

Read Carefully Before You Sign: You Could Waive Your Exemptions

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Scenario: Suppose an individual comes into your office for an initial consultation, stating that in order to obtain a loan for their business they had to sign a personal guaranty. They tell you that the business defaulted on the loan and now the individual is being sued on the personal guaranty. During your cursory review of the personal guaranty you note that the document provides that the individual waived the Florida wage exemption under Fla. Stat. § 222.11 and the Florida homestead exemption under Fla. Const. Art. 10 § 4(a)(1). Are such waivers enforceable?

In Florida, generally speaking, any member of the household who earns more than 50% of the household income is deemed the “head of household.” Fla. Stat. § 222.11 sets forth what is commonly known as the “Florida wage exemption” and it provides that a head of household’s wages are typically exempt from garnishment and creditor levy.

However, according to the Supreme Court of Florida in Chames v. DeMayo, 972 So.2d 850, 861 (Fla. 2007), state constitutional rights may be waived, provided that the waiver is knowing, intelligent and voluntary. Thus, in our scenario, if the individual voluntarily signed the personal guaranty knowing that they were waiving the Florida wage exemption, then such waiver is enforceable. What does this mean? Simply stated, if the creditor suing the individual on the personal guaranty obtains a judgment against the individual, then that judgment creditor can garnish the individual's wages in order to satisfy the judgment even if the individual is the head of household. The maximum allowable garnishment amount is governed by statute. 15 U.S.C. § 1673(a)(1) provides that the maximum allowable garnishment amount is 25% of one's weekly disposable earnings. “Disposable earnings” is defined as “that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.” 11 U.S.C. § 1672(b). Thus, for example, if the individual in our scenario has a monthly income of \$10,000.00, then their weekly income is approximately \$2,500.00 (based on a 4-week month); according to 15 U.S.C. § 1673(a)(1), 25% of the individual's weekly disposable earnings is the maximum amount that may be garnished, which in our example would be \$625.00 per week less taxes, as taxes are required by law to be withheld.

With respect to homestead property in Florida, courts look at a number of factors to determine whether a homestead applicant's property in fact their homestead, including but not limited to: 1) formal declarations of the applicant; 2) informal statements of the applicant; 3) where the applicant is employed; 4) where the applicant is registered to vote; 5) the address on the applicant’s driver’s license; 6) where the applicant’s license tag on his or her motor vehicle is issued; and 7) the address listed on the applicant’s federal income tax returns. *See*, Fla. Stat. § 196.015. Moreover, according to the applicable case law, actual occupancy of the home by the homestead applicant with an intention to remain in the home are essential elements of the homestead right. However, the applicant does not have to have conclusive intent to remain in the house forever. In re Van Meter's Estate, 214 So.2d 639, 643 (Fla. 2d DCA 1968); *see also*, Engel v. Engel, 97 So.2d 140, 140-2 (Fla. 2d DCA 1957).

The “Florida homestead exemption” is set forth in Fla. Const. Art. 10 § 4(a)(1). It provides if one’s home is located outside a municipality, then the homestead property is exempt

to the extent of 160 acres of contiguous land; and if one's home is located within a municipality, then the homestead property exemption is limited to one-half acre. Thus, pursuant to the Florida homestead exemption, a judgment creditor cannot foreclose a judgment against one's homestead property. Since this is a matter of Florida constitutional law, one would think that the Florida homestead exemption could not be waived. That is not the case.

As stated above, state constitutional rights may be waived, provided that the waiver is knowing, intelligent and voluntary. *See, Chames*, 972 So.2d at 861. Thus, in our scenario, if the individual voluntarily signed the personal guaranty knowing that they were waiving the Florida homestead exemption, then such waiver is enforceable. However, importantly, according to the Supreme Court of Florida in *Chames*, "a waiver of the homestead exemption in an unsecured agreement is unenforceable." *Chames*, 972 So.2d at 853. Therefore, with respect to our scenario, it would be necessary for the attorney to conduct an analysis of the personal guaranty signed by the individual to determine whether it is an unsecured agreement. Provided that the personal guaranty is an unsecured agreement, the homestead waiver would be unenforceable.

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