A Foreign Debtor who Lacks Permanent Residence in the U.S. may Qualify for Florida’s Homestead Exemption

Jenna Kirkland

Follow this and additional works at: https://scholarship.law.stjohns.edu/bankruptcy_research_library

Part of the Bankruptcy Law Commons
A Foreign Debtor who Lacks Permanent Residence in the U.S. may Qualify for Florida’s Homestead Exemption

Jenna Kirkland, J.D. Candidate 2023

Cite as: A Foreign Debtor who Lacks Permanent Residence in the U.S. may Qualify for Florida’s Homestead Exemption, 14 St. John’s Bankr. Research Libr. No. 16 (2022).

Introduction

The home has special significance under Florida law, as public policy favors property ownership, citizen independence, and preserving a home where a family can be sheltered and “live beyond the reach of economic misfortune.” Generally, once an individual files for bankruptcy, all property of the debtor becomes property of the estate. However, Section 522 of title 11 of the United States Code (“Bankruptcy Code”) allows a debtor to exempt certain property from the estate. The Bankruptcy Code permits states to opt out of the federal exemption scheme provided. Florida is one of the states that has opted out, therefore the exemptions are dictated by Florida state law. The homestead exemption in Florida is derived from its constitution, which provides that a debtor’s homestead is protected from forced sale.

---

4 In re Brown, 165 B.R. at 513
5 Id.
Florida courts have developed a two-part test to determine whether a homeowner may receive the benefit of the homestead exemption.\(^7\) Homeowners seeking to qualify must meet both an objective and subjective test. The objective test provides that the homeowner must actually use and occupy the home. The subjective test provides that the homeowner must express an actual intent to live permanently in the home.

An issue that frequently arises when the homestead exemption is litigated is whether a foreign debtor can meet the subjective prong of the homestead exemption test. Critical to the analysis of the subjective prong is the notion of intent. A foreign debtor can prove intent to permanently reside in a home when he has family members residing there who are permanent United States residents, even if he is personally not residing there. Thus, it is necessary to define the term “family.” Although it is clear that minor children are considered family, it is less clear if having an adult child in the home would allow the property to qualify for the exemption.

This memorandum explores under what circumstances a foreign debtor can qualify for the Florida homestead exemption. Part I examines Florida’s homestead law generally and the legal standards courts use to determine eligibility. Part II focuses on the disagreement among the courts regarding whether a foreign debtor can qualify for the exemption and analyzes whether adult children are considered “family” for purposes of qualifying for the homestead exemption.

I. The Standards for Determining Eligibility for Homestead Exemption

The homestead exemption should be “liberally construed in the interest of protecting the family home.”\(^8\) However, courts have cautioned not to construe the exemption so liberally as to make it an instrument of fraud or an imposition on creditors.\(^9\) The burden of proof is on the

---

\(^8\) Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018, 1020 (Fla. 2001).
\(^9\) Id.
objecting party to make a strong claim that the debtor is not entitled to the claimed homestead.\textsuperscript{10} A debtor loses his constitutional exemption if the claim falls into one of the three enumerated exceptions: “(1) the payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement or repair thereof; or (3) obligations contracted for house, field or other labor performed on the reality.”\textsuperscript{11} Exceptions to the homestead exemption are strictly construed.\textsuperscript{12}

A homestead is established “where the owner of property manifests the intention to occupy the property as a home and does not otherwise act inconstantly with that intent.”\textsuperscript{13} Homeowners seeking to qualify for the homestead exemption must meet both an objective and subjective test.\textsuperscript{14} The objective test is satisfied if the owner actually uses and occupies the home.\textsuperscript{15} However, continuous uninterrupted presence is not required and preparation for immediate occupancy may be sufficient to establish actual use.\textsuperscript{16} The subjective test is satisfied if the homeowner expresses an actual intent to live permanently in the home.\textsuperscript{17}

Although there is no specific occupancy period required to qualify for the homestead exemption, courts have typically held that vacation homes are not considered homesteads for the purpose of the exemption, as vacation homes do not comport with the primary purpose of the homestead exemption, which is assisting the debtor “in keeping a roof over his head” and preserving a debtor’s access to property that is “essential to life and livelihood.”\textsuperscript{18}

II. Florida’s Application of the Homestead Exemption to Foreign Debtors

\textsuperscript{10} \textit{In re} Franzese, 383 B.R. 197, 202-03 (Bankr. M.D. Fla. 2008).
\textsuperscript{12} \textit{Id}.
\textsuperscript{13} \textit{In re} Brown, 165 B.R. at 513.
\textsuperscript{14} \textit{In re} Franzese, 383 B.R. at 203
\textsuperscript{15} \textit{Id}.
\textsuperscript{16} \textit{In re} Brown, 165 B.R. at 514
\textsuperscript{17} \textit{In re} Franzese, 383 B.R. at 203.
Florida courts disagree on whether foreign debtors can claim the homestead exemption under Florida law. Specifically, courts disagree on whether foreign debtors can meet the subjective prong of the two-part test.\(^{19}\)

\textit{A. Foreign debtors cannot form a subjective intent to live in the U.S. forever}

Some courts have found that foreign debtors cannot meet the subjective prong of the homestead exemption because they cannot permanently live in the U.S. unless they have obtained a permanent visa or “green card” as of the of the bankruptcy petition date.\(^{20}\) Due to their temporary legal status, foreign debtors cannot form the requisite subjective intent to live in their home permanently.\(^{21}\) In \textit{In re Fodor}, the Bankruptcy court held that to qualify for the Florida homestead exemption, a debtor must be a permanent resident of the state and intend to make the property his permanent residence.\(^{22}\) The debtor in \textit{Fodor} was unable to satisfy the residency requirement, as his application for permanent resident status was pending when he filed his bankruptcy petition.\(^{23}\)

Similarly, a tourist who does not hold a permanent visa cannot be a lawful permanent resident of the state and is therefore incapable of declaring a home in the state as his permanent residence.\(^{24}\) A citizen and former resident of a foreign country who is in the United States merely through a temporary visa has no assurance that he can continue to reside in good faith for any

\(^{19}\) \textit{In re} De Bauer, 628 B.R. at 357.
\(^{20}\) \textit{In re} Fodor, 339 B.R. 519, 521 (Bankr. M.D. Fla. 2006); \textit{In re} Cooke, 412 So. 2d 340, 342 (Fla. 1982); \textit{In re} Walter, 230 B.R. 200, 204 (Bankr. S.D. Fla. 1999) (holding that Canadian citizens without permanent visas are not entitled to claim their vessel, or any other property, as a homestead).
\(^{21}\) \textit{In re} Fodor, 339 B.R. at 520.
\(^{22}\) \textit{Id.} at 520.
\(^{23}\) \textit{Id.} at 523.
\(^{24}\) \textit{In re} Cooke, 412 So. 2d at 342.
fixed period in this country. Therefore, the foreign debtor cannot declare a permanent residence, as he does not have the legal ability to determine his future status for himself.

Due to a foreign debtor’s lack of permanent residency in the United States, these courts have held that the debtor is incapable of having the requisite intent to live permanently in their home and is therefore unable to qualify for the Florida homestead exemption.

**B. The subjective prong may be satisfied by family members residing in the home**

Other courts have extended the right to claim Florida’s homestead exemption when the foreign debtor has family members residing at the claimed homestead who have permanent residency in the United States. For the debtor to formulate an actual subjective intent to permanently reside in his or her home, “at least one family member living in the home must demonstrate sufficient credible attempts to gain legal status as a permanent resident in the United States.”

A formal legal request for permanent residency is required. In *In re De Bauer*, although the debtor was not herself a permanent resident of the United States, she was able to claim the Florida homestead exemption by relying on the residency status of her adult daughter and son-in-law, who both resided with her. The debtor’s daughter demonstrated credible attempts to gain permanent residency by both enrolling in the Deferred Action for Childhood Arrivals (“DACA”) program.

---

25 *Id.* at 343 (citing Juarrero v. McNayr, 157 So. 2d 79, 81 (Fla. 1963)).
26 *In re Cooke*, 412 So. 2d at 343 (citing *Juarrero*, 157 So. 2d at 81).
27 *In re De Bauer*, 628 B.R. at 359; *Grisolia v. Pfeffer*, 77 So. 3d 732, 736 (Fla. Dist. Ct. App. 2011) (allowing a family to claim homestead protection based on the temporary visa held by the homeowners and the fact that their son was a U.S. citizen who lived in the home); *In re Oyola*, 571 B.R. 874, 880 (Bankr. M.D. Fla. 2017) (holding that the foreign debtor qualified for the homestead exemption based on the fact she was living with her adult daughter, who was a permanent resident, and her minor granddaughter).
29 *Id.*
30 *Id.*
and applying for a “green card.”\textsuperscript{31} Thus, the debtor’s daughter could satisfy the subjective prong for the exemption on the debtor’s behalf.\textsuperscript{32}

\textbf{C. Discord on whether adult children qualify as family to satisfy the subjective prong}

For foreign debtors, determining what individuals constitute as “family” is crucial, as these family members are the vehicle to form the requisite intent the debtor needs to qualify for the subjective prong of the homestead exemption. There is disagreement among the courts on whether the homestead’s protection of a family residence extends to property occupied by the owner and her adult child, as opposed to only permitting protection when the child is a minor. The definition of family arises in the context of the subjective prong of the homestead exemption test because the requisite intent to make the home a permanent residence may be satisfied if the homeowner intended to make his property his family’s permanent residence.\textsuperscript{33}

\textit{i. Test for family}

For purposes of the homestead exemption, the test for family is: (1) a legal duty to maintain arising out of the relationship and (2) a continuing communal living by at least two individuals under circumstances where one is regarded as the person in charge.\textsuperscript{34} The first prong of the test is referred to as “family in law,” while the second prong is considered “family in fact.”\textsuperscript{35} Under this test, the “head of the family must not only be obligated to support his family by law, but also must actually support such dependents.”\textsuperscript{36}

\textit{ii. The minority view refuses to recognize adult children as family}

\begin{itemize}
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} In re Cooke, 412 So. 2d at 341; Grisolia, 77 So. 3d at 734.
\item \textsuperscript{34} In re Oyola, 571 B.R. at 878.
\item \textsuperscript{35} Id. at 879.
\item \textsuperscript{36} Id.
\end{itemize}
While recognizing that the homestead exemption protects property occupied by the owner’s family, some courts have refused to recognize adult children as family. The rationale is that a parent’s legal duty to support a child ends when the child reaches the age of majority unless the child is physically or mentally disabled. Because the legal duty to support ends when the child reaches the age of majority, “family in law,” the first prong of the test, is not met. In In re Fowler, the debtor claimed as homestead two adjoining parcels, one occupied by her and the other by her adult daughter. The court refused to extend the homestead exemption to the daughter’s parcel and only permitted the exemption of the parcel the debtor herself lived in. The court reasoned that although the homestead exemption should be construed liberally, the exemption is still limited to the residence of the owner or the owner’s family. Because the daughter was an adult and the debtor had no legal duty to support her, she could not be considered family for purposes of the exemption.

iii. The majority of courts consider adult children to be family

Other courts have read the test for family as disjunctive, holding that the test can be met either singularly or in combination. Under this standard, even if there is no legal duty to support the child because the child reached the age of majority (“family in law”), the court may still find continuing communal living by at least two individuals under circumstances where one is regarded as the person in charge (“family in fact”). “Family in fact” arises out of a moral, 

37 In re Wilson, 393 B.R. 778, 783 (Bankr. S.D. Fla. 2008).
38 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 In re Oyola, 571 B.R at 878.
45 Id.
rather than legal, duty to support. The \textit{Oyola} court recognized that reading the test in the disjunctive is consistent with how Florida courts have since treated the homestead exemption, as numerous Florida courts have explained that the Florida homestead law recognizes both “family in law” and “family in fact.”

For example, in \textit{In re Oyola}, although there was no “family in law” because the foreign debtor’s daughter had reached the age of majority, the court concluded that there was a “family in fact,” as the debtor was living with her adult daughter and minor granddaughter and both the daughter and granddaughter recognized the debtor as the person in charge. Therefore, even though the debtor herself was not a permanent resident of the United States and could not legally intend to reside here permanently, she was able to satisfy the requisite intent of the subjective prong due to the formation of a “family in fact.”

\textbf{Conclusion}

There is disagreement among Florida courts on whether a foreign debtor may claim the protection of the homestead exemption. Courts that have held that a foreign debtor cannot claim the exemption have done so on the grounds that foreign debtors, due to their lack of permanent residency, cannot formulate the requisite intent to reside in the United States indefinitely. However, there is a recent trend toward extending the exemption to foreign debtors, relying on the residency status of the debtor’s family living in the home. With respect to the disagreement over whether adult children should be recognized as family for homestead purposes, the majority of the case law points to adult children being recognized. In the last ten years, all but two courts have extended the homestead exemption to property occupied by a debtor’s adult child.

\textsuperscript{46} \textit{Id.} at 879.
\textsuperscript{47} \textit{Id.;} Flannery \textit{v.} Green, 482 So. 2d 400, 402 (Fla. Dist. Ct. App. 1985).
\textsuperscript{48} 571 B.R. at 880.