Limiting Florida's homestead exemption: collecting on homestead property in excess of one-half acre.

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For well over a century, Florida's Constitution has made the homestead exempt from the claims of creditors. Public Health Trust v. Lopez, 531 So. 2d 946, 948 (Fla. 1988). Florida's constitutional provisions provides one of the most debtor-friendly homestead exemptions in the country, and debtors are permitted to divert substantial assets to the purchase of new and extravagant homes that can be shielded from creditors. Florida's Unlimited Homestead Exemption Does Have Some Limits: Part I, 77 Fla. Bar J. 60 (2003). There are, however, exceptions to the rule. This blawg post will focus on one exception: the creditor's ability to collect on homestead property located in a municipality that exceeds one-half acre.

Florida law provides for a homestead exemption as follows:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
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> (1) a homestead, if located outside a municipality, to the extent of 160 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.

Fla. Const. art. X, § 4. [emphasis added]. The Florida Constitution provides homestead exemption protection to real property which is located within a municipality only so long as the property is limited to one-half acre of contiguous land. Englander v. Mills (In re Englander), 95

F.3d 1028, 1032 (11th Cir. Fla. 1996), cert. denied, 520 U.S. 1186 (1997). There are no limitations upon the cost, size, or construction of the residence. Id. n12 (citing Smith v. Guckenheimer, 27 So. 900, 911 (1900)). Whether the residence is within or without a municipality is of critical importance in determining the portion of the debtor's homestead that will be protected because up to 160 acres of property outside of a municipality can be protected by homestead, Fla. Const. art. X, § 4, as opposed to just one-half acre within a municipality. Id.

Florida courts deny homestead protection to any portion of property that exceeds the allowed acreage limitation; any portion of property located within a municipality beyond one-half acre may be levied. When a debtor's property exceeds the one-half acre allowed for a municipal homestead, "he cannot declare as exempt his entire parcel, but may select his homestead in any contiguous shape from his qualifying lands." In re Kellogg, 197 F.3d 1116, 1120 (11th Cir. 1999) (citing Frase v. Branch, 362 So. 2d 317, 320 (Fla. 2d DCA 1978)). Debtor may reasonably designate his one-half acre portion of the property, so long as the remaining portion has legal and practical use. Id.

There are two methods courts have utilized in allowing creditors to collect on the portion of property exceeding the allowed acreage. First, if the property is divisible, courts will partition the property and allow the non-exempt portion to be sold for payment of the owner's debts. In re Englander, supra (citing Smith, at 916). Second, if the property is not divisible, courts will order a sale of the entire property and apportionment of the proceeds. In re Englander, supra; Kellogg v. Schreiber (In re Kellogg), 197 F.3d 1116 (11th Cir. Fla. 1999); Siewak v. Amsouth Bank, 2007 U.S. Dist. LEXIS 3030 (M.D. Fla. Jan. 16, 2007) (quoting In re Englander, 95 F.3d at 1031) ("Florida courts have denied the exemption to property that exceeds the allowed limitations of residency by dividing the property, and allowing the non-exempt property to be

sold for payment of the owner's debts."); In re Baxt, 188 Bankr. 322, 323-324 (Bankr. S.D. Fla.1995) (finding appropriate the sale of an urban indivisible 2.5 acre lot, and apportionment of the proceeds). See also In re Wierschem, 152 Bankr. 345, 347 (Bankr. M.D. Fla.1993) (holding that rural property that exceeded 160 acres was subject to sale and apportionment of proceeds).

In determining whether the homestead property can be divided, Florida courts have utilized a so-called "divisibility" test, which provides: "A unit which is both susceptible to division by perpendicular lines, horizontal lines, or both, and lawfully conveyable as an independent parcel under existing law should be the criteria for the divisibility." In re Kuver, 70 B.R. 190, 193 (Bankr. S.D. Fla. 1986). The divisibility test considers whether the property is divisible and lawfully conveyable, pursuant to local zoning and building regulations. Englander v. Mills (In re Englander), 95 F.3d 1028, 1032 (11th Cir. Fla. 1996). See also Menard v. Univ. Radiation Oncology Assocs., LLP, 976 So. 2d 69, 75 (Fla. 4th DCA 2008) ("the trial court shall determine whether under local law the entire property may be partitioned or in some other way divided legally (e.g., submitted to condominium ownership). If it cannot be so divided legally, then the entire parcel may be sold at public sale and only debtor's pro rata share will be exempt.")

In In re Englander, debtors claimed their 1.05 acre lake front residence as their homestead exemption. 95 F.3d 1028, 1029. The residence was located within an incorporated municipality and, therefore, subject to the one-half acre requirement. Id. However, local zoning and building regulations prevented the property from being subdivided. Id. The partition would have no legal use as its conveyance would violate local zoning law. Id. at 1032. Thus, the Court upheld a sale of the entire property and apportionment of the proceeds because debtors' claimed homestead property exceeds the acreage limitation and is indivisible. Id. The court reasoned that sale and

apportionment of the proceeds was an equitable solution because it allowed for an appropriate recognition of the debtors' homestead exemption, and afforded the creditors some satisfaction of their rightful claims. Id.

In Kellogg v. Schreiber (In re Kellogg), a judgment debtor claimed homestead exemption on his 1.3 acre oceanfront property in his bankruptcy petition. 197 F.3d 1116 (11th Cir. Fla. 1999). The Trustee and judgment creditor objected because the property exceeded one-half acre and was located within a municipality. Id. at 1118. The court ordered the sale of the homestead property and an allocation of the proceeds, with the proceeds which exceeded those attributable to one-half acre being made available to creditors. Id. at 1118-19. The order was upheld on appeal because the township zoning regulations prohibit subdividing his land Id. at 1120. The court justified the non-partition approach by stating that separating debtors' "land into an exempt and a nonexempt parcel is equivalent to subdividing it, since turning over excess land to the trustee for disposition exposes neighboring landowners to precisely the same evils the zoning laws are intended to prevent-namely, allowing double-building on a parcel of land." Id.

In sum, if the property passes the divisibility test, it is subject to partition. On the other hand, if the property will not pass the divisibility test (i.e. it cannot be divided into lawfully conveyable parcels), the property is subject to sale and apportionment of proceeds.

In Quraeshi v. Dzikowski (In re Quraeshi), the court addressed whether, after a sale of a debtor's property in which only a portion can be claimed as homestead, the debtor's homestead-exempt funds should be calculated as a portion of the net proceeds of the sale (after certain other liens have been paid) or based upon the gross sales price of the entire property. 289 B.R. 240, 244 (S.D. Fla. 2002). The court decided "it would seem that a debtor's homestead exemption would extend to a pro rata portion of the net proceeds of a sale of debtor's property, based on his

acreage share of the property sold, rather than a pro rata portion of the gross sales price. As such, only the proceeds remaining after those specific debts are paid qualify as "homestead."" Id.

This limitation to the homestead exemption is especially relevant in northeast Florida. All property in Duval County is "located within a municipality," and therefore subject to the one-half acre rule. For creditors, this means that a further look should be taken into the homestead asset before simply writing it off as an exempt item.

Practice areas: Creditors Rights and Commercial Collections

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