OSBORNE V. DUMOULIN: WHAT THE BENEFIT OF THE HOMESTEAD EXEMPTION MEANS AND ITS RELATION TO BANKRUPTCY’S FRESH START

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I. INTRODUCTION

The constitutional personal property exemption in Florida is nothing if not antiquated. People and their families emerging from bankruptcy need a fresh start, and the $1000 personal property exemption in Article X of the Florida Constitution does little to protect a person’s property. A recent ruling by the Florida Supreme Court held that debtors who own a home are also eligible for the statutory personal property exemption if the debtor meets certain conditions. Prior to the decision, a split in Florida Bankruptcy Courts forced some debtors to make a decision to either abandon their home or to keep property to move on with their lives. Many homeowners were left reeling from the mortgage crisis and needed another option that the Florida Supreme Court provided.

One result of the mortgage crisis was that nearly 25% of homeowners owe more than their homes are worth resulting in what is referred to as negative equity. A perfect storm of conditions occurred that gave rise to the economic climate, which resulted in the current meltdown. Lending regulations once required that home loans were limited to 80% of a home’s value. Deregulation in the lending arena shielded lenders from many of the risks lenders once faced when borrowers were forced to make a 20% down payment on the purchase of a new home.

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1 J.D. Candidate, 2011, Barry University Dwayne O. Andreas School of Law; B.A. 2007, University of South Florida St. Petersburg.
3 Osborne v. Dumoulin, 2011 Fla. LEXIS 291, 30 (Fla. Feb. 3, 2011); See also Fla Stat. §222.25(1).
4 Osborne, 2011 Fla. LEXIS 291, 30.
6 83 Am. Bankr. LJ. 663, 748.
home.\textsuperscript{7} Prior to the meltdown, some borrowers were actually able to borrow up 125\% of the home’s value.\textsuperscript{8} The decision to lend more than a home’s value was partially fueled by the speculation on rising property values.\textsuperscript{9} The downward spiral of property values and the deregulation of mortgage lending has left the housing market reeling and in turn, affected many aspects of the nation’s economy.

Debtors are not unscrupulous people seeking to stiff their creditors. These are people that need a hand up. By allowing the underwater homeowner to take the statutory personal property exemption, if the debtor follows the guidelines set forth in \textit{Osborne v. Dumoulin}, the Florida Supreme Court provides the honest debtor the ability to achieve a fresh start and also further the “well-settled proposition that exemptions in bankruptcy are to be liberally construed in order to afford the honest debtor a fresh start.”\textsuperscript{10} There is a long history in this country of helping others when they need it the most, the evolution of the Bankruptcy Code has aided in that goal.

Bankruptcy laws and policies have evolved over time in America. The current law enacted in 1978,\textsuperscript{11} and recently amended in 2005,\textsuperscript{12} focuses on the principle that the debtor deserves a fresh start.\textsuperscript{13} In order to achieve that goal, bankruptcy laws seek to discharge the debtor’s debts and keep possession of property that will help that person to start over. The primary way of accomplishing the goal of keeping possession of property is establishing exemption laws.\textsuperscript{14}

\begin{flushleft}
\textsuperscript{7} \textit{Id.}
\textsuperscript{8} \textit{Id.}
\textsuperscript{9} \textit{Id.}
\textsuperscript{11} Bankruptcy Reform Act of 1978.
\textsuperscript{12} Bankruptcy Abuse Prevention and Consumer Protection Act 2005 \textit{hereinafter} BAPCPA.
\textsuperscript{13} Katherine Porter and Dr. Deborah Thorne, \textit{The Failure of Bankruptcy's Fresh Start}, 92 CORNELL L. REV. 67, 68 (2006).
\textsuperscript{14} \textit{Supra} note 3.
\end{flushleft}
States have a choice of enacting either the federal exemptions or their own state exemptions.\textsuperscript{15} In Florida, a debtor utilizes the state exemption laws, which vary depending on the nature of the exemption and the nature of ownership interests in property.\textsuperscript{16} The nature of ownership in real property is not the same as it was prior to the economic downturn that has left Florida’s real estate market reeling. Today, a prospective debtor seeks to relieve himself of the burden of debt, while trying to keep as much of his property necessary to begin a new life and a fresh start. To facilitate this goal, the debtor looks to Florida’s exemption laws, which recently have the Bankruptcy Courts in Florida split, and a certified question yet to be answered from the Eleventh Circuit Court of Appeals to Florida’s Supreme Court seeking instruction on what it means to receive the benefit of a homestead exemption.\textsuperscript{17}

This article will explore why it is beneficial that Florida’s Supreme Court decided that home ownership does not equal receiving the benefit of homestead exemption. I will add to the existing arguments that have the Florida Bankruptcy Court’s split on the issue of what it means to receive the benefit of a homestead exemption. The current economic downturn requires all of us to take a second look at the policies that govern our financial system and how to protect our families’ assets.

The second section of this article will provide a brief history of American bankruptcy laws. It will address the evolution of bankruptcy, which started out as a tool for creditors, into the current Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).\textsuperscript{18} The section provides the details of how a bankruptcy filing works and who administers the procedure. It will also provide a framework of the goals of bankruptcy protection, focusing on

\textsuperscript{15} Id.
\textsuperscript{16} Fla. Const. Article X; Fla. Stat. Ch. 222.
\textsuperscript{17} Osborne, 326 Fed. Appx. at 502.
\textsuperscript{18} Supra note 3.
the goal of the fresh start. Finally, this section will give the reader a broad overview of how Florida’s laws interact with bankruptcy laws to help the debtor start over after bankruptcy.

A large part of this section will provide insight into the exemption laws that are primarily discussed in this article. The three exemption laws discussed at length are the personal property exemption, Florida’s homestead exemption, and a statutory personal property exemption for debtor’s that do not receive the benefit of a homestead exemption. All three of these laws come into play regarding the goal of providing a fresh start to the debtor who is emerging from bankruptcy protection, the degree of which will be discussed in this section.

Section three focuses on the split of bankruptcy courts in their interpretation of what it means to receive the benefit of a homestead exemption. This section will discuss the theories and will explain why ownership does not equal the benefit of a homestead exemption, thereby allowing a debtor to take an additional personal property exemption.

Section three will begin by exploring the reasons courts have held mere ownership does not equal receiving the benefit of a homestead exemption. The theories discussed in this section include that Article X of the Florida Constitution has the sole benefit of keeping a debtor’s homestead property protected from a forced judicial sale, if there is no equity then a debtor does not receive the benefit of a homestead exemption, and other theories including future interests and the statutory homestead exemption for individuals who do not own the land their home is situated.

The third section will then explore the reasons other courts have held that ownership is enough to receive the rights and benefits of a homestead exemption under Article X of the Florida Constitution. The most widely cited reason that courts have held that a debtor still
receives the benefit of a homestead exemption is that the debtor has not affirmatively abandoned
the homestead property.

In the conclusion I will explain why Florida’s Supreme Court should hold that the
homestead exemption in Article X §4(a) of the Florida Constitution should be read narrowly to
construe that it contains only the benefit to shield the homestead from forced judicial sale. The
Court should look at several factors when determining if a debtor receives the benefit of a
homestead exemption including having equity in the property, whether the property was claimed
as exempt at the time the bankruptcy petition was filed, and whether the homestead is being
protected from the reach of creditors in any other fashion. Florida’s Supreme Court seemed very
receptive to debtor’s counsel’s argument during oral arguments before the Court on March 4,
2010.

II. A BRIEF HISTORY OF THE BANKRUPTCY LAW

Congress, through the United States Constitution, has the power to enact laws regarding
bankruptcy.\textsuperscript{19} Bankruptcy laws have been in existence, albeit inconsistently, since 1800.\textsuperscript{20} The
first bankruptcy laws passed in the nineteenth century were vastly different than the current
bankruptcy law. Then, bankruptcy was a tool used by creditors against merchant traders.\textsuperscript{21} A
creditor could only bring a bankruptcy action against a debtor.\textsuperscript{22} Laws regarding relief sought by
a debtor were referred to as insolvency laws.\textsuperscript{23} Today, there is little to no difference between the
two terms. Bankruptcy laws provide relief to both debtors and creditors. The focus of this article

\textsuperscript{19} U.S. CONST. art. I, § 8, cl. 4.
\textsuperscript{20} In the nineteenth century there were many enactments and repeals of the bankruptcy law beginning in 1800,
Bankruptcy Act of 1800, which lasted until 1803; Bankruptcy Act of 1841 (repealed 1843); Bankruptcy Act of 1867
(repealed 1878); Bankruptcy Act of 1898 (repealed 1978); and the Bankruptcy Reform Act of 1978 (amended by the
\textsuperscript{22} Id.
\textsuperscript{23} Sturges v. Crowninshield, 17 U.S. 122, 194 (1819).
lies primarily with consumer bankruptcy laws, and the remedies available to debtors seeking a fresh start.

**A. Policy Considerations and the Fresh Start**

There is a lot of talk about the fresh start in bankruptcy, but what does it really mean? Basically, in order for a debtor to obtain a fresh start, the debtor must be able to set aside essential property to begin a new life after emerging from bankruptcy. In order to set aside this essential property, the debtor needs the ability to exempt property from the reach of creditors. Exemption laws are the driving force behind the debtor's ability to begin a new life after bankruptcy.

When the House of Representatives passed the Bankruptcy Code, they realized that the debtor needed exemption laws for the fresh start after the debtor emerged from bankruptcy. The House made note of three policy considerations when enacting the Code. First, by setting aside necessary property, a debtor would be able to start over without becoming a ward of the state. Second, bankruptcy provides relief to the debtor who feels there is no way out from under the debt. Lastly, the House stated that the Bankruptcy Code helps level the playing field between the sophisticated creditor and the less sophisticated debtor. It is important at this point to look at the exemptions Florida has to offer and place those in context with the overarching policy of the fresh start.

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24 6 Am. Bankr. Inst. L. Rev. 177, 177-78
25 Id.
26 Id.
27 Id. at 178.
28 Id.
29 Id.
30 Id.
B. Putting the Bankruptcy Laws in Context

The most common type of bankruptcy relief available is found in Chapter 7 Title 11 U.S. Code, commonly referred to as a “straight bankruptcy.”31 In a Chapter 7, a debtor’s assets, upon the filing of the bankruptcy petition, become property of the bankruptcy estate.32 A bankruptcy trustee administers the estate.33 The trustee’s duties include reducing any non-exempt property of the debtor into money for distribution to the creditors of the debtor.34 The goal of the debtor is to maintain as much property as is necessary to begin a new life after bankruptcy. The goal of the trustee is to administer the estate “as expeditiously as is compatible with the best interests of parties in interest.”35 As a result, there often lies a considerable amount of tension between the parties. For guidance, the debtor should look to the exemption laws that govern bankruptcy in the jurisdiction the debtor intends to file for bankruptcy protection. Unfortunately, the exemption laws can be the source of frustration as the debtor maneuvers her way through the complexities of bankruptcy legislation.

C. What Does Florida Have to Offer?

The Bankruptcy Code gives the individual states the option of using the federal exemptions, or the state exemptions for an individual who files for bankruptcy protection.36 Florida chose to opt-out of the federal exemptions thereby requiring a debtor to use the state exemptions.37 This section focuses on Florida’s exemptions including the personal property exemption, the homestead exemption, and what is commonly referred to as the “wild card

34 Id.
35 Id.
exemption.” These exemptions seek to help the debtor emerge from bankruptcy with accomplishing the goal of a fresh start.

1. The Personal Property Exemption

Florida’s $1,000 personal property exemption has not changed since 1868. One thousand dollars in 1868 would equal about $70 today. For a frame of reference, it would cost a person over $20,000 for the same amount of goods a person could purchase for $1000 in 1913. These figures come from the Bureau of Labor and Statistics and says this about the calculator:

The CPI inflation calculator uses the average Consumer Price Index for a given calendar year. This data represents changes in prices of all goods and services purchased for consumption by urban households. This index value has been calculated every year since 1913. For the current year, the latest monthly index value is used.

In Florida, a person may exempt personal property in accordance with the Florida Constitution. The Florida Constitution is silent on what the personal property exemption covers. However, Florida statutes provide specific exemptions for other types of property. These exemptions include a $1000 exemption for a debtor’s single automobile. There is an exemption for earnings for a person so defined as head of household in the Florida Statues. There are also exemptions for cash value of life insurance policies, unemployment compensation, and pensions. Therefore, any other property of the debtor should be exempt in

38 FLA. CONST. ARTICLE X §4(a)(2).
41 Id.
42 FLA. CONST. ARTICLE X §4(a)(2).
43 Fla Stat. §222.25(1).
44 Fla. Stat. §222.11.
46 Fla. Stat. §222.15; Fla. Stat. §222.16.
accordance with the constitutional personal property exemption. That means everything else: Furniture, appliances, clothes, jewelry, books, artwork, compact discs. In comparison, the bankruptcy code’s personal property exemptions are much larger than Florida’s exemptions.\(^{48}\)

Any personal property of the debtor that is not exempt under the constitution or statutes would then become property of the bankruptcy estate, and become subject to distribution to the debtor’s creditors in accordance with the bankruptcy code.\(^{49}\) The personal property exemption does not seem to help the debtor with a fresh start after going through bankruptcy. This property exemption leaves the debtor with little property and the scar of a bankruptcy filing on the debtor’s credit report, which can make it difficult for the debtor to provide for his/her family. Fortunately for the Florida homeowner/debtor, the state’s homestead exemption is quite generous.

2. Florida’s Homestead Exemption

\(^{47}\) Fla. Stat. §222.21.
\(^{48}\) 11 U.S.C. §522(d) The following property may be exempted under subsection (b)(2) of this section: (1) The debtor’s aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor. (2) The debtor’s interest, not to exceed $2,400 in value, in one motor vehicle. (3) The debtor’s interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. (4) The debtor’s aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. (5) The debtor’s aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection. (6) The debtor’s aggregate interest, not to exceed $1,500 in value, in implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor. (7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract. (8) The debtor’s aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542 (d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.
\(^{49}\) Title 11 U.S.C. §726.
A Florida resident’s home may be completely exempt from distribution under the Bankruptcy Code.\textsuperscript{50} If a debtor has owned a home for more than 1,215 days, all equity in the home is exempt from the bankruptcy estate.\textsuperscript{51} Merriam-Webster defines equity as, “the money value of a property or of an interest in a property in excess of claims or liens against it.”\textsuperscript{52} If the debtor has owned the homestead for less than 1,215 days, then the debtor may exempt $125,000 of the home’s equity from the bankruptcy estate.\textsuperscript{53} This exemption is new to the bankruptcy code under BAPCPA. Prior to BAPCPA, a Florida debtor could exempt the entire amount of the homestead property from the bankruptcy estate.\textsuperscript{54} This change in BAPCPA was in response to debtors moving to a state like Florida and putting any non-exempt assets into a homestead and then taking advantage of an unlimited homestead exemption.\textsuperscript{55} It is worthy to note that the Florida homestead exemption, under BAPCPA is still better than the federal bankruptcy exemption.\textsuperscript{56} So if you are a homeowner in Florida, and are going to file bankruptcy, Florida’s homestead exemption allows you to exempt anywhere between $125,000 and an unlimited amount, depending on how long you have owned your home. Now that is a fresh start a debtor can appreciate. What about the debtor who does not receive the benefit of a homestead exemption? In response, the Florida Legislature enacted a new personal property exemption for a Florida debtor who does not receive the benefit of a homestead exemption.\textsuperscript{57}

3. The Wild Card Exemption

\textsuperscript{52} Merriam-Webster.com, http://www.merriam-webster.com/dictionary/equity (last visited March 5, 2010).
\textsuperscript{55} Id.
\textsuperscript{56} Title 11 U.S.C. §522(d)(1) (the current bankruptcy exemption for a debtor’s homestead is $20,000).
\textsuperscript{57} Fla. Stat. §222.25(4).
A recently enacted statute in 2007, provides the Florida debtor with an additional $4000 exemption for the debtor’s personal property.58 This exemption applies to individuals who do not “receive the benefit of a homestead exemption,” under the Florida Constitution.59 However, the exemption does not apply to a debt owed for child or spousal support.60 The exemption, commonly referred to as the “wildcard exemption,” can be applied to any of the debtor’s property, which may be non-exempt because of the limiting $1000 personal property exemption in Florida’s Constitution.61 The wildcard exemption does a better job of providing the debtor with a fresh start then the personal property exemption in Article X of the Florida Constitution. It is appropriate to discuss the problems that occurred in determining if the additional exemption was the floor of the personal property exemption or if the $4000 exemption was the ceiling for debtors who did not claim the benefit of a homestead exemption.

a. Wildcard Exemption as Floor or Ceiling

Senate Bill 2118 was passed by the Florida Legislature, which added a new sub-section to Section 222.25 Florida Statutes for other property exempt from legal process.62 In In re Bezares, the debtor sought to exempt personal property from the bankruptcy estate in the amount of $5,000.63 The trustee objected to the claim of exemption arguing that the exemption only increased the existing $1,000 exemption to a total of $4,000.64 However, the court stated that even though the plain reading of the legislative history supports the trustee’s contention that the exemption is capped at $4,000, the legislature does not have the authority to modify a

58 Id.
59 Id.
60 Id.
61 Id.; FLA. CONST. ARTICLE X §4(a)(2).
62 Fla. Stat. §222.25(4); In re Bezares, 377 B.R. 413, 413-14 (Bankr. M.D. Fla. 2007).
63 In re Bezares, 377 B.R. at 414.
64 Id.
constitutional provision. The Florida Constitution provides the only way the constitution can be altered. The court went on to say that if it sustained the trustee’s objection to the debtor’s claim of exemptions, the court would be violating the Florida Constitution. Ultimately, the court held that the statute did indeed act as a floor, and allowed the debtor to take the full $5,000 exemption. Several courts have all reached the same conclusion as the court in Bezares. The next question a debtor should ask is what does it mean to receive the benefit of a homestead exemption.

b. Benefit of a Homestead Exemption

The answer to this question is central to this discussion. If a court holds that a debtor receives the benefit of a homestead exemption, then the debtor is not entitled to the wildcard exemption under Section 222.25(4) Florida Statutes. On the other hand, if a debtor does not receive the benefit of a homestead exemption, then an additional $4,000 exemption for personal property is at the debtor’s disposal. Unfortunately, bankruptcy courts in Florida could not come to an agreement when deciding what it meant to receive the benefit of a homestead exemption. The next section will explore the circuit split involving this question and explain why ownership is not mutually exclusive to receiving the benefit contained in Article X of the Florida Constitution.

III. WHO RECEIVES THE BENEFIT OF A HOMESTEAD EXEMPTION?

65 Id. at 415.
66 FLA. CONST. ART. XI(5); Id.
67 In re Bezares, 377 B.R. at 415.
68 Fla. Stat. §222.25(4).
69 In re Bezares, 377 B.R. at 415.
As with any legal argument, there are two sides to this question, and multiple issues to support each proposition. It would be easy to just say that the statutory interpretation should end with the plain meaning of the statute. However, there has been abundant controversy over the role of the plain language rule.\(^{71}\) This is evident when exploring the language contained in Florida’s Constitution regarding the homestead exemption.\(^{72}\) The language in this section of the constitution has not only led to different results in various districts in Florida, but also in the same division of the same district.\(^{73}\) The first position explored is the holdings that ownership alone does not equal receiving the benefit of a homestead exemption. Various courts have proffered different reasons for reaching the same conclusion; each of these reasons will be discussed.

**A. Benefit Does not Equal Ownership**

1. **Forced Judicial Sale the Sole Benefit under Article X**

At least one court has noted that the homestead exemption embodied in Florida’s Constitution\(^{74}\) provides only one benefit: exempting the home from forced judicial sale.\(^{75}\) It is prudent to note that there is also a homestead tax exemption available to Florida homeowners also contained in Florida’s Constitution.\(^{76}\) For the purposes of bankruptcy law, the homeowner’s

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\(^{72}\) **FLA. CONST. ART. X(a)(1).**

\(^{73}\) Compare In re Brown, 406 B.R. 568, 571 (Bankr. M.D. Fla. 2009) (holding “debtors' election not to claim the homestead exemption in the bankruptcy case, by itself, is an insufficient basis to claim the additional $4,000 personal property exemption, because they continue to live in the home, make the mortgage payments, and have reaffirmed the mortgage debts.”) and In re Bennett, 395 B.R. 781, 790 (Bankr. M.D. Fla. 2008) (holding that “debtors who do not affirmatively exempt their homestead under § 522(b)(1) and the Homestead Exemption, but instead leave it available for administration by the Chapter 7 trustee, neither have claimed nor received the benefits of the Homestead Exemption found in Article X of the Florida Constitution.”).

\(^{74}\) In re Heckman, 395 B.R. at 741; In re Mootosammy, 387 B.R. at 297; In re Hafner, 383 B.R. at 353; In re Gatto, 380 B.R. at 94.


\(^{76}\) **FLA. CONST. ART. VII(6); In re Bennett, 395 B.R. at 788.**
exemption that we are concerned with is in Article X of Florida’s Constitution. Therefore, any “general benefit” derived from home ownership plays no role in the present analysis. It does not matter if the debtor has “equity in the home, lives in the home, or enjoys any other type of tax benefit,” because the sole benefit under Article X Florida Constitution is the ability to stop a forced judicial sale. Based on this interpretation, the court in Bennett held that a debtor in bankruptcy could cease to receive the benefit of a homestead exemption regardless of whether the exemption also ceased under operation of state law.

Under the Bankruptcy Code, a debtor may elect to exempt certain property from the bankruptcy estate. Therefore, if a debtor chooses not to exempt certain property from the bankruptcy estate, it can be subject to administration by the bankruptcy trustee. The debtor who decides not to claim the homestead exempt leaves open the possibility that the trustee may dispose of the property even if there is little or no equity in the property. The mere possibility that the trustee will decide to liquidate the asset is enough to destroy the protection of the homestead exemption in Article X of the Florida Constitution. Several courts have therefore held that if a debtor does not claim the homestead exemption in Article X of the Florida Constitution, the debtor “has not claimed nor received the benefit” of Florida’s homestead exemption, thereby allowing a debtor to receive the additional personal property exemption.

2. No Equity, No Benefit

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78 In re Bennett, 395 B.R. at 788.
79 Id.
81 In re Bennett, 395 B.R. at 789.
82 11 U.S.C. 522(b)(1) (“an individual debtor may exempt from property of the estate”)(emphasis added); Id.
83 In re Bennett, 395, B.R. at 789-90.
84 Id. at 790.
85 Id.
In March, 2009, a Florida paper reported that over 1,000,000 Florida homeowners owed more than their homes were worth, which made Florida second in the nation with the highest number of “underwater borrowers.”\textsuperscript{87} In a recent US and World News report, Orlando is ranked fourth in the nation for underwater housing markets.\textsuperscript{88} It should therefore come as no surprise that a court has decided that if a debtor has no equity in the homestead property, the debtor is not receiving the benefit of a homestead exemption.\textsuperscript{89}

The reasoning behind this decision is that if a borrower owes more than the borrower’s home is worth, there is nothing to “protect from the creditors.”\textsuperscript{90} The court in \textit{Abbott} stated that it is a “well-settled proposition that exemptions in bankruptcy are to be liberally construed in order to afford the honest debtor a fresh start.”\textsuperscript{91} If debtors are unable to exit bankruptcy with enough property, they will not be able to take care of their families.\textsuperscript{92} The court in \textit{Abbott} proffered two arguments to support its holding. First, the court noted that after the enactment of BAPCPA, debtors who are affected by the homestead exemption are generally below the state median income.\textsuperscript{93} Second, the court interpreted that the exemption is unavailable to a debtor who “receives the benefit of a homestead exemption,” not a debtor who simply owns a homestead.\textsuperscript{94}

The court in \textit{Abbott} concluded that three events had to happen in order for a debtor to claim the additional exemption under Section 222.25(4) of the Florida Statutes: 1) the debtor had to owe more than the home was worth on the date the petition was filed; 2) the debtor did not claim the homestead exempt on Schedule C of the bankruptcy petition; and 3) the home was not

\begin{itemize}
\item \textsuperscript{87} \textit{In re Abbott}, 408 B.R. at 911.
\item \textsuperscript{89} \textit{In re Abbott}, 408 B.R. at 912.
\item \textsuperscript{90} \textit{Id}.
\item \textsuperscript{91} \textit{Id}.
\item \textsuperscript{92} \textit{Id}.
\item \textsuperscript{93} \textit{Id}.
\item \textsuperscript{94} \textit{Id}.
\end{itemize}
being “shielded” from the reach of creditors by some other means.\textsuperscript{95} So far the \textit{Abbott} Court is the only court to hold that if a debtor owes more than the home is worth, the debtor does not receive the benefit of the homestead exemption.\textsuperscript{96}

\textbf{3. Other Theories in Determining if a Debtor Receives a Benefit}

Other courts have used different theories when making the determination that a debtor has not received the benefit of a homestead exemption and therefore entitled to the exemption under Section 222.25(4) Florida Statutes. These theories include the title of the property in fee simple in the non-filing spouse’s name, and when a debtor takes the statutory homestead exemption.\textsuperscript{97}

a. Future Interest in Non-Filing Spouse’s Property

One court has decided that a debtor does not receive the benefit of a homestead exemption when the debtor may at some time in the future claim the benefit.\textsuperscript{98} The debtor in \textit{Sanon} did not have any ownership interest in his spouse’s homestead property.\textsuperscript{99} The court held that only property of the debtor could be exempted under the Bankruptcy Code.\textsuperscript{100} The proper time to determine whether property is exempt from the bankruptcy estate is whether the property is owned at the time the bankruptcy petition was filed.\textsuperscript{101} Therefore, the court in \textit{Sanon} held the debtor was able to take the additional exemption under Section 222.25(4) Florida Statutes

\textsuperscript{95} \textit{Id.}
\textsuperscript{96} Compare \textit{In re Abbott}, 408 B.R. at 912 (holding that if a debtor has no equity in the home, does not claim the home exempt, and is not otherwise shielding the home from other creditors than the debtor is not receiving the benefit of the homestead exemption) and \textit{In re Archer}, 416 B.R. 900, 902 (Bankr. S.D. Fla. 2009) (holding that where the debtor does not have any equity in the home, the trustee has abandoned the property from administration of the bankruptcy estate, and the debtor continues to live in the home, the debtor is still receiving a benefit of the homestead exemption).
\textsuperscript{97} Fla. Stat. §222.05.
\textsuperscript{98} \textit{In re Sanon}, 403 B.R. 737, 740 (Bankr. M.D. Fla. 2009).
\textsuperscript{99} \textit{Id.} at 739.
\textsuperscript{100} 11 U.S.C. §522; \textit{Id.} at 740.
\textsuperscript{101} \textit{In re Franzese}, 383 B.R. 197, 203 (Bankr. M.D. Fla. 2008).
because he did not have a present possessory interest in his non-filing spouse’s homestead property.\textsuperscript{102}

b. Statutory Homestead Exemption

When a debtor owns a home, mobile home, or modular home but does not own the land the home sits on, the debtor is able to claim the statutory homestead exemption.\textsuperscript{103} Two bankruptcy courts in Florida have held that a debtor claiming the statutory homestead exemption is still entitled to the wild card exemption under Section 222.25(4) Florida Statutes.\textsuperscript{104} The theory behind the holdings in \textit{Heckman} and \textit{Lisowski}, rests in the fact that the debtors did not own the land where their homes were situated.\textsuperscript{105} In order for the constitutional homestead exemption to apply, “the homestead property must consist of an interest in realty.”\textsuperscript{106} If there is no interest in realty, a debtor still has the ability to exempt the home.\textsuperscript{107} The two exemptions deal with different forms of ownership, “and the Statute does not simply implement the Constitutional exemption.”\textsuperscript{108} Therefore, the court in \textit{Lisowski} held that the debtor could claim his mobile home exempt under Section 222.05 Florida Statutes, and receive the personal property exemption under Section 222.25(4) Florida Statutes.

B. Ownership Equals Benefit of a Homestead Exemption

Generally speaking, the courts that have come down on the other side of the equation in determining if a debtor receives the benefit of a homestead have put forth only a few different
arguments. The first argument several courts have used is that if a debtor does not properly abandon the homestead property then the debtor is still receiving the benefit of a homestead exemption.109 One court in the Middle District of Florida Tampa Division held that if a debtor continues to live in the homestead property, the debtor is shielding the homestead from the reach of creditors and utilizing the one benefit afforded by Article X of the Florida Constitution.110 Two courts have ruled against title arguments proffered by debtors regarding tenancy by the entireties exemptions to circumvent the Florida Constitutional homestead exemption.111 The crux of this entire argument lies with the interpretation of the phrase “receive the benefit of a homestead exemption,” in Article X of the Florida Constitution. Courts in the previous subsection interpreted the phrase narrowly. Courts in this subsection generally interpret the phrase broadly. The first argument discusses issues with the abandonment of the homestead property.

1. Abandonment

Some debtors argue that receiving the benefit of a homestead exemption should be read narrowly. Unfortunately for them, some courts have rejected this argument. Some bankruptcy courts in Florida have held that receiving the benefit of a homestead exemption includes a bundle of rights and benefits at the debtor’s disposal, “regardless of whether the debtor actually has realized the advantage.”112 Once the constitutional protection of the homestead exemption is


110 In re Brown, 406 B.R. at 570.


112 In re Archer, 416 B.R. at 901 quoting In re Franzese, 383 B.R. at 205-06.
attained, the homestead retains the protections until it is abandoned. The act of leaving the homestead property off of Schedule C in the bankruptcy petition does not act as an abandonment of the property. Therefore, unless a debtor properly abandons the homestead property, the debtor continues to receive the benefit of a homestead exemption and is not entitled to the wildcard exemption under Section 222.25(4) Florida Statutes.

Another argument debtors make is that if they do not claim the homestead property exempt it becomes property of the bankruptcy estate subject to administration by the trustee. If the trustee abandons the claim to the property because of lack of equity, the debtor does not receive the benefit. Again, some courts have held that this is not the case.

If a trustee abandons property of the estate, the property is essentially returned to the debtor and the rights to the property are restored. The court in Kent stated three factors must be present for the homestead exemption to attach: “(1) the debtor must have a legal or equitable interest which gives him the legal right to use and possess the property as his residence; (2) the debtor must have the intention to make the property his homestead; and (3) the debtor must actually maintain the property as his principal residence.” The debtors in Kent claim that they did not have a legal or equitable interest in the homestead property because they did not claim the exemption and the property became subject to administration by the trustee. Therefore the homestead property did not meet the court’s requirements for the homestead exemption to attach. The court did not agree. The court stated that if there is no equity in the property

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113 Id. at 901 quoting In re Magelitz, 386 B.R. at 883.
114 Id. at 900.
115 Id. at 901.
116 In re Kent, 411 B.R. at 752 quoting Collier on Bankruptcy, 15th ed. rev. P554.02[3].
117 Id. at 753.
118 Id.
119 Id. at 754.
then the proper thing for the trustee to do is abandon the property. If the trustee abandons the property, the rights to the property revert to the debtor. Based on this reasoning, the court stated that the debtors did have legal or equitable title to the property, the property met the other two requirements in order for the homestead exemption to attach, the debtors received the benefit of a homestead exemption, and the debtors did not qualify for the wildcard exemption under Section 222.25(4) of the Florida Statutes.

2. Shielding the Homestead from the Reach of Creditors

Another holding closely related to abandonment that one court has used to determine that a debtor received the benefit of a homestead exemption is when a debtor shields the home from the reach of creditors. The court in Brown agreed with the court in Bennett by holding that Article X of the Florida Constitution conferred but one benefit: “it shields the homestead from forced judicial sale.” The similarities between Brown and Bennett stop there. The court in Brown held that not claiming the homestead exemption by itself is insufficient to claim the wildcard exemption under Section 222.25(4). The court reasoned that the debtors still lived in the homestead, reaffirmed the mortgage, and continued to make the mortgage payments thereby still receiving the sole benefit, protecting the homestead from forced judicial sale, of the homestead exemption under Article X of the Florida Constitution.

3. Tenancy by the Entireties

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120 Id.
121 Id.
122 Id.
123 In re Brown, 406 B.R. at 571.
124 Id. at 571 n.6; In re Bennett, 395 B.R. at 788.
125 Supra note 57.
126 In re Brown, 406 B.R. at 571.
127 Id.
The last argument proffered by debtors held ineffective by bankruptcy courts deals with a debtor taking a statutory exemption available to married debtors. The debtor in *Franzese* did not take the constitutional homestead exemption. Instead, the debtor chose to take the statutory exemption in the Bankruptcy Code for tenancy by the entireties. This exemption is only available to people who meet all six unities. Unfortunately for the debtor in *Franzese*, the court held that the constitutional exemption also applied. The court stated that homeowners seeking the constitutional homestead exemption must meet a subjective and objective test. The first test deals with actual use and residency by the homeowner. The second test deals with the homeowner’s intent on living in the home. The court in *Franzese* was satisfied that the debtor met both tests. The court stated that the debtor is living in the home, satisfying the first test, and by failing to surrender the home satisfies the subjective test set forth by the court. The court further stated that by merely failing to assert the privilege of the constitutional homestead exemption did not “preclude him from relying on the provision.” Finally, the court held that relying on the tenancy by the entireties exemption did not obviate the protections afforded by Article X of the Florida Constitution. Therefore, the debtor in *Franzese* did receive the benefit of a homestead exemption and was not entitled to the personal property exemption under Section 222.25(4) Florida Statutes.

**C. Osborne v. Dumoulin**

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130 *Id.* at 200 n.2.
131 *Id.* at 204.
132 *Id.* at 203.
133 *Id.*
134 *Id.*
135 *Id.* at 204.
136 *Id.*
137 *In re Franzese*, B.R. 383 at 204.
138 *Id.*
139 *Id.* at 208.
The split between the Bankruptcy courts in Florida reached its crescendo with an appeal to the Eleventh Circuit Court of Appeals by a debtor seeking to take the wild card exemption.¹⁴⁰ Denise Dumoulin filed for relief under Chapter 7 and originally claimed her homestead property as exempt.¹⁴¹ The only other property Ms. Dumoulin listed on her schedules was a car worth $5,925.¹⁴² Ms. Dumoulin intended to surrender her home by selling it prior to the foreclosure action that was pending in the state court and subsequently rent it from the purchaser.¹⁴³ Unfortunately for Ms. Dumoulin, the sale did not happen.¹⁴⁴ At the creditors meeting, the trustee demanded property or the cash equivalent in the amount of $4,000.¹⁴⁵ Ms. Dumoulin then amended her schedules and exempted a majority of the vehicle under Fla. Stat. 222.25(4), and elected not to take the homestead exemption.¹⁴⁶

The trustee objected to the claim of exemption on the vehicle because Ms. Dumoulin initially claimed the homestead exemption.¹⁴⁷ The court overruled the objection to the claim of exemption, stating that Ms. Dumoulin amended her schedules and was no longer taking the homestead exemption under Article X of the Florida Constitution.¹⁴⁸ As a result of Ms. Dumoulin no longer receiving the benefit of a homestead exemption, she was then entitled to the wild card exemption.¹⁴⁹ The trustee appealed the ruling to the District Court.¹⁵⁰

¹⁴¹ Id.
¹⁴² Id.
¹⁴³ Id.
¹⁴⁴ Id.
¹⁴⁵ Id.
¹⁴⁶ Id.
¹⁴⁷ Id.
¹⁴⁸ Osborne, 326 Fed. Appx. at 500 (citing In re Gatto, 380 B.R. at 93).
¹⁴⁹ Id.; Fla. Stat. §222.25(4).
¹⁵⁰ Osborne, 326 Fed. Appx. at 500.
The District Court affirmed the ruling of the bankruptcy court that Ms. Dumoulin was not receiving the benefit of a homestead exemption. In reliance on its interpretation, the District Court looked to the plain language of the statute. The court stated that the statute read that the debtor is entitled to the wildcard exemption if the debtor did not claim the homestead exemption under Article X of the Florida Constitution. Furthermore, the court stated that the debtor had clearly intended to surrender the property from the outset of the case. After the District Court’s ruling, the trustee appealed the decision to the Eleventh Circuit Court of Appeals.

The Circuit Court took notice that courts have ruled in favor of both the debtor’s and trustee’s propositions. However, because the issue dealt with the interpretation of a Florida Statute, the Circuit Court sought the Florida Supreme Court’s help in determining “[W]hether a debtor who elects not to claim a homestead exemption and indicates an intent to surrender the property is entitled to the additional exemptions for personal property under Fla. Stat. § 222.25(4).”

IV. CONCLUSION

At best, these are challenging economic times. The unemployment rate in the United States in January, 2011, was 9.0%. In the past sixty-two years, the unemployment rate has only been higher during 1982. In the month of February, 2010, every 1 in 163 homes in

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152 Osborne, 326 Fed. Appx. at 500.
153 Id.
154 Id.
155 Id.
156 Id. at 501.
157 Id. at 502.
Florida received a foreclosure notice.\textsuperscript{160} In 2009, there were nearly 70,000 Chapter 7 filings and over 20,000 Chapter 13 filings in Florida.\textsuperscript{161} The honest debtor should be able receive the help a debtor needs for a fresh start.

In Osborne, the appellate court for the Eleventh Circuit certified the following question to the Florida Supreme Court: “Whether a debtor who elects not to claim a homestead exemption and indicates an intent to surrender the property is entitled to the additional exemptions for personal property under Fla. Stat. § 222.25(4).”\textsuperscript{162} On March 4, 2010, the Florida Supreme Court heard oral arguments regarding the certified question proffered by the Eleventh Circuit Court of Appeals.\textsuperscript{163} During the arguments, the Court seemed open to the fact that the homestead exemption in Article X of the Florida Constitution only conferred one benefit: shielding the homestead from forced judicial sale.\textsuperscript{164} It also appeared that the Court thought that the certified question was too limited.\textsuperscript{165} The Court asked counsel for Ms. Dumoulin how he would phrase the question certified by the Eleventh Circuit Court of Appeals. He said that he would ask “[i]f a debtor presents and received, present and uses no obstacle to the levying creditor outside of bankruptcy or to the bankruptcy trustee inside of bankruptcy, is she receiving the benefits of a homestead exemption?”\textsuperscript{166} The Court also asked counsel for Ms. Dumoulin

\begin{itemize}
\item \textsuperscript{161} \textit{See supra} note 15.
\item \textsuperscript{162} Osborne, 326 Fed. Appx. at 502.
\item \textsuperscript{163} FloridaSupremeCourt.org, http://jweb.flcourts.org/pls/docket/ds_docket?p_casenumber=751&psSearchType=.
\item \textsuperscript{164} Transcript of Oral Argument at 25, Osborne v. Dumoulin, SC09-751 (Fla. Apr. 4, 2009).
\item \textsuperscript{165} \textit{Id.} at 26
\item \textsuperscript{166} \textit{Id.} at 27.
\end{itemize}
which ruling the Court should follow regarding the certified question.\textsuperscript{167} Counsel for Ms. Dumoulin responded that the Court should follow the ruling in \textit{Abbott}.\textsuperscript{168}

The Florida Supreme Court has discretion and may rephrase the issue, provide additional issues, and give answers to the issue in a manner not sought.\textsuperscript{169} By the exchange that took place during oral arguments, it appeared the Court was ready to use its discretion regarding this question.\textsuperscript{170}

On February 3, 2011, the Court used its discretion and rephrased the certified question. The Court negatively answered the restated question:

\begin{quote}
Whether for the purpose of the statutory personal property exemption in section 222.25(4), a debtor in bankruptcy receives the benefits of Florida's article X, section 4, constitutional homestead exemption where the debtor owns homestead property but does not claim the homestead exemption in bankruptcy and the trustee's administration of the property is not otherwise impeded by the existence of the homestead exemption.\textsuperscript{171}
\end{quote}

In coming to its decision, the Court read the personal property statute liberally and the Constitutional Homestead Exemption narrowly.\textsuperscript{172}

The Court held that the only benefit under Article X is to protect the homestead property from forced sale or levy.\textsuperscript{173} The Court further stated that normally a debtor does not need to claim the exemption; it is self-executing.\textsuperscript{174} In the bankruptcy context, all of the property of the debtor becomes property of the estate.\textsuperscript{175} Therefore, the debtor in bankruptcy has the ability to

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\textsuperscript{167} \textit{Id.}.
\textsuperscript{168} \textit{Id.}; \textit{In re Abbott}, 408 B.R. at 912.
\textsuperscript{169} Swire Pacific Holdings Inc. v. Zurich Ins. Co., 284 F.3d 1228, 1234 (11th Cir. 2002).
\textsuperscript{170} Transcript of Oral Argument at 26, Osborne v. Dumoulin, SC09-751 (Fla. Apr. 4, 2009).
\textsuperscript{171} \textit{Osborne}, 2011 Fla. LEXIS 291 at 2.
\textsuperscript{172} \textit{Id.} at 20-21.
\textsuperscript{173} \textit{Id.} at 21.
\textsuperscript{174} \textit{Id.} at 23.
\textsuperscript{175} \textit{Id.}
\end{flushright}
exempt the property from administration of the bankruptcy estate.\textsuperscript{176} If the debtor does exempt
the homestead property, the debtor in turn receives the benefit under Article X of the Florida
Constitution.\textsuperscript{177}

If a debtor does not claim the homestead property exempt from the bankruptcy estate the
property is surrendered to the trustee subject to administration.\textsuperscript{178} The trustee may elect not to
move on the homestead property because of a lack of equity.\textsuperscript{179} Any benefit the debtor may
realize from the trustee’s inaction is not the benefit conferred under Article X of the Florida
Constitution.\textsuperscript{180} When this situation occurs, the debtor is not receiving the benefits of the
homestead exemption and is therefore entitled to the statutory personal property exemption.\textsuperscript{181}

The debtor does not receive a windfall for not claiming the homestead exemption.\textsuperscript{182} By
not claiming the homestead exemption, the debtor faces the real possibility that the trustee will
seek to administer the property even if there is little or no equity.\textsuperscript{183} The trustee could find a
willing investor to purchase a trustee deed subject to the mortgage on the property.\textsuperscript{184} The
trustee could then take the proceeds from the sale of the deed and distribute them pro-rata to the
unsecured creditors, thus leaving a debtor without the home that was not exempted on the
debtor’s schedules.\textsuperscript{185}

A sophisticated debtor should not be able to circumvent the constitutional exemptions to
shield a home that has equity and take a statutory exemption on the debtor’s personal property.

\textsuperscript{176} Id. at 24.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 24-25.
\textsuperscript{180} Id. at 25.
\textsuperscript{181} Osborne, 2011 Fla. LEXIS 291 at 25.
\textsuperscript{182} In re Bennett, 395, B.R. at 790.
\textsuperscript{183} Id. at 791.
\textsuperscript{184} Id.; Interview with Marshall G. Reissman, St. Petersburg bankruptcy attorney (discussing how a trustee
would seek to administer a piece of property with little to no equity) (February 26, 2010).
\textsuperscript{185} Interview with Marshall G. Reissman, St. Petersburg bankruptcy attorney (discussing how a trustee would
seek to administer a piece of property with little to no equity) (February 26, 2010).
A married debtor should not be able to hide behind the benefit of a homestead exemption the debtor’s spouse retains through the tenancy by the entireties (TBE) exemption allowed in the Bankruptcy Code. This would be too much like the debtor receiving a windfall just for filing bankruptcy. A debtor cannot have his cake and eat it too. The Court correctly dealt with this complex issue as well. The Court held that each case should be decided on a case-by-case basis because of the complexities that may arise when property is owned TBE. This inquiry will ensure that only debtors that meet the statutory requirements receive the benefit of the statutory exemption.

The Florida Supreme Court was not be persuaded by the proposition that the homestead exemption contained in Article X of the Florida Constitution will continue unless the property is properly abandoned or alienated. This proposition, however well crafted, is misplaced. It is well known that a person may waive any number of constitutional rights. A defendant may consent to a search that would otherwise be protected under the Fourth Amendment. A defendant in a criminal case can waive the right to remain silent and the right to an attorney under the Fifth Amendment. The same defendant can also waive the right to counsel under the Sixth Amendment. The right to be free from unreasonable searches or compelled to be a witness against oneself is of the greatest importance in this country. With the holding in Osborne v. Dumoulin, the Florida Supreme Court held that in the limited bankruptcy context, a debtor may elect not to utilize the Constitutional Homestead Exemption.

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188 Id. at 29.
189 In re Kent, 411 B.R. at 750.
193 Osborne, 2011 Fla. LEXIS 291 at 24-25.
The Florida Supreme Court looked to the bankruptcy courts in Florida for guidance on how to construct a rule for determining when a debtor is able to take the statutory personal property exemption even if the debtor owns homestead real property. The courts in Bennett, Shoopman, Martias, and Hernandez all held that if a debtor does not claim the homestead exempt and leaves the property for administration by the bankruptcy trustee, the debtor does not receive the benefit of a homestead exemption.\textsuperscript{194} The court in Abbott went a step further, holding that a debtor is eligible for the statutory personal property exemption if the debtor does not have any equity in the home, does not claim the home exempt, and is not be shielding the home from creditors in any other way in order to not receive the benefit of a homestead exemption.\textsuperscript{195} The Florida Supreme Court incorporated these holdings in its ruling and correctly held that by not electing to claim the homestead exempt from administration from the bankruptcy estate, the debtor does not receive the benefit of the homestead exemption and therefore entitled to the “wild card” statutory personal property exemption.

In order to realize a true fresh start, the debtor must have enough property so he is not impoverished and able to provide for his family.\textsuperscript{196} The recent decision by the Florida Supreme Court in Obsorne v. Dumoulin, helps facilitate the goal of the fresh start. If a debtor does not elect to exempt certain homestead property, a debtor is then able to exempt from administration much more personal property. This in turn provides the debtor with enough property to start over after emerging from bankruptcy and helps the debtor provide for his family. Debtors in Florida now have a choice when electing to exempt certain property from the bankruptcy estate.

\textsuperscript{195} In re Abbott, 408 B.R. at 912.
\textsuperscript{196} Id.