

Protecting Your Assets Under the Florida Homestead Exemption

~ J. Michael Hartenstine

What do O.J. Simpson, Burt Reynolds, and Paul Bilzerian have in common? They all moved to Florida to take advantage of Florida's "mansion loophole," the Florida law permitting debtors to transform substantial, out-of-state assets into homestead-protected mansions beyond the reach of creditors.

Florida is considered a debtor's haven for its constitutionally guaranteed homestead protection. With no property value limitation, the Florida constitution allows assets of unlimited value to be converted into homestead property shielded from forced sale.

The Florida constitution does not exempt homestead property from every creditor claim. Homestead property is always subject to enforceable liens for payment of taxes; obligations contracted for the purchase, repair, or improvement of the property; and obligations contracted for house, field, or other labor performed on the property. If you acquire a bank mortgage to purchase or improve your homestead property, the mortgage is considered an obligation for which you contracted. Therefore, if you default under the mortgage, the homestead status of the property will not prevent foreclosure.

This point is worth repeating: The exemption of homestead property from claims of creditors does not apply to liens you voluntarily place on your homestead as security for a debt. The exemption instead protects your homestead from judgment liens arising out of litigation. If a creditor acquires a judgment in litigation for damages resulting from your breach of contract or negligent act, the creditor can enforce the lien of the judgment against your non-homestead property but not against your homestead property.

In addition to protection from creditor claims, the Florida constitution affords real property tax benefits to homestead property and places limits on the conveyance and descent of homestead property. The rules governing homestead status in these three contexts are not identical, so property may, for example, qualify as homestead for creditor-protection purposes but not for conveyance and descent purposes. This article focuses on protection of homestead property from creditor claims but also addresses, to a limited extent, the real property tax benefits.

Requirements for Homestead Exemption from Creditor Claims

Florida residency, property location and size, and ownership and occupancy requirements must be satisfied for property to qualify for homestead protection from creditor claims.

Florida residency. Because the purpose of homestead exemption from forced sale is to protect families from displacement, you must prove the property is your residence to qualify for homestead exemption. Residency can be established by declaring and proving intent to reside on the property permanently. You may file a declaration of domicile with the local clerk of court. If you have residential property in another state, you must declare the Florida property as your principal home, since Florida homestead protection is only available for your principal residence. You can also demonstrate residency intent by, for example, registering to vote in Florida and obtaining a Florida driver's license. Foreign individuals cannot qualify for Florida residency unless they are Green Card holders. As for married couples living separately, they may claim two separate homestead exemptions.

Property location and size. The property must be located in Florida. It may be any dwelling, including a co-op apartment, a condominium unit, a mobile home, or even a boat used as a primary residence. If the property is located outside the boundaries of a municipality, it may not exceed 160 acres. If the property is located within a municipality, it may not exceed one-half acre. If you currently live outside the boundaries of a municipality, any future extension of the city limits would not reduce your entitlement to homestead protection for up to and including 160 acres, without your consent.

If homestead property exceeds the size limitations, that part of the property not exceeding the size limitations will be exempt from creditor claims. If the property reasonably cannot be physically divided into an exempt portion and a non-exempt portion, a court may order a sale of the property, in which case the sales proceeds will be distributed based on the percentage of size of the homestead-protected area as compared to the aggregate size of the property.

If the property for which you claim homestead exemption exceeds the applicable size requirement, a court ultimately has authority to determine the portion of the property actually exempt from creditor claims. In the case of a condominium unit, the property size is determined by adding (1) the square footage of the condominium land divided by the unit's percentage interest in the common elements and (2) the square footage of the unit. It would be rare for a condominium unit to exceed the acreage limitation. It could potentially arise in condominium developments with relatively few units that are situated on large tracts of land within a municipality.

Ownership and occupancy. The property must be owned by a "natural person." Recent cases have held property owned by a revocable trust qualifies as property owned by a natural person, because the settlor maintains a right to revoke the trust and retrieve the property. By contrast, property held by an irrevocable trust may not qualify absent provisions granting the beneficiary claiming homestead exemption the right to live on the property.

You do not need to be the sole owner of the property or own the property in fee simple. Any beneficial interest in the property may be sufficient. A long-term leasehold interest, for example, will suffice. Property held in joint ownership also qualifies.

Joint ownership typically is categorized as a tenancy in common or a joint tenancy with right of survivorship. When property is held as tenants in common, each owner's interest in the property passes to the owner's heirs upon the owner's death. When property is held as joint tenants with right of survivorship, an owner's interest in the property passes to the surviving tenants upon the owner's death. In either form of joint ownership, some co-owners might qualify for homestead exemption while other co-owners might not. Creditors of a co-owner whose interest does not qualify for homestead protection could force a sale of that interest, thereby introducing a stranger into the joint ownership of the property. Moreover, upon acquiring the co-owner's interest, the stranger could force a division or sale of the entire property through a suit for partition.

In the case of spouses, Florida law presumes that real property acquired jointly during marriage is owned as a tenancy by the entirety. This form of ownership offers an important protection. Forced sale of the property may not occur to satisfy individual debts incurred by either spouse. This protection applies to all property, not just to homestead property. However, even property held as a tenancy by the entirety is subject to forced sale for claims incurred jointly by both spouses, unless the property is their homestead.

Claiming Homestead Exemption

When a creditor obtains a judgment in court, the law permits the judgment to become a lien on the debtor's property by recording a certified copy of the judgment in the public records of the county in which the property is located. The creditor may then commence a suit to foreclose the lien in a manner similar to the foreclosure of a mortgage. Following a judgment of foreclosure, the property will be sold by the clerk of court at a public sale, and the sale proceeds will be made available to satisfy the debt owed to the creditor.

Under Florida Statutes, a debtor may file in the public records a statement identifying property qualifying as the debtor's homestead at any point before the actual sale of the property. If the debtor has a contract to sell the property or a commitment from a lender for a mortgage on the property, the debtor may also file a homestead designation in the public records. The filing of a homestead designation forces the creditor to file suit within 45 days to challenge the homestead status of the property. If suit is not filed within 45 days, the property may be sold or mortgaged free of the creditor's judgment lien.

Transfer of Funds and Homestead Property

If homestead property is sold, the proceeds of sale will be protected from creditor claims as long as the sale proceeds are invested within a reasonable time in new homestead property. Any excess proceeds that are not invested in the new homestead are not protected. This was the result in a Florida bankruptcy case in which excess sale proceeds were awarded to a creditor when the debtor sold his homestead property and bought a less expensive residence.

A controversial aspect of Florida's homestead exemption is its extension to debtors who convert non-protected assets into homestead-protected property in order to hinder, delay, or defraud their creditors. Because the Florida constitution does not make the homestead exemption contingent on the debtor's purpose or intent, the Florida Supreme Court has

held that the homestead exemption is applicable even when the debtor acquires homestead property to defeat creditor claims. However, under fairness considerations, a court may impose an equitable lien on homestead property if the debtor acquired the property with funds obtained through fraud or reprehensible conduct. For example, a homestead purchased with embezzled funds is not exempt from creditor claims.

Bankruptcy

In 2005, in response to the “mansion loophole” and its perceived frequent abuse by debtors, Congress reformed federal bankruptcy law to restrict the investment of out-of-state assets into state-protected homesteads. Following that reform, to benefit from the Florida homestead exemption in bankruptcy court, the debtor must have been a Florida resident for at least 730 days prior to the filing for bankruptcy. Additionally, if the property was acquired within 1,215 days from the filing date, the property is only exempt up to a value of \$160,375. These time and value limitations seek to prevent moving assets to Florida for homestead protection on the eve of a bankruptcy proceeding.



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Real Estate Tax Benefits

In addition to its valuable asset protection benefits, homestead status also provides important real estate tax benefits. For real estate tax purposes, an owner must designate property as homestead through the property appraiser’s office. This designation provides an annual \$25,000 ad valorem tax exemption for all taxes assessed against the property and an additional \$25,000 ad valorem tax exemption for non-school taxes assessed against the property. Another tax benefit of homestead designation is a maximum 3 percent “Save Our Homes” cap on annual property valuation increases. For example, if the homestead’s current assessed value is \$1,000,000, the assessed value for the next year cannot exceed \$1,030,000, regardless of actual market appreciation.

If homestead property is owned by more than one person as tenants by the entirety or joint tenants with right of survivorship, and at least one co-owner qualifies for homestead tax exemption, that co-owner is permitted the entire exemption amount. In contrast, if the co-owners hold the property as tenants in common, the qualifying owner can only claim an exemption for such owner's percentage interest in the property.

A homestead that is transferred to a revocable trust may continue to benefit from homestead tax benefits as long as the transferor reapplies for the homestead exemption or confirms eligibility with the property appraiser. Such confirmation often is made by a recitation in the deed conveying the property to the trust.

Conclusion

Outside federal bankruptcy court proceedings, Florida's "mansion loophole" remains an attractive choice for debtors seeking to protect assets from creditor claims. The "mansion loophole" is far less attractive if the creditor claim is being pursued in the bankruptcy court due to the 2005 bankruptcy reform law. Subject to bankruptcy law limitations, establishing homestead in Florida offers significant protection from creditor claims, as well as substantial real estate tax benefits.



The assistance of Barbara Negron, law student at Stetson University, in the preparation of this article is most gratefully acknowledged.



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