

WHITE PAPER¹
TO THE
FLORIDA CONSTITUTIONAL REVISION COMMISSION

PROPOSED AMENDMENT TO CREATE EXEMPTIONS FROM
CREDITOR CLAIMS

I. SUMMARY

The Florida Constitution protects Florida residents and their families from the forced sale of their primary residence to satisfy debts. There are, however, three specific types of creditor claims that are not barred by the homestead protection, each discussed below. Historically, Florida courts interpreted the language of the Constitution to allow creditors to enforce liens against homestead property in those situations where equity warrants such relief due to the actions of the homeowner and/or the relationship between the homeowner and the creditor.

Proposal 17 seeks two additional exceptions to allow creditors to force the sale of a Floridian's homestead residence to satisfy a debt or obligation. These additional exceptions would allow the forced sale of the homestead residence when the owner:

- (1) Obtained the homestead using the proceeds from a fraudulent or dishonest act; or
- (2) Caused the creditor's damages or losses by an intentional criminal or fraudulent act.

The proposed additional exceptions may create confusion with respect to existing case law. For example, a debtor might be guilty of a criminal act, such as shoplifting from a department store, but used his legitimate income to purchase a home and/or make mortgage payments on the home. Under current law, the protection would remain in place. As discussed below, the courts have found that the protection for the owner and the owner's family should not apply in certain

¹ This White Paper was requested to provide a legal analysis. This does not evaluate political, or extra-legal, issues, and is not provided as an advocacy instrument pro, con or otherwise. This White Paper is not an advocacy position of the Real Property, Probate and Trust Law Section of The Florida Bar; thus, this Paper has not been submitted to the Section's Executive Council for approval.

situations, but the courts have focused on the source of the funds for the purchase or improvement of the home, rather than the conduct of the homeowner.

II. CURRENT SITUATION

A. The Constitutional Provisions

The homestead protection from creditor claims dates back to the 1868 Florida Constitution. Until 1984, the protection applied to a home owned by the head of the household. In 1984, the Florida Constitution was amended to extend the protection to a homestead residence owned by a “natural person” even if that person did not have any dependent family members. Article X, section 4(a) currently states:

(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.

One court summarized the three exceptions as follows:

The plain language of the Florida Constitution indicates that homesteads in Florida may not be used to satisfy court judgments except in three specifically enumerated instances: (1) unpaid property taxes for the homestead itself; (2) mortgages for the purchase or

improvement of the homestead itself; or (3) mechanics' liens for work performed on the homestead.²

The constitution recognizes that homestead property may be mortgaged, requiring only that the spouse of a married owner join in the mortgage.

B. Statutory Provisions for Liens against Homestead Property

Exceptions to the constitutional homestead protection have been addressed in many statutes.

1. Mortgages

A mortgage is a lien on real property.³ Chapter 702, Florida Statutes, governs the foreclosure of mortgages and statutory liens. The foreclosure of a mortgage is a procedure in equity, and not subject to a jury trial.⁴ A lender who obtains a valid mortgage to protect the lender's right to repayment can foreclose on homestead real property if necessary to enforce the debt. A valid mortgage is considered a voluntary lien encumbering the homestead property, and therefore an exception to the protection from forced sale.⁵ Even when the lender cannot collect from the debtor personally in a bankruptcy proceeding, the foreclosure can proceed against the real property.⁶

2. Construction Liens

Chapter 713, Florida Statutes, provides a procedure to protect those who provide labor or construction materials to improve real property. A construction lien can be foreclosed in the same manner as a mortgage.

3. Ad Valorem Taxes

When property taxes are not paid, the tax certificate sold for the payment of delinquent taxes creates a lien on the property, which can be enforced in the same

² *Willis v. Red Reef, Inc.*, 921 So. 2d 681, 684 (Fla. 4th DCA 2006).

³ §697.02, Fla. Stat.

⁴ §702.01, Fla. Stat.

⁵ Art. X, s. 4(c), Fla. Stat.

⁶ *Evans v. Codilis & Stawiarski, P.A.* (In re Evans), 2005 Bankr. LEXIS 2843 (Bankr. N.D. Fla. Dec. 21, 2005).

manner as a mortgage.⁷ If a homeowner wrongfully claims a homestead property tax exemption, the county property appraiser can claim a lien for the difference between the amount actually due and the amount paid.⁸

4. Criminal Restitution

For the victims of criminal acts, the courts can order restitution, including the imposition of a restitution lien.⁹ Criminal restitution liens are not included among the exceptions to the homestead protection from forced sale. However, the case law discussed below does allow a victim of fraud or criminal activity to enforce a claim against homestead real property if the funds used to *purchase or improve* the homestead residence can be directly linked to the criminal or fraudulent activity.

5. Fraudulent Transfers

The Florida Statutes address transfers that are considered “fraudulent” because they prevent creditors with valid claims from recovering assets or funds of the debt to satisfy the debt. Chapter 726 governs the determination and setting aside of fraudulent transfers. Despite its name, a “fraudulent transfer” does not necessarily involve “fraud,” but generally involves transfers that were made for the sole purpose of putting the assets beyond the reach of creditors. Valid and legitimate transfers are not affected. The Florida Supreme Court concluded that the statutory provisions in Chapter 726 do not supersede the constitutional protections in Article X, section 4.¹⁰ The court noted a previous attempt to add fraudulent transfers to defeat valid claims of creditors as a fourth exception in Article X, section 4.¹¹

⁷ §197.432, Fla. Stat. (2).

⁸ §193.155(10), Fla. Stat.

⁹ § 960.294, Fla. Stat.

¹⁰ *Havoco of Am. v. Hill*, 790 So. 2d 1018, 1028 (Fla. 2001).

¹¹ “Such an amendment was considered by the 1997-98 Constitutional Revision Commission, as was an amendment to article X, section 4, which would have provided: “The homestead exemption in this section does not apply to any property to the extent that it is acquired with the intent to defraud creditors.” Journal of the 1997-1998 Florida Constitutional Revision Commission, Proposal 70, Amendment 7. That amendment was rejected by the Commission by a 24 to 7 vote.” *Havoco of Am. v. Hill*, 790 So. 2d 1018, 1023 (Fla. 2001).

6. Procedures to Invoke the Protection

In general, Chapter 222, Florida Statutes, provides the procedure for invoking the constitutional protection. A homeowner can invoke the exemption from forced sale before a creditor attempts to levy on the homestead by sending the creditor a notice by certified mail.¹² Upon receipt of the notice, the creditor has a limited time to initiate a lawsuit to challenge the protected status of the home. The homeowner can also invoke the protection after the levy process has been initiated.¹³

C. Treatment by the Courts

The Florida Supreme Court has recognized the challenge in balancing the public policy behind protecting the family home and the rights of legitimate creditors.

This Court has long emphasized that the homestead exemption is to be liberally construed in the interest of protecting the family home. *See, e.g., Milton v. Milton*, 63 Fla. 533, 58 So. 718, 719 (Fla. 1912) ("Organic and statutory provisions relating to homestead exemptions should be liberally construed in the interest of the family home."). However, in the same breath we have similarly cautioned that **the exemption is not to be so liberally construed as to make it an instrument of fraud or imposition upon creditors**: "[T]he [homestead exemption] should not be so applied as to make it an instrument of fraud or imposition upon creditors. [**7] " *Id.*¹⁴

(Emphasis Added.) The Florida Supreme Court has historically applied equitable principles to prevent a "bad" debtor from unjustly invoking constitutional homestead protections when fraudulent acts increased or was incorporated into the value of the homestead.. In 2001, the Florida Supreme Court acknowledged that, "[W]here equity demands it this Court has not hesitated to permit equitable liens to be imposed on homesteads beyond the literal language of article X, section 4."¹⁵

¹² §201.01, Fla. Stat.

¹³ § 222.02, Fla. Stat.

¹⁴ *Havoco of Am. v. Hill*, 790 So. 2d 1018, 1020 (Fla. 2001).

¹⁵ *Havoco of Am. v. Hill*, 790 So. 2d 1018, 1024 (Fla. 2001), citing *Palm Beach Savings and Loan Association v. Fishbein*, 619 So. 267, 270 (Fla. 1993).

1. Equitable Liens

Florida courts have imposed an equitable lien in situations where funds obtained through fraud or reprehensible conduct were used to “... invest in, purchase, or improve the homestead.”¹⁶ Courts have used the concepts of vendor lien, equitable lien, equitable subrogation, equitable estoppel and unjust enrichment to do equity where deemed appropriate. But our Courts have acknowledged that there are situations where the “transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors” will not pierce the homestead veil.¹⁷

- In 1925, the Florida Supreme Court imposed an equitable lien when the owner of a bankrupt bakery used embezzled funds to improve the debtor’s homestead residence.¹⁸
- In 1931, the Florida Supreme Court imposed an equitable lien where the debtor borrowed funds to purchase a homestead residence, promising to execute a mortgage. The debtor failed to execute the mortgage as promised.¹⁹
- In 1939, the Florida Supreme Court again imposed an equitable lien to override the homestead protection where the creditors contributed labor to improve a residence based upon the debtor’s promise that they would be rewarded with an ownership interest in the home.²⁰

The common theme in each has been the wrongful incorporation of the creditor’s funds or equivalent such as labor, into the homestead.

a. Constructive Fraud

In a case where a trustee breached his fiduciary duty by conveying Florida real property to an undeserving third party, the court found that constructive fraud

¹⁶ *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1027-28 (Fla. 2001), *opinion after certified question answered*, 255 F.3d 1321 (11th Cir. 2001), citing *Jones v. Carpenter*, 90 Fla. 407, 415, 106 So. 127, 130 (1925); *La Mar*, 135 Fla. 703, 711, 185 So. 833, 836.

¹⁷ *Id.*

¹⁸ *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (Fla. 1925).

¹⁹ *Craven v. Hartley*, 102 Fla. 282, 135 So. 899 (Fla. 1931).

²⁰ *LaMar v. Lechliden*, 135 Fla. 703, 185 So. 833 (Fla. 1939). It appears that the parties who contributed the improvements did not follow the statutory procedures to obtain a construction lien, and the court felt that it would be inequitable to allow the insolvent homeowner to benefit from the good-faith efforts of the parties who improved the homestead.

could be the basis of a constructive trust, resulting in an equitable lien on homestead property:

Florida courts have recognized that constructive fraud may exist independently of an intent to defraud. It is a term which is applied to a great variety of transactions that equity regards as wrongful, to which it attributes the same or similar effects of those that follow from actual fraud and *for which it gives the same or similar relief*.

(Emphasis added).²¹

b. Vendor's Liens

In *Golden v. Woodward*²² the court granted a "vendors lien", a form of equitable lien. The borrowers, Mr. and Mrs. Golden, entered into a purchase agreement in 2003 with Mr. Woodward, agreeing to pay \$550.00 per month towards the purchase price. In 2004, Mr. Woodward delivered a warranty deed without requiring full payment or a mortgage to secure the balance of the purchase price. Because this lien is based upon a contract for the purchase of real property, it could fall within one of the exceptions to the homestead protection under Section 4(a), Article X, of the Florida Constitution. The court found equity required a lien on the property in favor of Mr. Woodward's estate. To find otherwise would allow the purchaser's unjust enrichment because they received title without paying the full purchase price as agreed in writing and the purchaser's title and any homestead claim, arose after the obligation to pay for the property.

c. Subrogation Liens

Florida law currently addresses fraudulent acts by a debtor that impair the creditor's ability to enforce a lien to the extent the fraudulent conduct provided value to the homestead. In *Palm Beach Savings & Loan Ass'n v. Fishbein*, a husband fraudulently signed his wife's name to a mortgage to satisfy the constitutional requirement that the spouse of a married person sign a mortgage on homestead property. The wife then claimed the mortgage was not enforceable. The court imposed an equitable subrogation lien. In effect, the court gave the new lender a

²¹ *Hirchert Family Trust v. Hirchert*, 65 So. 3d 548 , (Fla. 5th DCA 2011), citing *Allie v. Ionata*, 466 So. 2d 1108, 1110 (Fla. 5th DCA 1985).

²² 15 So. 3d 664 (Fla. 1st DCA 2009).

valid lien because the lender's funds were used to pay off a prior mortgage.²³ Without the new lender's funds, the husband would not have been able to satisfy a prior mortgage on the homestead property.

In a recent decision, the Fourth District held that a subrogation lien could be imposed to recover from a daughter the proceeds wrongfully taken from the sale of her father's home to satisfy the mortgage on the daughter's home. Finding that the deed transferring the property to the daughter was not valid, the father's estate was able to recover its loss through an equitable lien on the daughter's home in an amount equal to the amount of the mortgage paid with the wrongfully obtained funds.²⁴

d. Debt Unrelated to Criminal or Fraudulent Acts

Butterworth v. Caggiano involved forfeiture proceedings initiated by the State of Florida against a defendant's homestead residence because the home was used in the course of criminal activity. The Florida Supreme Court distinguished equitable liens and forfeiture proceedings. The court explained that the application of equitable principals can only occur within the recognized exceptions as set forth in the Constitution – liens for property taxes, mortgages for the purchase or improvement of the home, and liens for labor provided for the improvement of the home. The court refused to permit a taking based solely upon criminal activity without a connection to funds used to purchase or improve the home.²⁵

²³ *Palm Beach Savings & Loan Ass'n v. Fishbein*, 619 So. 2d 267 (Fla. 1993).

²⁴ *Flinn v. Doty*, 214 So. 3d 683 (Fla. Dist. Ct. App. 2017).

²⁵ *Butterworth v. Caggiano*, 605 So. 2d 56, 60, n.5 (Fla. 1992).

III. EFFECT OF PROPOSED CHANGES

A. Homestead Obtained Using the Proceeds From a Fraudulent or Dishonest Act

The first proposed change would add an exception to the homestead protection from creditor claims if a homestead was obtained using the proceeds from a fraudulent or dishonest act. This appears to limit the application of this exception to monies used to purchase or obtain the homestead property and not also to “improve” or “repair.”

A “fraudulent act” is often discussed in the case law with respect to transfers that defeat the claims of creditors. The courts seem comfortable with this concept; however, the term “dishonest act” is not clearly defined within current case law and would invite significant litigation in order to interpret whether such an act has occurred in a given factual context. For example, a person convicted of misdemeanor theft could face the loss of the family home if he or she could not pay the restitution ordered by the court. A party to a contract could argue that the homeowner was not truthful about facts that were part of a contract with no relationship to the home, such as an unsecured loan or employment contract, and therefore committed a dishonest act when entering into the contract.

If “dishonest act” is a sub-category of “fraudulent” acts, then limiting the terminology to fraudulent transfers involving the homestead with respect to the creditor seeking to enforce a debt might meet the proponent’s goals, if the text is carefully worded. A previous proposal limited the criminal acts to those that were classified as a felony.

B. Causing Damages by Intentional Criminal or Fraudulent Acts

The second proposed change would be based on criminal or fraudulent acts. The proposal includes the modifier “intentional.”

Recognizing the difference in types of penalties, traditionally penalties for criminal behavior have not included the forfeiture of protected homestead:

The homestead provision of our Constitution sets forth the exceptions and provides the method of waiving the homestead rights attached to the residence. *These exceptions are unqualified. They create no personal qualifications touching the moral character of the resident nor do they undertake to exclude the vicious, the criminal, or the*

immoral from the benefits so provided. The law provides for punishment of persons convicted of illegal acts, but this forfeiture of homestead rights guaranteed by our Constitution is not part of the punishment.²⁶

Initially, the proposed text creates an ambiguity with the placement of the word “intentional” as to whether the word is to modify only “criminal acts” or is to limit the exception to damages caused by “intentional criminal or intentional fraudulent acts.” It is questioned as to whether there is a fraudulent act that is not “intentional?” Regardless, the proposed language could be read to extend the exception to damages suffered as a result of certain types of criminal acts, a situation that is not covered by current case law.

The proposed language could also be interpreted to extend to any homestead owner who committed any criminal or fraudulent act, even if the criminal or fraudulent act had no effect on the creditor trying to collect on a debt. The proposed language appears to allow for an evaluation of the homeowner’s moral turpitude when determining whether the homestead protection should apply. Case law clearly reflects that this was not the intent behind the constitutional protections.

It is important to point out that if the property loses the protected homestead status, a creditor (including a victim of a crime with a restitution or civil judgment) could levy against the property and obtain financial relief.

These changes would significantly expand creditor rights to pursue enforcement against the homestead properties of Florida citizens. Careful consideration must be given those situations in which those rights should be expanded. The proposed language is susceptible to very broad interpretation by both the Courts and the Florida Legislature.

²⁶ *Butterworth v. Caggiano*, 605 So. 2d 56, 60 (Fla. 1992).

IV. FISCAL IMPACT

A. Tax/Fee Issues

The addition of the proposed exceptions to the homestead protection would not appear to have a fiscal impact on state revenue.

B. Private Sector Impact

It is unlikely that the proposed exceptions would have any significant adverse impact upon the private business sector.

The proposed exceptions would have an impact on the private personal sector as it would place at risk the homestead, the traditional “roof over the head”, not just for a debtor, but also the debtor’s family as discussed below.

The proposed amendment would not be self-executing and would avoid the need to collect a debt through normal judicial proceedings.

C. Government Sector Impact

It is unlikely that the proposal would have a direct impact upon the government sector.

The proposal would have an indirect impact. The long-standing policy behind the homestead protection from forced sale is to ensure that the homeowner and his or her family has a home, reducing the likelihood of becoming dependent upon state support. As such, the courts have recognized that the homestead protection is not purely personal to the homeowner, but a benefit for the entire state.

As a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live [**6] beyond the reach of financial misfortune and the demands of creditors who have given credit under such law. *See Bigelow v. Dunphe*, 143 Fla. 603, 197 So. 328 (1940).²⁷

²⁷ *Pub. Health Tr. v. Lopez*, 531 So. 2d 946, 948 (Fla. 1988)