller v. Burns (In re Burns)*, 395 B.R. 756 (Bankr. M.D. Fla. 2008)

Joint debtors can "stack" the exemption caps for a total $250,000.00 limit on equity in a homestead owned less than 1215 days. (Limit would now be $320,750). *In re Rasmussen*, 349 B.R. 747 (Bankr. M.D. Fla. 2006); *In re Chouinard*, 358 B.R. 814 (Bankr. M.D. Fla. 2006)

The § 522(p) limit on a homestead does not apply to a home exempted as tenancy by entireties. *In re Buonopane*, 359 B.R. 346 (Bankr. M.D. Fla. 2007)

Increase in value from market appreciation is not included in calculating homestead cap. *In re Chouinard*, 358 B.R. 814 (Bankr. M.D. Fla. 2006)

Selected Cases Interpreting Homestead

Havaco of America, Ltd. v. Hill, 790 So. 2d 1018(Fla. 2001) Supreme Court rules that the transfer of non-exempt assets into an exempt homestead, even if acquired by debtor with the intent to hinder, delay or defraud creditors, did not impair the homestead exemption. §222.30, which prevents fraudulent transfers from creating exemptions, does not apply to a homestead. In a bankruptcy filed after BAPCPA, this ruling may be ineffective. As noted above,11 U.S.C.§ 522(o) reduces the homestead exemption to the extent`it results from an intentional fraudulent transfer which occurred in the previous ten years.

In re Cooke, 412 So. 2d 340 (Fla. 1982) Visiting foreign tourist could not declare property he owned as homestead because he could not formulate an intent to maintain property as his permanent residence.

In re McClain, 281 B.R. 769 (Bankr. M.D. Fla. 2002) A motor home with a permanent sewer and water hookup, underground electricity and on a permanent concrete pad was determined to qualify the land as a homestead.

Smith v. Hamilton, 428 So. 2d 386 (Fla. 4th DCA 1983) Homestead can be sold by judgement creditor if judgment lien attached prior to property being homestead of debtor.

Kirkland v. Kirkland 253 So.2d 728(Fla. 3rd DCA 1971) Homestead property was subject to levy under judgment recorded prior to time property became homestead of judgment debtor.

Bowers v. Mozingo, 399 So. 2d 492 (Fla. 4th DCA 1981).Pre-existing judgments do not attach to homestead if debtor acquires property which he immediately makes his homestead.

Quigley v. Kennedy & Ely Ins, Inc, 207 So. 2d 431 (Fla. 1968) Later purchased lots adjoining residence included in homestead. Judgment recorded prior to purchase of lots not a lien.

Choquette v. Dodge, 80 Fla. 4, 86 So. 271 (Fla. 1920) Sale of homestead in execution gives no title to purchaser.

Orange Brevard Plumbing & Heating v. La Croix, 137 So. 2d 201 (Fla. 1962) Proceeds of sale of homestead qualify for homestead exemption if sale of homestead is made with good faith intent to reinvest proceeds in another homestead within reasonable amount of time.

JBK Associates, Inc. v. Sill Bros, Inc, SC15-977, 2016 Fla. LEXIS 884; 41 Fla. L. Weekly S 189 (Fla. April 28, 2016) Florida Supreme Court restates its *Orange Brevard Plumbing & Heating* decision that the proceeds from the sale of a homestead were exempt. Sets forth three rules: (1) there must be a good faith intention, prior to and at the time of the sale, to reinvest the proceeds in another homestead within a reasonable time; (2) the funds must not be commingled with other monies; (3) the proceeds must be kept separate and apart and held for the sole purpose of acquiring another home. Investment of part of proceeds in securities did not void the exempton.

Barnes v. Camden Reality Inc. 578 So.2d 20 (Fla. 1st DCA 1991) Proceeds of sale of homestead qualify for homestead exemption if sale of homestead is made with good faith intent to reinvest proceeds in another homestead within reasonable amount of time.

Sun First Nat. Bank of Orlando v. Gieger, 402 So. 2d 428, (Fla. 5th DCA 1981) Proceeds of sale of homestead qualify for homestead exemption if sale of homestead is made with good faith intent to reinvest proceeds in another homestead within reasonable amount of time. Intent to make mortgage payments for new homestead with proceeds deemed sufficient.

In re Kalynych, 284 B.R. 149, (Bankr. M. D. Fla. 2002). Sum ex-wife ordered to pay debtor from refinance or sale of former marital residence is exempt because debtor intended to reinvest proceeds in new homestead.

Town of Lake Park v. Grimes, 963 So. 2d 940 (Fla 4th DCA 2007). Absent proof of intent to reinvest proceeds in a new homestead, homeowner was not entitled to receive foreclosure surplus against competing claim of code enforcement liens.

Florida Dept. Of Revenue v. Pelsy, 779 So. 2d 629 (Fla. 1st DCA 2001). Borrowed money in bank account not exempt from levy, notwithstanding intent to invest in homestead. Monies did not come from a homestead.

Nationwide Financial Corporation of Colorado v. Thompson, 400 So. 2d 559 (Fla. 1st DCA 1981). Debtor did not abandon homestead by moving into an apartment because wife and child remained in home.

Hillsborough Investment Company v. Wilcox, 152 Fla. 889, 13 So. 2d 448 (Fla. 1943) One year absence from home did not constitute abandonment.

Cain v. Cain, 549 So. 2d 1161, (Fla. 4th DCA 1989) Former residence of divorced spouse still his homestead because his children resided there.

Coy v. Mango Bay Property and Investments, Inc, 963 So. 2d 873 (Fla. 4th DCA 2007) Husband who left homestead pursuant to an injunction has not abandoned

homestead.

Law v. Law, 738 So. 2d 522 (Fla. 4th DCA 1999). Husband and wife can have separate homesteads if legitimately separated.

In re Haning, 252 B.R. 799 (Bankr. M.D. Fla. 2000) Use of part of a homestead for business does not cancel any part of homestead exemption. Case discusses opinions from other Florida bankruptcy courts on this issue. Very good analysis of 1968 amendments to homestead provision in constitution. Lease to third party of part of home distinguished. No mention in decision of rural versus urban homestead.

Davis v. Davis, 864 So.2d 458 (Fla. 1st DCA 2003) Mobile home park contiguous to homestead is part of homestead (rural homestead). Good discussion of rural versus urban homestead. Urban homestead cannot include rental, rural can. This case was discussed but not followed by:

In re Radtke, 344 B.R. 690 (Bankr. S.D. Fla. 2006) This case discusses *Davis,* but refuses to follow it and holds that homestead outside city cannot include a business.

In re Earnest, 2009 Bankr. LEXIS 1821 (Bankr. M.D. Fla. Mar. 26, 2009) Judge Funk follows the *Davis* decision, ruling that a business located on a homestead outside a municipality does not limit the homestead exemption.

In re Oullette, 2009 Bankr. LEXIS 1745 (Bankr. M.D. Fla. Mar. 26, 2009) Decided the same day as *Earnest,* Judge Funk also rules that rent from a mobile home located on the debtor's homestead outside a municipality is also exempt.

Engelke v. Estate of Engelke, 921 So. 2d 693, (Fla. 4th DCA 2006) Home held in a revocable living trust qualifies as an exempt homestead.

In re Cocke, 371 B.R. 554 (Bankr. M.D. Fla. 2007) Home held in a revocable living trust does qualify as an exempt homestead. (Effectively overrules contrary decision *In re Bosonetto,* 271 B.R. 403 (Bankr. M.D. Fla. 2001))

Southern Walls, Inc. v. Stilwell Corporation, 810 So. 2d 566 (Fla. 5th DCA 2002) Debtor's interest in a cooperative apartment can constitute a homestead. May be contrary to *In Re Estate of Wartels*, 357 So. 2d 708 (Fla. 1973), which the opinion discuses. *In Re Estate of Wartels* involved a probate homestead, which is provided for by the same section of the constitution that provides for a creditor homestead.

Phillips v. Hirshon, 958 So. 2d 425 (Fla. 3rd DCA 2007) Contrary to *Southern Walls,* supra, finds that a Debtor's interest in a cooperative apartment is not a homestead. After initially accepting conflict jurisdiction, the Florida Supreme Court changed its mind and declined to hear the case. *Levine v. Hirshon,* 980 So. 2d 953 (Fla. 2008)

In re Williams, 427 B. R. 541 (Bankr. M.D. Fla 2010) A remainder interest can be exempted as a homestead if the debtor resides there and has the continued right to live there through family ties.

Chames v. DeMayo, 972 So. 2d 250 (Fla. 2008) Written waiver of homestead in an attorney retainer agreement is ineffective.

In re Gilley, 236 B.R. 441 (Bankr. M.D. Fla 1999) Cash proceeds of a cause of action and insurance proceeds payable because of damage to homestead are exempt when proceeds are intended to rehabilitate homestead.

Special Rules for Jacksonville

A homestead outside a municipality is exempt to the extent of 160 contiguous acres. All of Duval county is inside the municipality of Jacksonville, so it is incorrectly believed by many that homesteads in Jacksonville are all limited to ½ acre, unless they were owned prior to consolidation. Jacksonville, in its charter, grandfathered in the old city limits for the purposes of Article X, section 4, Florida Constitution. Charter of the City of Jacksonville, § 2.06, as authorized by Article VIII, § 6(e), Florida Constitution, incorporating Art. VIII, § 9 of 1885 Florida Constitution. Therefore, in Jacksonville, the old city limits still apply for purposes of the amount of land entitled to homestead protection from creditors.

CHARTER OF THE CITY OF JACKSONVILLE, FLORIDA

Section 2.06. Homestead law.

That part of the general services district not included in the urban services district shall be deemed to be a rural area, and a homestead in such rural area shall not be limited as if in a city or town. Whenever any urban services district is altered, created, or expanded pursuant to this charter or legislative act, a homestead within such urban services district shall be limited as if in a city or town.

(Laws of Fla., Ch. 67-1535; Laws of Fla., Ch. 78-536, § 2; Laws of Fla., Ch. 92-341, § 1)

Jacksonville is divided into urban service districts which were the former city limits of Jacksonville, Baldwin, Atlantic Beach, Neptune Beach and Jacksonville Beach. The remainder of the county is in the general services district. The property appraiser's website can be used to determine whether a parcel is in the general services district and therefore entitled to an exemption for 160 acres. A rural homestead is also free from the use restrictions of an urban homestead. An urban homestead is generally limited to the residence of the owner or his family. A rural homestead is not so limited.

Fla. Const. Art. X, § 4 also provides a $1,000.00 personal property exemption. This is in addition to the various other statutory and common law exemptions discussed

below.

D. Statutory Exemptions - Chapter 222

Florida's statutory exemptions are mostly contained in Chapter 222, Florida Statutes. The remainder are in the chapter that relates to the particular exemption, such as the workers' compensation exemption contained in Chapter 440.

1. § 222.05 - Mobile home on leased land is exempt.

> 222.05 Setting apart leasehold.--Any person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his or her own which he or she may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his or her homestead, shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid.

Although this exemption is similar to the homestead exemption, it does not prevent a debtor from claiming the "wildcard" personal property exemption provided in Fl St. § 222.25(4) *In re Lisowski,* 395 B.R. 771 (Bankr. M.D. Fla. 2008) (Judge Glenn)

There are a number of Florida bankruptcy cases interpreting Fl. St. §222.05, including attempts to exempt boats as well as motor homes.

Miami Country Day Sch. v. Bakst, 641 So. 2d 467 (Fla. 3rd DCA 1994) - 3,000 square foot houseboat, never equipped with a motor and debtor's sole residence was exempt.

In re Schumacher, 400 B.R. 831 (Bankr. M.D. Fla. 2008) - Motor home which was driven only to move it to leased lot, in which debtors resided and which debtors no longer intended to drive was exempt.

In re Yettaw, 316 B.R. 560 (Bankr. M.D. Fla. 2004) - Motor home which was debtors' sole residence and which was not driveable was exempt.

In re Hacker, 260 B.R. 542 (Bankr. M.D. Fla. 2000)(Judge Funk) - Boat was not exempt under § 222.05. Debtor resided in boat, located in repair yard, when he was not traveling. Although boat was currently not movable, it was being repaired and debtor intended to return it to seafaring shape.

2. § 222.11 - Wages of a head of family are fully exempt.

Wages of the head of a family are exempt. This includes wages deposited in a financial institution in the last six months.

> 222.11 Exemption of wages from garnishment.—
> (1) As used in this section, the term:
> (a) "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.

(b) “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.

(c) “Head of family” includes any natural person who is providing more than one-half of the support for a child or other dependent.

(2) (a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to $750 a week are exempt from attachment or garnishment.

(b) Disposable earnings of a head of a family, which are greater than $750 a week, may not be attached or garnished unless such person has agreed otherwise in writing. The agreement to waive the protection provided by this paragraph must:

1. Be written in the same language as the contract or agreement to which the waiver relates;

2. Be contained in a separate document attached to the contract or agreement; and

3. Be in substantially the following form in at least 14-point type:
IF YOU PROVIDE MORE THAN ONE-HALF OF THE SUPPORT FOR A CHILD OR OTHER DEPENDENT, ALL OR PART OF YOUR INCOME IS EXEMPT FROM GARNISHMENT UNDER FLORIDA LAW. YOU CAN WAIVE THIS PROTECTION ONLY BY SIGNING THIS DOCUMENT. BY SIGNING BELOW, YOU AGREE TO WAIVE THE PROTECTION FROM GARNISHMENT.

(Consumer’s Signature) (Date Signed)

I have fully explained this document to the consumer.

(Creditor’s Signature) (Date Signed)

The amount attached or garnished may not exceed the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(c) 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, 15 U.S.C. s. 1673.

(3) Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

See *In re Weinshank,* 406 B.R. 413, (Bankr. S.D. Fla. 2009) for a decision that deposited wages of a person not the head of a family are exempt.

Brock v. Westport Recovery Corp., 832 So. 2d 209, 212 (Fla. 4th DCA 2002)

Earnings do not always include distributions from a business controlled by the debtor. “An employee has regular earnings pursuant to an employment agreement. He or she is paid directly for personal labor or services. By contrast, this Debtor and others similarly situated who run their own businesses, have control over the timing and amount of their compensation. Certainly, the legislature did not intend to exempt all funds a person chooses to "draw" from a business where the individual has full discretion over what expenses to pay or not pay in order to fund the draw.”

Vining v. Segal, 731 So. 2d 826 (Fla. 3d DCA 1999) Profits of a sole proprietor are not “earnings” and are not exempt.

In re Pettit, 224 B.R. 834 (Bankr. M.D. Fla. 1998) (Judge Funk) Label of “independent contractor” was not sole factor in determining if monies received were “earnings” that could be exempted. Court adopted a totality of the circumstances test. Very good analysis of *Schlein v. Mills (In re Schlein)*, 8 F.3d 745 (11th Cir. 1993) and the effect on this decision of subsequent amendments to Fl. St § 222.11

In re Branscum, 229 B.R. 32 (Bankr. M.D. Fla. 1999) Declined to follow the *In re Pettit* decision and found “private investigator”to be a non-exempt independent contractor under §222.11.

In re Rutenberg, 164 B.R. 683 (Bankr. M.D. Fla. 1994) - Merrill Lynch CMA account is not a bank account. Wages deposited in CMA account not exempt.

In re Cabrera, 2009 Bankr. LEXIS 3977 (Bankr. S.D. Fla. Dec. 8, 2009) Exemption does not protect funds from bank’s set off rights.

In re Lawton, 261 B.R. 774 (Bankr. M.D. Fla. 2001) Stock options received from employer were not “earnings” which could be claimed exempt.

In re Carlton, 309 B.R. 67 (Bankr. S.D. Fla. 2004) Stock options gained prepetition are part of the estate.

In re Braddy, 226 B.R. 479 (Bankr. N.D. Fla. 1998) Insurance renewal commissions are not “earnings” which could be claimed exempt. Case provides a very good analysis of this issue with extensive case cites.

In re Hanick, 164 B.R. 165 (Bankr. M.D. Fla. 1994) (Judge Paskay) Real estate commissions were not “earnings” which could be claimed exempt.

In re Jans, 2016 Bankr. LEXIS 570 (Bankr. M.D. Fla. 2016) (Judge Delano) Real estate commissions can be exempt under this section.

In re Stroup, 221 B.R. 537 (Bankr. M.D. Fla. 1997) Physician’s deferred compensation were not “earnings” which could be claimed exempt. Court also stated, “Florida bankruptcy courts also are in agreement that severance pay in its various forms is not considered "earnings" under the protection of Florida Statute Section 222.11.”

In re Beckmann, 2000 Bankr. LEXIS 1991 (Bankr. M.D. Fla. June 30, 2000) (Judge Baynes) Although husband consistently had a higher income than wife, her income was sufficient such that she was not his dependent and he was therefore not the

head of family.

In re Holland, 2017 Bankr. LEXIS 4209 (Bankr. M.D. Fla. 2017)- (Judge Funk) When husband only had a slightly higher income than wife, and there were no other dependents, that he was not head of family because wife was not dependent upon him for support.

Ulisano v. Ulisano, 154 So. 3d 507 (Fla. 4th DCA 2015) Wage exemption statute applies to non-residents.

3. § 222.13 - Proceeds of a life insurance policy are exempt from the creditors of the deceased, unless the deceased was the beneficiary.

If a debtor receives or is entitled to receive life insurance proceeds at the time a petition is filed or within the next 180 days, they are property of the estate pursuant to 11 U.S.C. § 541 (a)(5)(C) and are not exempt unless they qualify as Veterans benefits or are exempt under 38 USC § 1970(g).

> 222.13 Life insurance policies; disposition of proceeds.--
>
> (1) Whenever any person residing in the state shall die 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, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise. Notwithstanding the foregoing, 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 shall become a part of the insured's estate for all purposes and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate.
>
> (2) Payments as herein directed shall, in every such case, discharge the insurer from any further liability under the policy, and the insurer shall in no event be responsible for, or be required to see to, the application of such payments.

4. § 222.14 - Cash surrender value of life insurance and proceeds of an annuity contract are exempt.

If a life insurance policy covers the life of the policy owner, the cash surrender value is exempt. If a debtor owns a policy on the life of another person, such as a spouse or child, the cash surrender value is not exempt. Proceeds of annuity contracts are exempt.

> 222.14 Exemption of cash surrender value of life insurance policies and annuity contracts from legal process.--The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person 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 for the benefit of such creditor.

Goldenberg v. Sawczak, 791 So. 2d 1078 (Fla. 2001) (Certified from 11th Circuit) - Annuity contract that could be surrendered early was still exempt. Court discussed penalty for early surrender, but did not appear to require penalty provision to insure

exemption.

In re McCollam, 612 So. 2d 572 (Fla. 1993) (Certified from 11th Circuit) - Personal injury structured settlement funded by annuity is exempt, even though debtor does not own annuity. Debtor received proceeds of annuity as her structured settlement payments.

Guardian Life Ins. Co. v. Solomon (In re Solomon), 95 F.3d 1076 (11th Cir. Fla. 1996) - Almost the same facts as McCollam, yet different answer. Debtor was not paid directly by annuity. Annuity was used to ensure settling party had sufficient funds to pay structured settlement.

In re Turner, 332 B.R. 461 (Bankr. N.D. Fla. 2005) - Judge Killian explains the distinction between *McCollam* and *Solomon*.

In re Holt, 422 B.R. 778 (Bankr. M.D. Fla. 2010)(Judge Glenn) - Debtor claimed payments received on a promissory note were actually annuity payments. Court ruled no intent to create an annuity.

In re Lowery, 272 B.R. 317 (Bankr. M.D. Fla. 2001)(Judge Funk) - Owner of life insurance policy must also be the insured for cash surrender value to be exempt.

5. § 222.18 - Disability income benefits are exempt.

> 222.18 Exempting disability income benefits from legal processes.--Disability income benefits under any policy or contract of life, health, accident, or other insurance of whatever form, shall not in any case be liable to attachment, garnishment, or legal process in the state, 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.

In re Ryzner, 208 B.R. 568 (Bankr. M.D. Fla. 1997) - Disability benefits exempt even after deposit into bank account.

In re Dennison, 84 B.R. 846 (Bankr. S.D. Fla. 1988) - Refund of prepaid premiums for disability insurance were exempt.

In re Chesley, 526 B.R. 888 (M.D. Fla. 2014) Monies obtained from an auto accident case are not exempt as “disability income benefits” even if Debtor is now disabled.

6. § 222.201 - Some bankruptcy exemptions are available in Florida.

Although Fl. St. § 222.20 denied federal bankruptcy exemptions to Florida residents, § 222.201 allows the exemptions listed in 11 U.S.C. §522(d)(10). These exemptions are:

> (10) The debtor's right to receive—
>
> (A) a social security benefit, unemployment compensation, or a local public assistance benefit;
>
> (B) a veterans' benefit;
>
> (C) a disability, illness, or unemployment benefit;
>
> (D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
>
> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

In re Watkins, 1988 U.S. Dist. LEXIS 9139 (S.D. Fla. July 30, 1988) - Bankruptcy court's determination that $306,000.00 lump sum alimony award that did not end upon death or remarriage was exempt alimony was affirmed.

In re Brackett, 259 B.R. 768 (Bankr. M.D. Fla. 2001) (Judge Proctor) - Payments ordered in divorce case labeled "Direct Financial Support" were actually debt repayment. Court ignored labels in divorce final judgment in determining that the payments were not alimony and therefore not exempt.

In re Ellertson, 252 B.R. 831 (Bankr. S.D. Fla. 2000) - Payments labeled equitable distribution in final judgment were determined to be exempt alimony.

Social security already received is not exempt under 11 U.S.C. §522(d)(10). Social Security already received may be exempt under 42 USC § 407. See below.

7. § 222.21 - IRS qualified pensions and retirements are exempt.

> 222.21 Exemption of pension money and certain tax-exempt funds or accounts from legal processes.—
>
> (1) Money received by any debtor as pensioner of the United States within 3 months next preceding 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 or otherwise 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 release all pension moneys held by such attachment or garnishment process, immediately, upon the filing of such affidavit or the making of such proof.

(2) (a) Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:

1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;

2. Maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable; or

3. Not maintained in accordance with a plan or governing instrument described in subparagraph 1. or subparagraph 2. if the person claiming exemption under this paragraph proves by a preponderance of the evidence that the fund or account is maintained in accordance with a plan or governing instrument that:

a. Is in substantial compliance with the applicable requirements for tax exemption under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended; or

b. Would have been in substantial compliance with the applicable requirements for tax exemption under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, but for the negligent or wrongful conduct of a person or persons other than the person who is claiming the exemption under this section.

(b) It is not necessary that a fund or account that is described in paragraph (a) be maintained in accordance with a plan or governing instrument that is covered by any part of the Employee Retirement Income Security Act for money or assets payable from or any interest in that fund or account to be exempt from claims of creditors under that paragraph.

(c) Any money or other assets or any interest in any fund or account that is exempt from claims of creditors of the owner, beneficiary, or participant under paragraph (a) does

not cease to be exempt after the owner's death by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986, including, but not limited to, a direct transfer or eligible rollover to an inherited individual retirement account as defined in s. 408(d)(3) of the Internal Revenue Code of 1986, as amended. This paragraph is intended to clarify existing law, is remedial in nature, and shall have retroactive application to all inherited individual retirement accounts without regard to the date an account was created.

(d) Any fund or account described in paragraph (a) is not exempt from the claims of an alternate payee under a qualified domestic relations order or from the claims of a surviving spouse pursuant to an order determining the amount of elective share and contribution as provided in part II of chapter 732. 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 Revenue, of the alternate payee. As used in this paragraph, the terms "alternate payee" and "qualified domestic relations order" have the meanings ascribed to them in s. 414(p) of the Internal Revenue Code of 1986.

(e) This subsection applies to any proceeding that is filed on or after the effective date of this act.

Baker v. Tardif (In re Baker), 590 F.3d 1261(11th Cir. 2009) determined that a Keogh plan did not have to qualify under ERISA to be exempt, based on this statute.

In re Brackett, 259 B.R. 768 (Bankr. M.D. Fla. 2001)(Judge Proctor) - ERISA quailified retirement benefits awarded in a divorce are not exempt if no QDRO entered. Non-ERISA retirement benefits exempt without QDRO. (QDRO is not available if non-ERISA qualified retirement.)

In re Kauffman, 299 B.R. 641 (Bankr. M.D. Fla. 2003) states that a divorce award of a non-ERISA pension is not exempt. This case was reversed on appeal (3:03-cv-1101-J-16), but the appellate decision was not published.

Robertson v. Deeb, 16 So. 3d 936 (Fla. Dist. Ct. App. 2d Dist. 2009) Inherited IRA is not exempted by Fl. St § 222.21. Decision was based on IRA losing its tax exempt status upon being inherited. Reasoning would not apply to an IRA inherited by spouse. This case was overruled by the legislature by amending the statute in 2011 (Laws of Florida 2011-84) See the specific reference to inherited IRS in § 222.21 (1)(c).

In re Willis, 2009 Bankr. LEXIS 2160 (Bankr. S.D. Fla. 2009) Owner of self directed IRAs engaged in transactions prohibited by tax code. IRAs not exempt under 11 USC § 522(b)(3)(C). Very thorough analysis of the issue, including effect on rollover IRAs.

Clark v Rameker, 134 S. Ct. 2242 (2014). Supreme Court ruled that an IRA inherited by a non-spouse is not "retirement funds" and therefore not exempt pursuant to

11 U.S.C. § 522(b)(3)(C). This case has no effect in Florida as long as a debtor exempts the inherited IRA under Florida Statutes § 222.21 instead of 11 U.S.C. § 522(b)(3)(C).

8. § 222.22 - Education savings, health savings and hurricane savings.

222.22 Exemption of assets in qualified tuition programs, medical savings accounts, Coverdell education savings accounts, and hurricane savings accounts from legal process.--

(1) Moneys paid into or out of, the assets of, and the income of any validly existing qualified tuition program authorized by s. 529 of the Internal Revenue Code of 1986, as amended, including, but not limited to, the Florida Prepaid College Trust Fund advance payment contracts under s. 1009.98 and Florida Prepaid College Trust Fund participation agreements under s. 1009.981, are not liable to attachment, levy, garnishment, or legal process in the state in favor of any creditor of or claimant against any program participant, purchaser, owner or contributor, or program beneficiary.

(2) Moneys paid into or out of, the assets of, and the income of a health savings account or medical savings account authorized under ss. 220 and 223 of the Internal Revenue Code of 1986, as amended, are not liable to attachment, levy, garnishment, or legal process in this state in favor of any creditor of or claimant against any account participant, purchaser, owner or contributor, or account beneficiary.

(3) Moneys paid into or out of, the assets of, and the income of any Coverdell education savings account, also known as an educational IRA, established or existing in accordance with s. 530 of the Internal Revenue Code of 1986, as amended, are not liable to attachment, levy, garnishment, or legal process in this state in favor of any creditor of or claimant against any account participant, purchaser, owner or contributor, or account beneficiary.

(4) (a) Moneys paid into or out of, the assets of, and the income of any hurricane savings account established by an insurance policyholder for residential property in this state equal to twice the deductible sum of such insurance to cover an insurance deductible or other uninsured portion of the risks of loss from a hurricane, rising flood waters, or other catastrophic windstorm event are not liable to attachment, levy, garnishment, or legal process in this state in favor of any creditor of or claimant against any account participant, purchaser, owner or contributor, or account beneficiary.

(b) As used in this subsection, the term "hurricane savings account" means an account established by the owner of residential real estate in this state, which meets the requirements of homestead exemption under s. 4, Art. X of the State Constitution, who specifies that the purpose of the account is to cover the amount of insurance deductibles and other uninsured portions of risks of loss from hurricanes, rising flood waters, or other catastrophic windstorm events.

(c) This subsection shall take effect only when the federal government provides tax-exempt or tax-deferred status to a hurricane savings account, disaster savings account, or other similar account created to cover an insurance deductible or other uninsured portion of the risks of loss from a hurricane, rising flood waters, or other catastrophic windstorm event.

The hurricane or disaster savings account exemption is not in effect because congress has not yet provided tax-exempt or tax deferred status to these accounts.

9. § 222.25 - Miscellaneous exemptions - motor vehicles, health aids, EIC tax refund, extra $4,000.00 for citizens with no homestead.

222.25 Other individual property of natural persons exempt from legal process.--The following property is exempt from attachment, garnishment, or other legal process:

(1) A debtor's interest, not to exceed $1,000 in value, in a single motor vehicle as defined in s. 320.01.

(2) A debtor's interest in any professionally prescribed health aids for the debtor or a dependent of the debtor.

(3) A debtor's interest in a refund or a credit received or to be received, or the traceable deposits in a financial institution of a debtor's interest in a refund or credit, pursuant to s. 32 of the Internal Revenue Code of 1986, as amended. This exemption does not apply to a debt owed for child support or spousal support.

(4) A debtor's interest in personal property, not to exceed $4,000, if the debtor does not claim or receive the benefits of a homestead exemption under s. 4, Art. X of the State Constitution. This exemption does not apply to a debt owed for child support or spousal support.

The availability of the extra $4,000.00 exemption, sometimes referred to as a "wildcard" exemption, is available even if the debtor still owns and resides in his home when he files for bankruptcy. The earlier bankruptcy decisions which required an intent to surrender the home no longer apply.

Answering a certified question from the 11th Circuit the Florida Supreme Court, has written its decision on this issue in *Osborne v. Dumoulin*, 55 So. 3d 577 (Fla. 2011). An intent to surrender the homestead is not required. If the debtor does not claim the home exempt and does not interfere with the trustee's good faith attempt to sell the home, he is entitled to the extra $4,000.00 exemption. Protecting the home with a tenancy by the entireties exemption instead of a homestead exemption will nonetheless prevent a debtor from receiving the additional $4,000.00 exemption because the debtor has "received the benefits of a homestead exemption". If a home has no equity, the trustee will not be able to administer the property even though not claimed exempt and the debtor will be allowed the additional $4,000.00 exemption. See *Iuliano v. Brook,* 2011 U.S. Dist. LEXIS 47156 (M.D. Fla. Apr. 29, 2011) and *In re Rodale,* 452 B.R. 290, (Bankr. M.D. Fla. 2011) for cases which did not allow a trustee to interfere with a debtor's possession of a home not claimed exempt but with no equity.

Claiming a mobile home on a leased lot exempt also does not prevent use of the "wildcard" exemption. *In re Munao*, 2008 Bankr. LEXIS 2748 (Bankr. M.D. Fla. 2008)(Judge Glenn)

Non-filing spouse waived homestead exemption for homestead jointly owned with debtor. Debtor allowed $4,000 "wildcard" exemption. *In re Fitzpatrick*, 521 B.R. 698 (Bankr. M.D. 2014)

Debtor's homestead rights in home owned solely by non-filing spouse insufficient to prevent use of $4,000 "wildcard" exemption. *In re Castillo*, 2014 Bankr. LEXIS 822 (Bankr. S. D. Fla. 2014)

Claiming TBE exemption for home owned jointly with non-filing spouse does not prevent use of the "wildcard" exemption. *In re Kehoe*, 2012 Bankr. LEXIS 1321 (Bankr. M.D. Fla. Mar. 30, 2012)

The 11th Circuit has overruled the few bankruptcy court decisions, *In re Didelis,* 2015 Bankr. Lexis 213 (Bankr. M. D. Fla. 2015) and *In re Valone,* 500 B.R. 645, 651 (Bankr. M.D. Fla. 2013), that the $4,000.00 "wildcard" exemption was unavailable in a Chapter 13 if the debtor was keeping a home, even if the home had no equity. *In re Valone,* 784 F.3d 1398 (11th Cir. 2015)

E. Statutory Exemptions Not Contained In Chapter 222

1. § 112.215(10)(a) Florida Government Employees Deferred Compensation is exempt.

> (10)(a) The moneys, pensions, annuities, or other benefits accrued or accruing to any person under the provisions of any plan providing for the deferral of compensation and the accumulated contributions and the cash and securities in the funds created thereunder are hereby exempt from any state, county, or municipal tax. They shall not be subject to execution or attachment or to any legal process whatsoever by a creditor of the employee and shall be unassignable by the employee.

2. § 112.363(9) - State administered retirement health insurance subsidy is exempt.

> (9) BENEFITS.--Subsidy payments shall be payable under the retiree health insurance subsidy program only to participants in the program or their beneficiaries, beginning with the month the division receives certification of coverage for health insurance for the eligible retiree or beneficiary. If the division receives such certification at any time during the 6 months after retirement benefits commence, the retiree health insurance subsidy shall be paid retroactive to the effective retirement date. If, however, the division receives such certification 7 or more months after commencement of benefits, the retroactive retiree health insurance subsidy payment will cover a maximum of 6 months. Such subsidy payments shall not be subject to assignment, execution, or attachment or to any legal process whatsoever.

3. § 121.055(6)(e)(3) - Benefits payable under the Senior Management Service Optional Annuity Program are exempt.

> 2. The benefits payable to any person under the Senior Management Service Optional Annuity Program, and any contribution accumulated under such program, are not subject to assignment, execution, or attachment or to any legal process whatsoever.

4. § 121.131 - Benefits payable under the Florida Retirement System are exempt.

> 121.131 Benefits exempt from taxes and execution.--The benefits accrued to any person under the provisions of this chapter and the accumulated contributions, securities, or other investments in the trust funds hereby created are exempt from any state, county, or municipal tax of the state and shall not be subject to assignment, execution, or attachment or to any legal process whatsoever.

5. § 122.15 - State and county officers and employees retirement system benefits are exempt.

> 122.15 Benefits exempt from taxes and execution.--
>
> (1) The pensions, annuities, or any other benefits accrued or accruing to any person under the provisions of this chapter and the accumulated contributions and the cash securities in the funds created under this chapter are hereby exempted from any state, county or municipal tax of the state

and shall not be subject to execution or attachment or to any legal process whatsoever and shall be unassignable.

(2) This subsection shall have no effect upon this section except that the department may, upon written request from the retired member, deduct premiums for group hospitalization insurance from the retirement benefit paid such retired member.

6. § 175.241 - Firefighter pensions are exempt.

175.241 Exemption from tax and execution.--For any municipality, special fire control district, chapter plan, local law municipality, local law special fire control district, or local law plan under this chapter, the pensions, annuities, or other benefits accrued or accruing to any person under any chapter plan or local law plan under the provisions of this chapter and the accumulated contributions and the cash securities in the funds created under this chapter are hereby exempted from any state, county, or municipal tax and shall not be subject to execution or attachment or to any legal process whatsoever, and shall be unassignable.

7. § 185.25 - Municipal police pensions are exempt.

185.25 Exemption from tax and execution.--For any municipality, chapter plan, local law municipality, or local law plan under this chapter, the pensions, annuities, or any other benefits accrued or accruing to any person under any municipality, chapter plan, local law municipality, or local law plan under the provisions of this chapter and the accumulated contributions and the cash securities in the funds created under this chapter are exempted from any state, county, or municipal tax of the state and shall not be subject to execution or attachment or to any legal process whatsoever and shall be unassignable.

8. § 238.15 - Teachers retirement is exempt.

238.15 Exemption of funds from taxation, execution, and assignment.--The pensions, annuities or any other benefits accrued or accruing to any person under the provisions of this chapter and the accumulated contributions and cash securities in the funds created under this chapter are exempted from any state, county or municipal tax of the state, and shall not be subject to execution or attachment or to any legal process whatsoever, and shall be unassignable, except:

(1) That any teacher who has retired shall have the right and power to authorize in writing the Department of Management Services to deduct from his or her monthly retirement allowance money for the payment of the premiums on group insurance for hospital, medical and surgical benefits, under a plan or plans for such benefits approved in writing by the Chief Financial Officer, and upon receipt of such request the department shall make the monthly payments as directed; and

(2) As may be otherwise specifically provided for in this chapter.

9. § 440.22 - Workers' compensation benefits are exempt.

Benefits are still exempt once received and deposited. *Broward v. Jacksonville Medical Ctr.*, 690 So. 2d 589 (Fla. 1997)

Benefits received and invested in publicly traded securities are still exempt. *In re Harrelson*, 311 B.R. 618 (Bankr. M.D. 2004)(Judge Funk), affirmed on appeal *Jones v. Harrelson,* 143 Fed. Appx. 238 (11th Cir 2005)

440.22 Assignment and exemption from claims of creditors.--No assignment, release, or commutation of compensation or benefits due or payable under this chapter except as provided by this chapter shall be valid, and such compensation and benefits shall be exempt from all claims of creditors, and from levy, execution and attachments or other remedy for recovery or collection of a debt, which exemption may not be waived. However, the exemption of workers' compensation claims from creditors does not extend to claims based on an award of child support or alimony.

10. § 443.051 - Unemployment benefits and reemployment assistance benefits are exempt.

443.051 Benefits not alienable; exception, child support intercept.—

(1) DEFINITIONS.—As used in this section:

(a) “Reemployment assistance” or “unemployment compensation” means any compensation payable under state law, including amounts payable pursuant to an agreement under any federal law providing for compensation, assistance, or allowances for unemployment.

(b) “Support obligations” includes only those obligations that are being enforced under a plan described in s. 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under Part D of Title IV of the Social Security Act. Support obligations include any legally required payments to reduce delinquencies, arrearages, or retroactive support.

(c) “Support order” means a judgment, decree, or order, whether temporary or final, issued by a court of competent jurisdiction or administrative agency for the support and maintenance of a child that provides for monetary support, health care, arrearages, or past support. When the child support obligation is being enforced by the Department of Revenue, the term “support order” also means a judgment, decree, or order, whether temporary or final, issued by a court of competent jurisdiction for the support and maintenance of a child and the spouse or former spouse of the obligor with whom the child is living that provides for monetary support, health care, arrearages, or past support.

(2) BENEFITS NOT ALIENABLE.—Except as provided in subsection (3), benefits due under this chapter may not be assigned, pledged, encumbered, released, or commuted and, except as otherwise provided in this chapter, are exempt from all claims of creditors and from levy, execution, or attachment, or other remedy for recovery or collection of a debt, which exemption may not be waived.

(3) EXCEPTION, SUPPORT INTERCEPT.—

(a) The Department of Revenue shall, at least biweekly, provide the Department of Economic Opportunity with a magnetic tape or other electronic data file disclosing the

individuals who owe support obligations and the amount of any legally required deductions.

(b) For support obligations established on or after July 1, 2006, and for support obligations established before July 1, 2006, when the support order does not address the withholding of reemployment assistance or unemployment compensation, the department shall deduct and withhold 40 percent of the reemployment assistance or unemployment compensation otherwise payable to an individual disclosed under paragraph (a). If delinquencies, arrearages, or retroactive support are owed and repayment has not been ordered, the unpaid amounts are included in the support obligation and are subject to withholding. If the amount deducted exceeds the support obligation, the Department of Revenue shall promptly refund the amount of the excess deduction to the obligor. For support obligations in effect before July 1, 2006, if the support order addresses the withholding of reemployment assistance or unemployment compensation, the department shall deduct and withhold the amount ordered by the court or administrative agency that issued the support order as disclosed by the Department of Revenue.

(c) The department shall pay any amount deducted and withheld under paragraph (b) to the Department of Revenue.

(d) Any amount deducted and withheld under this subsection shall for all purposes be treated as if it were paid to the individual as reemployment assistance or unemployment compensation and paid by the individual to the Department of Revenue for support obligations.

(e) The Department of Revenue shall reimburse the department for the administrative costs incurred by the department under this subsection which are attributable to support obligations being enforced by the department.

In re Swetic, 493 B.R. 635 (Bankr. M.D. Fla. 2013) Debtor cannot claim unemployment compensation already paid and deposited as exempt.

11. § 497.456 - Preneed funeral contracts are <u>not</u> exempt.

This statute regulates a trust funded by a small fee paid every time a preneed funeral contract is sold. The statute provides that the trust fund is not subject to levy, which protects it from the funeral home's creditors, but says nothing about exempting preneed funeral contracts from customer's creditors.

12. § 620.1703 - An interest in a limited partnership enjoys a limited exemption.

620.1703 Rights of creditor of partner or transferee.--

(1) On application to a court of competent jurisdiction by any judgment creditor of a partner or

transferee, the court may charge the partnership interest of the partner or transferable interest of a transferee with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee of the partnership interest.

(2) This act shall not deprive any partner or transferee of the benefit of an exemption law applicable to the partner's partnership or transferee's transferable interest.

(3) This section provides the exclusive remedy which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor's interest in the limited partnership or transferable interest. Other remedies, including foreclosure on the partner's interest in the limited partnership or a transferee's transferable interest and a court order for directions, accounts, and inquiries that the debtor general or limited partner might have made, are not available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the limited partnership and may not be ordered by a court.

13. § 620.8504 - An interest in a general partnership enjoys a limited exemption.

620.8502 Partner's transferable interest in partnership.--The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. A partner's interest in the partnership is personal property.

620.8504 Partner's transferable interest subject to charging order.--

(1) Upon application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require.

(2) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

(3) At any time before foreclosure, an interest charged may be redeemed:

(a) By the judgment debtor;

(b) With property other than partnership property, by one or more of the other partners; or

(c) With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.

(4) This act does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.

(5) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.

14. § 605.0502 - .0503- An interest in an LLC may have a limited protection against creditors.

This section, along with § 605.502, is a rewrite of former § 608.433. The language is similar, so cases interpreting § 608.433 should still be good law.

Fl. St. § 608.433(1) provides that an assignee of an LLC interest has no membership rights. For a thorough discussion, see *Business Law: Asset Protection Proofing Your Limited Partnership or LLC for the Bankruptcy of a Partner or Member*, 81 Fla. Bar J. 34 (2007)

In 2015, the Florida Revised Limited Liability Company Act went into full effect and replaces Chapter 608. The limited protection of an interest in an LLC is contained in Fl. St. § 605.0503.

In re Soderstrom, 484 B.R. 874 (M.D. Fla. 2013) Debtor's interest in an LLC functioned as an "executory" contract and Trustee's notice of intent to sell Debtor's interest was sufficient to satisfy estate creditor's due process rights.

§ 605.0502 Transfer of transferable interest.—

(1) Subject to s. 605.0503, a transfer, in whole or in part, of a transferable interest:

(a) Is permissible;

(b) Does not by itself cause a member's dissociation or a dissolution and winding up of the limited liability company's activities and affairs; and

(c) Does not entitle the transferee to:

1. Participate in the management or conduct of the company's activities and affairs; or

2. Except as otherwise provided in subsection (3), have access to records or other information concerning the company's activities and affairs.

(2) A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(3) In a dissolution and winding up of a limited liability company, a transferee is entitled to an account of the company's transactions only from the date of dissolution.

(4) A transferable interest may be evidenced by a certificate of the interest issued by the limited liability company in a record, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(5) A limited liability company need not give effect to a transferee's rights under this section until the company knows or has notice of the transfer.

(6) A transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person who has knowledge or notice of the restriction at the time of transfer.

(7) Except as otherwise provided in s. 605.0602(5)(b), if a member transfers a transferable interest, the transferor retains the rights of a member other than the transferable interest transferred and

retains all the duties and obligations of a member.

(8) If a member transfers a transferable interest to a person who becomes a member with respect to the transferred interest, the transferee is liable for the member's obligations under ss. 605.0403 and 605.0406(3) which are known to the transferee at the time the transferee becomes a member.

§ 605.0503 Charging order.—

(1) On application to a court of competent jurisdiction by a judgment creditor of a member or a transferee, the court may enter a charging order against the transferable interest of the member or transferee for payment of the unsatisfied amount of the judgment with interest. Except as provided in subsection (5), a charging order constitutes a lien upon a judgment debtor's transferable interest and requires the limited liability company to pay over to the judgment creditor a distribution that would otherwise be paid to the judgment debtor.

(2) This chapter does not deprive a member or transferee of the benefit of any exemption law applicable to the transferable interest of the member or transferee.

(3) Except as provided in subsections (4) and (5), a charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's transferee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company.

(4) In the case of a limited liability company that has only one member, if a judgment creditor of a member or member's transferee establishes to the satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment within a reasonable time, a charging order is not the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against a judgment debtor who is the sole member of a limited liability company or the transferee of the sole member, and upon such showing, the court may order the sale of that interest in the limited liability company pursuant to a foreclosure sale. A judgment creditor may make a showing to the court that distributions under a charging order will not satisfy the judgment within a reasonable time at any time after the entry of the judgment and may do so at the same time that the judgment creditor applies for the entry of a charging order.

(5) If a limited liability company has only one member and the court orders a foreclosure sale of a judgment debtor's interest in the limited liability company or of a charging order lien against the sole member of the limited liability company pursuant to subsection (4):

(a) The purchaser at the court-ordered foreclosure sale obtains the member's entire limited liability company interest, not merely the rights of a transferee;

(b) The purchaser at the sale becomes the member of the limited liability company; and

(c) The person whose limited liability company interest is sold pursuant to the foreclosure sale or is the subject of the foreclosed charging order ceases to be a member of the limited liability company.

(6) In the case of a limited liability company that has more than one member, the remedy of foreclosure on a judgment debtor's interest in the limited liability company or against rights to distribution from the limited liability company is not available to a judgment creditor attempting to satisfy the judgment and may not be ordered by a court.

(7) This section does not limit any of the following:

(a) The rights of a creditor who has been granted a consensual security interest in a limited liability company interest to pursue the remedies available to the secured creditor under other law applicable to secured creditors.

(b) The principles of law and equity which affect fraudulent transfers.

(c) The availability of the equitable principles of alter ego, equitable lien, or constructive trust or other equitable principles not inconsistent with this section.

(d) The continuing jurisdiction of the court to enforce its charging order in a manner consistent with this section.

Se Prop. Holdings, LLC v. McElheney, 2016 U.S. Dist. LEXIS 193479, 2016 WL 7494300 (N. D. Fla. 2016) Very instructive case analyzing interests in LLC's, as shown by the following quote. "Again, membership and the right to distributions are two separate property rights. The latter is by default freely transferrable, whereas the former cannot really be "transferred" at all, at least not under the default rules." A must read if a Debtor is trying to exempt an interest in an LLC.

15. § 632.619 - Fraternal benefit society benefits are exempt.

632.619 Benefits not attachable.--No money or other benefit, charity, relief, or aid to be paid, provided, or rendered by any society, shall be subject to attachment, garnishment, or other process, nor seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment by the society.

16. § 769.05 - Damages for injury or death at work in a hazardous occupation are exempt.

769.01 Employers affected by fellow servant act.--This chapter shall apply to persons engaged in the following hazardous occupations in this state; namely, railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, boating, when boat is propelled by steam, gas or electricity.

769.05 Proceeds of recovery for injuries exempt from garnishment and execution.--Writs of garnishment, execution or other processes, shall not issue out of any court to reach any money due or likely to become due as damages under the provisions of this chapter.

17. § 960.14 - Crime victim compensation awards are exempt.

960.14 Manner of payment; execution or attachment.--

(1) Any award made under this chapter shall be in accordance with the discretion and direction of the department as to the manner of payment. No award made pursuant to this chapter shall be subject to execution or attachment other than for expenses resulting from the injury or death which is the basis for the claim. In every case providing for compensation to a claimant under this chapter, the department may, if in its opinion the facts and circumstances of the case warrant it, convert the compensation to be paid into a partial or total lump sum without discount. Any eligible bills may be paid by the department directly to affected service providers.

(2) If a claimant owes money to the Crimes Compensation Trust Fund in connection with any other claim as provided for in ss. 938.03, 960.16, and 960.17, the amount owed shall be reduced from any award.

(3) The department may reconsider a claim at any time and modify or rescind previous orders for compensation, based upon a change in circumstances of a victim or intervenor.

(4) Payment made to a service provider will be considered payment in full for the services rendered to the victim by said provider. In the event a provider does not accept the payment as payment in full, then that payment may be made to the claimant.

F. Federal Non-Bankruptcy Exemptions

1. 5 USC § 8130 - Federal government employees death and disability benefits are exempt.

§ 8130. Assignment of claim

An assignment of a claim for compensation under this subchapter is void. Compensation and claims for compensation are exempt from claims of creditors.

2. 5 USC § 8346 - Civil Service employees retirement benefits are exempt.

§ 8346. Exemption from legal process; recovery of payments

(a) The money mentioned by this subchapter is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of this title, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

(b) Recovery of payments under this subchapter may not be made from an individual when, in the judgment of the Office of Personnel Management, the individual is without fault and recovery would be against equity and good conscience. Withholding or recovery of money mentioned by this subchapter on account of a certification or payment made by a former employee of the United States in the discharge of his official duties may be made only if the head of the agency on behalf of which the certification or payment was made certifies to the Office that the certification or payment involved fraud on the part of the former employee.

3. 10 USC § 1035 - Pay deposited with military service while on active duty is exempt.

§ 1035. Deposits of savings

(a) Under joint regulations prescribed by the Secretaries concerned, a member of the armed forces who is on a permanent duty assignment outside the United States or its possessions may deposit during that tour of duty not more than his unallotted current pay and allowances in amounts of $5 or more, with any branch, office, or officer of a uniformed service. Amounts so deposited shall be deposited in the Treasury and kept as a separate fund, and shall be accounted for in the same manner as public funds.

(b) Interest at a rate prescribed by the President, not to exceed 10 percent a year, will accrue on

amounts deposited under this section. However, the maximum amount upon which interest may be paid under this subsection to any member is $10,000, except that such limitation shall not apply to deposits made on or after September 1, 1966, in the case of those members in a missing status during the Vietnam conflict, the Persian Gulf conflict, or a contingency operation. Interest under this subsection shall terminate 90 days after the member's return to the United States or its possessions.

(c) Except as provided in joint regulations prescribed by the Secretaries concerned, payments of deposits, and interest thereon, may not be made to the member while he is on duty outside the United States or its possessions.

(d) An amount deposited under this section, with interest thereon, is exempt from liability for the member's debts, including any indebtedness to the United States or any instrumentality thereof, and is not subject to forfeiture by sentence of a court-martial.

(e) The Secretary concerned, or his designee, may in the interest of a member who is in a missing status or his dependents, initiate, stop, modify, and change allotments, and authorize a withdrawal of deposits, made under this section, even though the member had an opportunity to deposit amounts under this section and elected not to do so. Interest may be computed from the day the member entered a missing status, or September 1, 1966, whichever is later.

(f) The Secretary of Defense may authorize a member of the armed forces who is on a temporary duty assignment outside of the United States or its possessions in support of a contingency operation to make deposits of unallotted current pay and allowances during that duty as provided in subsection (a). The Secretary shall prescribe regulations establishing standards and procedures for the administration of this subsection.

(g) In this section:

(1) The term "missing status" has the meaning given that term in section 551 (2) of title 37.

(2) The term "Vietnam conflict" means the period beginning on February 28, 1961, and ending on May 7, 1975.

(3) The term "Persian Gulf conflict" means the period beginning on January 16, 1991, and ending on the date thereafter prescribed by Presidential proclamation or by law

4. 10 USC § 1440 - Military retirement annuities are exempt.

§ 1440. Annuities not subject to legal process

Except as provided in section 1437 (c)(3)(B) of this title, no annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process.

5. 10 USC § 1450(i) - Military survivor annuities are exempt.

(i) Annuities Exempt From Certain Legal Process.— Except as provided in subsection (l)(3)(B), an annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

6. 15 USC § 1673 - Limits garnishment of wages to 25%.

7. 22 USC § 4060(c) - Foreign service employees annuities and severance pay are exempt.

(c) Applicability of other provisions of law or remedies

None of the moneys mentioned in this part shall be assignable either in law or equity, except under subsection (a) or (b) of this section, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal law.

8. 25 USC § 410 - Money from lease or sale of Indian lands held in trust by U.S. is exempt.

§ 410. Moneys from lease or sale of trust lands not liable for certain debts
No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

9. 28 USC § 376(n) - Survivor annuities for federal judges, justices, bankruptcy judges. federal claims judges, Federal Judicial Center directors, a Counselor to the Chief Justice of the United States and a director of the Administrative Office of the United States Courts are exempt.

(n) Each annuity authorized under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity shall have accrued. No annuity authorized under this section shall be assignable, either in law or in equity, except as provided in subsections (s) and (t), or subject to execution, levy, attachment, garnishment, or other legal process.

10. 33 USC § 775 - Lighthouse workers' survivor benefits are exempt.

§ 775. Payments nonassignable and exempt from process

No payment under sections 771 to 775 of this title shall be assignable, either in law or in equity, or be subject to execution, levy, lien, attachment, garnishment, or other legal process.

11. 33 USC § 916 - Longshore and Harbor Workers' Compensation Act benefits are exempt.

§ 916. Assignment and exemption from claims of creditors

No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

12. 38 USC § 1562(c) - Medal of Honor pension payments are exempt.

(c) Special pension shall not be subject to any attachment, execution, levy, tax lien, or detention under any process whatever.

13. 38 USC § 1970(g) - Service members and veterans group life insurance benefits are exempt.

(g) Any payments due or to become due under Servicemembers' Group Life Insurance or Veterans' Group Life Insurance made to, or on account of, an insured or a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to

(1) collection of amounts not deducted from the member's pay, or collected from him by the Secretary concerned under section 1969 (a) of this title,

(2) levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.) (relating to the seizure of property for collection of taxes), and

(3) the taxation of any property purchased in part or wholly out of such payments.

14. 38 USC § 5301(a) - Veterans benefits are exempt. (Formerly 38 USC § 1301)

§ 5301. Nonassignability and exempt status of benefits

(a)

(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(3)

(A) This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit

into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

15. 42 USC § 407 - Social Security benefits are exempt.

§ 407. Assignment of benefits

(a) In general

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Social Security already received may only be exempt if necessary to provide for the debtor's basic needs. *Matter of Treadwell*, 699 F.2d 1050 (11th Cir. 1983). The Social Security Act was amended shortly after *Treadwell.* At least on court has ruled that the amendment overrules *Treadwell. In re Barron,* 85 B.R. 603 (Bankr. N.D. Ala. 1988) ("the continued application of the *Treadwell* exposition of section 522(b) is inappropriate after the 1983 amendment to the anti-assignment statute in the Social Security Act"). *Treadwell* has been discussed by at least two Middle District of Florida cases which did not mention the amendment to the Social Security Act made shortly after *Treadwell*. *In re Crandall*, 200 B.R. 243 (Bankr. M.D. Fla. 1995); *In re Lazin*, 217 B.R. 332, 334 (Bankr. M.D. Fla. 1998). *Carpenter v Ries (In re Carpenter),* 614 F. 3d 930 (8th Cir 2010) The Eighth Circuit made a detailed analysis of the amendments to this exemption after *Treadwell*, and makes a powerful argument that received Social Security is exempt without limits or exceptions.

16. 42 USC § 1717 - Compensation for death or injury from war risk hazard is exempt.

§ 1717. Assignment of benefits; execution, levy, etc., against benefits

The right of any person to any benefit under subchapter I of this chapter shall not be transferable or assignable at law or in equity except to the United States, and none of the moneys paid or payable (except money paid hereunder as reimbursement for funeral expenses or as reimbursement with respect to payments of workmen's compensation or in the nature of workmen's compensation benefits), or rights existing under said subchapter, shall be subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law.

17. 45 USC § 231m - Railroad retirement benefits are exempt.

§ 231m. Assignability; exemption from levy

(a) Except as provided in subsection (b) of this section and the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated [1]

(b)(1) This section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 231a (b) of this title from income taxable pursuant to the Federal income tax provisions of the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.].

(2) This section shall not operate to prohibit the characterization or treatment of that portion of an annuity under this subchapter which is not computed under section 231b (a), 231c (a), or 231c (f) of this title, or any portion of a supplemental annuity under this subchapter, as community property for the purposes of, or property subject to, distribution in accordance with a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree. The Board shall make payments of such portions in accordance with any such characterization or treatment or any such decree or settlement.

18. 45 USC § 352(e) - Railroad unemployment insurance benefits are exempt.

(e) Assignment, taxation, garnishment, attachment, etc., of benefits

Notwithstanding any other law of the United States, or of any State, Territory, or the District of Columbia, no benefits shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

19. 46 USC § 11109 - Seaman’s and fisherman’s wages are exempt.

§ 11109. Attachment of wages

(a) Wages due or accruing to a master or seaman are not subject to attachment or arrestment from any court, except for an order of a court about the payment by a master or seaman of any part of the master’s or seaman’s wages for the support and maintenance of the spouse or minor children of the master or seaman, or both. A payment of wages to a master or seaman is valid, notwithstanding any prior sale or assignment of wages or any attachment, encumbrance, or arrestment of the wages.

(b) An assignment or sale of wages or salvage made before the payment of wages does not bind the party making it, except allotments authorized by section 10315 of this title.

(c) This section applies to an individual employed on a fishing vessel or any fish processing vessel.

20. 46 USC § 11110 - Seaman’s clothes are exempt.

§ 11110. Seamen’s clothing

> The clothing of a seaman is exempt from attachments and liens. A person detaining a seaman's clothing shall be fined not more than $500, imprisoned for not more than 6 months, or both.

G. Common Law Exemptions

1. The debtor's interest in a spendthrift trust is exempt.

The Debtor's interest in a spendthrift trust may not be property of the estate under 11 U.S.C. § 541(c)(2). Regardless of whether it is exempt or not property of the estate, the validity of a spendthrift trust is a matter of state law. A good start in this area can be had by reading Judge Proctor's opinion in *In re May*, 83 B.R. 812 (Bankr. M. D. Fla. 1988), where he stated:

> Florida law recognizes and enforces as spendthrift trusts those trusts:
>
> > that are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection. The provisions against alienation of the trust fund by the voluntary act of the beneficiary, or invitum by his creditors, are the usual incidents of such trusts.
>
> *Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460, 465, 57 So. 243, 244 (1911); see also, *Waterbury v. Munn*, [**5] 159 Fla. 754, 32 So.2d 603 (1947). Because the purpose of a spendthrift trust is to protect the beneficiary and creditors, such a trust fails, under Florida law, where the beneficiary exercises absolute dominion over trust property. *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985). Similarly, where the beneficiary has the right to require the trustee to convey trust property to him or her, the beneficiary has dominion and control over the trust res and the trust will fail as a spendthrift trust. *In re Gillett*, 46 B.R. 642, 644 (Bkrptcy. S.D. Fla. 1985).

In Florida a person cannot fund or create his own spendthrift trust. Other states have various statutes allowing a person to create their own spendthrift trust. These may not be effective for non- residents of those states. *Kilker v. Stillman*, 2012 Cal. App. Unpub. LEXIS 8542

2. Property owned as tenancy by the entireties is exempt from debts that are not joint.

Tenancy by the entireties (TBE) has always been a part of Florida real estate law. Any real property purchased jointly by a married couple is presumed to be held as property by the entireties. By statute (Fl. St. § 689.115) this presumption also applied to mortgages acquired by a couple while married. Until 2001, (TBE) was very limited in it's application to personal property. In 2001, the Florida Supreme Court decided *Beal Bank, SSB v. Almand and Associates,* 780 So. 2d 45 (Fla. 2001). This ruling extended the presumption that had previously only applied to real property so that personal property acquired jointly by a married couple is presumed to also be TBE.

"Property held as a tenancy by the entireties possesses six characteristics: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); 6 (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names)." *Beal Bank,* supra, at page 52.

"Although only a married couple is legally entitled to hold property as a tenancy by the entireties, a married couple may also hold property jointly as tenants in common or as joint tenants with right of survivorship. Tenancies in common, joint tenancies, and tenancies by the entireties all share the characteristic of unity of possession; however, tenancies in common do not share the other characteristics or unities. See *Andrews*, 21 So. 2d at 206. Joint tenancies and tenancies by the entireties share the characteristic of survivorship and three additional unities of interest, title, and time. See id. In other words, for both joint tenancies and tenancies by the entireties, the owners' interests in the property must be identical, the interests must have originated in the identical conveyance, and the interests must have commenced simultaneously." *Beal Bank,* supra, at page 53.

TBE property can only be taken to satisfy joint debts. A judgment against a single spouse is not a lien on TBE property. If only one spouse files for bankruptcy, TBE property may be exempt, depending on the existence of joint debts or joint judgments. If the spouses file separate bankruptcies instead of a joint bankruptcy, this will not protect TBE property. *In re Stewart*, 373 B.R. 736 (Bankr. M.D. Fla. 2007)(Judge Proctor); *In re Stewart*, 375 B.R. 689 (Bankr. M.D. Fla. 2007)(Judge Funk) (Petitions filed 3 days apart)

Judge Funk had ruled that theTBE property exemption can only be challenged if a joint judgment exists. *In re Himmelstein,* 203 B.R. 1009 (Bankr. M.D. Fla. 1996). Judge Funk reconfirmed his *Himmelstein* decision in *In re Collins,* 2019 Bankr. LEXIS 970 (March 27, 2019) Conversely, Judge Glenn has ruled that any joint debt will allow the trustee to sell TBE property, but the proceeds can only be used to pay joint debts. *In re Droumtsekas,* 269 B.R. 463 (Bankr. M.D. Fla. 2000)

In re Mathews, 360 B.R. 732 (Bankr. M.D. Fla. 2007) Judge Funk applied the *Beal Bank* decision to various properties. The debtors' joint stock and joint mutual funds were determined not to be TBE. Both the stock certificates and mutual funds were held as joint tenants. Each could have been titled TBE, but were not. The debtor was a sophisticated businessman who understood the difference between TBE and joint tenancy, yet chose the wrong form of joint ownership. The debtors' furnishings, boat slip and several properties were determined to be exempt. The *Beal Bank* presumption that personal property acquired jointly by a married is held as TBE was overcome by the debtor intentionally not titling the assets as TBE.

There are several cases interpreting TBE as applied to jointly owned motor vehicles. Relying on an interpretation of Fl. St. § 319.22, these cases hold that a vehicle titled jointly with "or" between the names cannot be TBE. *In re Gillette,* 248 B.R. 845 (Bankr. M.D. Fla. 1999)(Judge Glenn); *In re Brown,* 162 B.R. 616 (Bankr. M.D. Fla. 1993) *Xayavong v. Sunny Gifts, Inc*., 891 So. 2d 1075 (Fla. 5th DCA 2004)

Sunshine Resources, Inc. v. Simpson, 763 So. 2d 1078 (Fla. 4th DCA 1999) Rent received from TBE property enjoys the same exemption as the property.

In re Uttermohlen, 13-10289 (11th Circuit August 9, 2013) Unpublished opinion affirming District Court decision (*In re Uttermohlen,* 506 B.R. 142 (M.D. Fla. 2012)) that a tax refund could be claimed exempt as TBE.

In re Smith, 2016 Bankr. Lexis 502 (Bankr. M. D. Fla 2018) (Judge May) Joint tax refund is presumed to be held as TBE.

Gibson v. Wells Fargo Bank, N.A. 2018 Fla. App. LEXIS 9881 (Fla. 2nd DCA 2018) Joint tax refund is presumed to be held as TBE.

In re Qamar, 2017 Bankr. LEXIS 4522 (Bankr. M. D. Fla. 2017) (Judge Funk) Filing a joint bankruptcy petition does not destroy the unities of TBE. If there is no joint debt, the exemption is still available.

If property is purchased by a couple prior to their marriage, the later marriage will not convert the property to TBE. If a couple divorces, TBE property becomes tenants in common by operation of Fl. St. § 689.15. If a divorced couple later remarries the property will not automatically convert back to TBE. The couple must deed the properties to themselves to recreate TBE. One spouse can deed the property to both spouses to create TBE. Fl. St. § 689.11 This statute does not apply to personal property, which must be acquired by both spouses at the same time, . *Smart v. City of Miami Beach, Fla.*, 51 F. Supp. 3d 1299, 1303 (S.D. Fla. 2014); *Tardif v. McCuan (In re McCuan),* 569 B.R. 511, 2017 U.S. Dist. LEXIS 46146, 2017 WL 1161305 (M.D. Fla. 2017)

H. Deadline for Objections to Claim of Exemptions

Trustee may not contest the validity of claimed exemption under 11 USC § 522 after the Bankruptcy Rule 4003(b) 30-day period after conclusion of § 341 meeting has expired, and no extension is sought, even though debtor had no colorable basis for claiming exemption. *Taylor v Freeland & Kronz*, 503 US 638, 118 L Ed 2d 280, 112 S Ct 1644 (1992)

Burden is on the trustee to object in a timely manner to any improper exemption claims. Personal injury suit valued at $1.00 and exempted was fully exempt even though ultimately worth more. *Allen v Green (In re Green),* 31 F3d 1098 (11th Cir. 1994) Reversed by US Supreme Court in *Schwab v. Reilly,* 130 S.Ct. 2652, (2010) Supreme Court ruled that a debtor must state he is claiming an asset to be 100% exempt to put the trustee on notice. If the value claimed exempt matches the claimed asset value, that is not sufficient to exempt 100% of the value.

The time to object to the debtor's claimed exemption under Fed. R. Bankr. P. 4003(b) recommences when the debtor's Chapter 13 case is converted to Chapter 7. *In re Campbell*, 313 B.R. 313 (10th Cir. BAP 2004); *Weissman v. Carr (In re Weissman)*, 173 B.R. 235 (M.D. Fla. 1994); *In re Fish*, 261 B.R. 754 (Bankr. M.D. Fla. 2001) See Bankr. Rule 1019(2)(B), which provides:

(B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:

(i) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or

(ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.

Determining when the meeting of creditors has been concluded is best determined on a case by case basis and by evaluating whether the trustee acted reasonably under the circumstances. *In re Brown*, 221 B.R. 902, 906 (Bankr. M.D. Fla. 1998)