

STORAGE NAME: h4003s1.rpp

DATE: March 26, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HJR 4003

RELATING TO: Homestead exemptions

SPONSOR(S): Representative Sublette

COMPANION BILL(S): SJR 1816

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

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I. SUMMARY:

CS/HJR 4003 amends Section 4 of Article X of the State Constitution to limit the homestead exemption to exclude assets that are intentionally converted to homestead property to hinder, delay, or defraud creditors.

If passed, this joint resolution would be on the November 1998 ballot.

This House Joint Resolution would have a fiscal impact on the Department of State.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The Florida Constitution, Article X, Section 4, provides wide protection for homestead property. Unlimited value in homesteaded real property is exempt from creditors, limited to one-half acre within a municipality or 160 acres outside of a municipality.

Generally, the perception is that Florida's exemption law is susceptible to abuse. Newspaper articles frequently address homestead abuse in the headlines in major Florida newspapers and the associated press. See, e.g. Catherine Wilson, Associated Press, *Rich Man, Poor Man: Millionaires Find Shelter in State Bankruptcy Laws; Man Can Keep Millions*, Sun Sentinel, Dec. 28, 1993, 1D; Associated Press, *Man Can Keep Millions, Forget Debts: Big Lotto Winner Is Protected by Florida's Bankruptcy Law*, Miami Herald, May 8, 1993, 1B. Similarly, the Florida Bar Journal frequently addresses the legal concerns associated with utilizing the homestead exemption. See R. Wade Wetherington, Eleventh Hour Conversions: A Journey Into the Labyrinth of Prebankruptcy Planning, Fla. B.J., Jan. 1995, 18.

However, even in circumstances where a debtor's acquisition of homestead property in Florida is alleged to have been made with the sole intent to defraud creditors, the constitutional protection prevents attachment of homestead property. In Bank Leumi Trust Co. Of New York v. Lang, 898 F. Supp. 883, (S.D. Fla. 1995) the federal district court wrestled with the fact that the evidence showed that the defendants intentionally had acquired homestead property in Florida solely to take advantage of the homestead provisions; however, because of the present provisions in the Florida Constitution, the property remained exempt from creditors.

Bankruptcy courts seldomly permit creditors who challenge a debtor's conversion of non-exempt assets to exempt assets to attach homestead property. In re: Popek, 188 B.R. 701 (S.D. Fla. 1995); In re: Lane, 190 B.R. 125 (S.D. Fla. 1995); In re: Clements, 194 B.R. 923 (M.D. Fla. 1996); but see In re: Thomas, 172 B.R. 673 (M.D. Fla. 1994) (concluding that where debtors sold a non-exempt automobile (free of liens) for \$6,000 two days before filing for bankruptcy and after meeting with a bankruptcy attorney, those proceeds used to pay down mortgage in homestead property would not be exempt from creditors).

Sections 222.29 and 222.30, Florida Statutes, were enacted to prohibit conversion of non-exempt property by a debtor with the intent to delay, hinder, or defraud creditors. Section 222.29, Florida Statutes, provides that an exemption from attachment, garnishment, or legal process is not effective if it results from a fraudulent transfer or conveyance as provided in chapter 726, Florida Statutes. Chapter 726, Florida Statutes, defines transfers and those instances when a transfer is presumed to be fraudulent. Section 726.102(2), Florida Statutes, provides that the definition of "assets" subject to chapter 726, Florida Statutes, excludes exempt property.

B. EFFECT OF PROPOSED CHANGES:

The joint resolution will amend Section 4 of Article X of the State Constitution to remove the homestead protection for non-exempt assets that are intentionally converted to homestead property to "hinder, delay, or defraud creditors." If the joint resolution is adopted and passed by the voters, homestead property, or that portion thereof, which is intentionally acquired to defraud creditors will no longer be exempt. Additionally, where property has been improved or where the equity value of the property has been increased by the prepayment or mortgage debt with the intent to hinder, delay, or defraud creditors, the amount of the improvement or increase in equity value will no longer be exempt.

Ballot Requirements

Section 101.161(1), Florida Statutes, requires the substance of the amendment, in clear and unambiguous language, be followed by the word "yes" and the word "no" so that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. Although this resolution does not contain the requisite "yes" and "no" boxes, the ballot language is styled in a manner consistent with placement of "yes" and "no" choices on the actual ballot. Additionally, the proposed ballot language appears to meet the requirement that the explanatory statement not exceed 75 words in length and the ballot title, by which the measure is commonly referred to, not exceed 15 words in length. According to Advisory Opinion to the Attorney General Re Casino Authorization, Taxation, and Regulation, 656 So. 2d 466 (Fla. 1995), section 101.161, Florida Statutes, "requires a title and summary that are 'accurate and informative,' and that '[t]he summary must give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots."

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Although creditors presently have the right to challenge conversions of non-exempt property to exempt homestead property, the suits are generally unsuccessful. Litigation may increase as creditors become more successful.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

None.

(2) what is the cost of such responsibility at the new level/agency?

None.

(3) how is the new agency accountable to the people governed?

None.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

None. The resolution would amend Section 4, Article X of the Florida Constitution.

E. SECTION-BY-SECTION RESEARCH:

See B. EFFECT OF PROPOSED CHANGES.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

1. Recurring Effects:

N/A

2. Long Run Effects Other Than Normal Growth:

N/A

3. Total Revenues and Expenditures:

N/A

C. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

The Division of Elections estimates that the total cost to advertise the proposed constitutional amendment twice in a newspaper of general circulation in each county prior to the 1998 general election is \$35,000.

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

D. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

To some extent, creditors will be benefited if debtors are not permitted to intentionally place non-exempt assets in homestead property.

3. Effects on Competition, Private Enterprise and Employment Markets:

Creditors will be able to attach property from debtors who are using the homestead exemption to defraud creditors.

E. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The mandates provision does not apply to joint resolutions to amend the Florida constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The mandates provision does not apply to joint resolutions to amend the Florida constitution.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The mandates provision does not apply to joint resolutions to amend the Florida constitution.

V. COMMENTS:

Without specific definition, the definition of "actual intent to hinder, delay or defraud" appears unclear and may create litigation. Section 222.30(2), Florida Statutes, refers to the intent to "hinder, delay or defraud," but does not define the term. Section 726.105, Florida Statutes, uses the same terminology without definition and lists the factors to be considered in determining actual intent.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Real Property & Probate passed this bill with one amendment which was incorporated into the committee substitute.

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The amendment clarified that bill to include that improvement to the property or prepayment of mortgage debt, which would increase the equity value of homestead, would no longer be exempt if acquired with the intent to hinder, delay or defraud creditors.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

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