

Case comment

Geraci v. Sunstar, 2012 WL 2401793 (Fla. 2d DCA June 27, 2012), 37 FLW D1545.

Facts:

Ms. Geraci died owning and permanently residing in a condominium unit built on land subject initially to a 100 year land lease which, at the time of her death, had an unexpired term of approximately 75 years. Her estate was insolvent and creditors included the Agency for Health Care Administration and Pinellas County Emergency Medical Services Authority. Judge Laughlin, of the Sixth Circuit, Pinellas County, decided the condominium did not qualify for homestead status under article X, s. 4(a) of the Florida Constitution since the owner did not own an interest in land, a leasehold not being an interest in the land for purposes of article X, s. 4.

The Second District Court of Appeal, correctly stated the issue as “whether a condominium that is subject to a long-term leasehold may qualify as a homestead [under article X, s. 4(a) and (b), Fla.Const.] to be protected from forced sale to pay the creditors of the deceased owner.” In a unanimous opinion the court reversed the trial court and answered the stated issue in the affirmative.

Analysis

I disagree with the Second District’s opinion in *Geraci v. Sunstar*.

In addition to the result, which I think is simply wrong (possibly caused by the fact that only the appellant appeared in the appellate proceeding), I disagree with the two principal holding by the court on which the decision is based.

The two holdings which are fundamental error in *Geraci* are:

1. The considerations in determining whether a residence is benefitted by the protections of article X, s. 4(a)(1) and (b) are different from the considerations in determining whether that residence is burdened by the limitations on devise in article X, s. 4(c).
2. A residence located on leased land, where the lease had an initial term of 100 years and a remaining term of 75 years, is entitled to protection under article X, s. 4(a)(1) and (b).

On the first matter, the *Geraci* court needed to distinguish its facts so as to avoid the application of *In re Estate of Wartels*, 357 So.2d 708 (Fla.1978), which would compel an opposite result. As explained in the *Geraci* opinion, *Wartels* holds “that a co-op is not a homestead for purposes of descent because it is not ‘an interest in realty.’ The court notes in *Geraci* “. . . the homestead protection at issue in this case is not that of descent and devise [in article X, section 4(c) as it was in *Wartels*]. . . . Instead, this case involves the application of the homestead exemption from forced sale as set forth in article X, section 4(a)(1), to satisfy the

appellee creditors' claims.” Impliedly, the court ruled that the lifetime exemption under s. 4(a) and its inurement under s. 4(b) does not require that the homesteader own an interest in the realty, while s. 4(c) of that same article does.

This attempt to distinguish existing binding precedent is unavailing.

In fact, the same definition and limitation that define homestead for the creditor’s exemption (in s. 4(a)(1)) define homestead for purposes of all of s. 4, including the limitation on devise found in s. 4(c). This is settled law.

In *Holden v. Gardiner*, 420 So.2d 1082, 1085 (Fla. 1982), on this subject, the Supreme Court said:

It is important to read section 4 in its entirety. Subparagraph (a) provides that the homestead and personal property shall be exempt from forced sale and contains the requirement that the property be “owned by the head of a family.” Subparagraph (b) provides that “these exemptions,” referring to homestead rights in general, shall inure to the surviving spouse or heirs of the owner who is a head of family. Subparagraph (c), the provision in issue in this proceeding, begins with the phrase, “The homestead shall not be subject to devise” We believe that this refers to homestead as it is otherwise used in section 4. To adopt the construction suggested by the petitioner would create two distinct definitions of homestead; one definition under subparagraphs (a) and (b) of section 4, and another definition under subparagraph (c) concerning the devise of the homestead.

See also *Phillips v. Hirshon*, 958 So.2d 425 (Fla. 3d DCA 2007), *review dismissed*, *Levine v. Hirshon*, 980 So.2d 1053 (Fla. 2008), where the court similarly held:

A cursory reading of Article X, section 4 reveals that while the constitutional benefits of the forced sale exemption and devise and descent restriction are voiced in different subsections of Article X, section 4--compare Article X, § 4(a); (b) (forced sale) with Article X, § 4(c) (devise and descent)--these protections have in common Article X, section 4(a)(1), which defines the physical extent of the benefit if allowable.

It is clear that the *Geraci* court was unaware that it could not differentiate the definition of homestead under any part of article X, s. 4. That differentiation was their basis for ruling contrary to the holdings in *Wartels* and *Phillips*. The result is that the *Geraci* court failed to distinguish its issue from the issue in *Wartels*, and *Wartels* is therefore controlling.

A second fatal error in the *Geraci* court’s analysis of the law is its attempt to find article X, s. 4 homestead on a residence “that is subject to a long-term leasehold.” *Geraci* is the first state court case that has held a long term lease can support homestead status under article X, s. 4.

The constitutional definition of article X, s. 4 homestead is found in s. 4(a). *Holden and Phillips, supra*. (It is also supplemented by case law interpretation.) The homestead must be “owned” (s. 4(a)), it must be “contiguous land” limited in area (s. 4(a)(1)) and it must be the permanent residence of the “owner or the owner’s family” (s. 4(a)(1)). s. 4(a)(1), in fact the entire article X, s. 4, pertains to real property, except s. 4(a)(2) which specifically pertains to “personal property”. Under s. 4(a)(2), any part of homestead that is personal property is limited in value to \$1,000 as provided in s. 4(a)(2). It must be determined, therefore, whether the “ownership” of the claimed residence is an interest in real property or is personalty.

The Florida Supreme Court in *Wartels*, found a co-operative apartment was not homestead because a co-operative apartment was not an interest in real property.

Neither the Constitution nor the statutes define a homestead for the purpose of devise and descent. The words contained in Article X, Section 4(a)(1) "to the extent of one hundred sixty acres of contiguous land" and the words "if located within a municipality, to the extent of one-half acre of contiguous land" have been repeatedly defined to mean that homestead property must consist of an interest in realty *Pasco v. Harley*, 73 Fla. 819, 75 So. 30 (1917); *Hill v. First National Bank*, 73 Fla. 1092, 75 So. 614 (1917); *Milton v. Milton*, 63 Fla. 533, 58 So. 718 (1912). (Emphasis added.)

Wartels at page 709.

At common law (which applies pursuant to F.S. 2.01 unless changed by statute applicable to the particular matter), a lease, even one for a long term, is not an interest in real property; rather it is a chattel, generally known as a chattel real because of its relationship to the land.

It has been long recognized in this state that, at common law, a leasehold interest was considered as a chattel real, that is, a species of personal property, and, in the absence of a statute changing the common law rule, the leasehold was to be classified as personalty, not realty. See *Williams v. Jones*, 326 So.2d 425, 433 (Fla.1975), appeal dismissed, 429 U.S. 803, 97 S.Ct. 34, 50 L.Ed.2d 63 (1976); *Thalheimer v. Tischler*, 55 Fla. 796, 808, 46 So. 514, 518 (Fla.1908); *Miller v. Higgs*, 468 So.2d 371, 376 (Fla. 1st DCA), pet. for review denied, 479 So.2d 117 (Fla.1985); *Oliver v. Mercaldi*, 103 So.2d 665, 668 (Fla. 2d DCA 1958). It is also clear that the common law shall have continuing force and effect where the Legislature has not acted to change it. See § 2.01, Fla.Stat. (1983).

Despite Aurora's compelling argument that a lessee's interest in a long-term lease is for practical purposes substantially the same as the fee simple ownership of the real property, see C.J. Moynihan, *Introduction to the Law of Real Property* 63 (1962), we have not been directed to, and have not found, any Florida statute relating to ad valorem taxation which can be fairly read to classify leases of

privately owned property as real property. Indeed, the statutory definition of “real property” for purposes of ad valorem taxation “land, building, fixtures and all other improvements to land,” § 192.001(12), Fla.Stat. (1983), cuts against Aurora's contention that “real property” means, as well, a “leasehold interest in real property.” (Footnotes omitted.)

Aurora Group, Ltd. v. Department of Revenue, 487 So.2d 1132 (Fla. 3d DCA1986).

The homestead tax exemption (common homestead) under article VII s. 6, of the Florida Constitution of 1968 specifically allows a homestead tax exemption on a leasehold initially in excess of ninety-eight years. This contributes to confusion about leasehold interests as homestead under article X, s. 4.

As is said in 17 Cyc. 953: ‘At common law a leasehold interest in lands, no matter for what term of years, was a chattel, and in the absence of a statute to the contrary may be levied upon and sold as personal property.’ Also see authorities there cited, as well as text and authorities cited on page 954. We have no statute in this state changing the common-law rule in this respect, and we have no doubt that, if Tischler's interest in the lot was a leasehold interest only, it was subject to sale under an execution.

Thalheimer v. Tischler, 55 Fla. 796, 46 So. 514, 518 (Fla. 1908)

In *Thalmeimer*, the court ultimately found Tischler's interest to be an equitable interest in real property because his lease included an option to purchase, and a right to be reimbursed for improvements placed on the property during the lease term, thereby creating an equitable interest in the lot.

In Florida, there are several examples of where the character of a leasehold interest has been changed by statute, constitutional provision or court decision from personalty to be an interest in land. This is most common in documentary stamp tax and real property taxation (or exemption) statutes where the tenant's rights under the lease have been deemed sufficiently equivalent to full ownership during the lease term that documentary stamp tax is imposed upon the initial transfer of those rights.

A lease has been defined as “a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own” and ‘it passes a present interest in the land for the period specified, *Chandler et al. v. Hart et al.*, 161 Cal. 405, 119 P. 516, 519, Ann.Cas.1913B, 1094, a definition which was approved by the Supreme Court of Ohio in *Brenner et al. v. Spiegle*, 116 Ohio St. 631, 157 N.E. 491. At common law estates for years were classified as chattels real and regarded as personal property. *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822. Of similar import was the holding in *Townsend v. Boyd*, 217

Pa. 386, 66 A. 1099, 12, L.R.A.,N.S., 1148. The Supreme Court of Indiana in *Watson v. Penn*, 108 Ind. 21, 8 N.E. 636, 58 Am.Rep. 26, held that the part of a lease not completed was a chattel real.

De Vore v. Lee, 158 Fla. 608, 610, 30 So.2d 924, 926 (Fla. 1947).

Prior to January 1, 1969, a cooperative apartment could not receive a real estate tax homestead exemption because it was not, for this purpose, an interest in real property. See FL Op.Atty.Gen., 066-38, April 14, 1966 (A person occupying a parcel of property under a 99 year lease does not have sufficient interest in real estate to be eligible to qualify as a freeholder.) On that date, F.S. 196.041, which implemented the provisions of article VII, s. 6 of the new Florida Constitution, became effective which defined the cooperative form of ownership as coming within ownership that qualified for the homestead tax exemption.

The writer is cognizant of the common thread in article X, s. 4 homestead cases that “it is clear that the homestead provision is to be liberally construed in favor of maintaining the homestead property. (citations omitted)” *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997). Even considering that, the finding by the *Geraci* court that a residence on leased land could be homestead under article X, s. 4, was simply erroneous.

The appellant here was not without precedent that could be cited in support of reversal of the trial court opinion. However, all of these cases must yield to the last pronouncement by the court in *Wartels, supra*, ((1978) “homestead property must consist of an interest in realty”) and *Holden, supra*, ((1982) “To adopt the construction suggested by the petitioner would create two distinct definitions of homestead; one definition under subparagraphs (a) and (b) of section 4, and another definition under subparagraph (c) concerning the devise of the homestead”) which have impliedly, if not explicitly, overruled earlier precedent, and must prevail over lower court statements to the contrary.”)

It has long been held that a person need not have a fee simple ownership to support that person’s claim of article X, s. 4 homestead. *Bessemer Properties v. Gamble*, 158 Fla. 38; 27 So. 2d 832 (Fla. 1946),

Several Florida bankruptcy cases have held that a creditor’s homestead exemption may exist on a residence on leased land. *Geraci* relies on these cases to support its holding. *In re Alexander*, 346 B .R. 546, 549–50 (Bankr. M.D.Fla. 2006); *In re Dean*, 177 B.R. 727, 729 (Bankr. S.D.Fla. 1995); *In re McAtee*, 154 B.R. 346, 348 (Bankr.N.D.Fla.1993). In *Alexander*, the homestead was titled in a revocable trust and the bankruptcy court found that to be an equitable interest sufficient to support the claim of homestead. In *Dean* and *McAtee*, the homestead involved a co-operative apartment (including a leasehold) and a residence built directly on an initial term 99-year leasehold on public lands. *Dean* relied on *Southern Walls v. Stillwell, infra* as authority. See below for discussion of this case. *McAtee* relied for authority on F.S. 196.199(7) which directs that real property belonging to a governmental agency and leased

by it for an original term of 100 years or more, shall be deemed to be owned by the lessee for purposes of its taxation.

Also see The Fund TN 19.01.03 which, based on these cases, requires joinder in a lease assignment of a residence by the spouse of the lessee, if married, if the property would otherwise be homestead.

In the distant past, the Supreme Court used expansive language (more so that was necessary to the determination of the case) to describe the required interest that must be held by the homesteader. “But, even if she merely retained possession of the land, it is of sufficient value to her to have it protected under the homestead law, and it is of no concern whatever to the creditor that another has the superior title.” *Hill v. First Nat. Bank*, 73 Fla. 1092, 75 So. 614 (Fla. 1917). This was a fact specific case with unusual facts; however, the case is typically cited for the proposition that a homestead can exist on a tenancy in common interest.

Similarly, in *Bessemer Properties v. Gamble*, 158 Fla. 38; 27 So. 2d 832 (Fla. 1946), the court said “. . . a homestead exemption extends to any right or interest the head of a family may hold in land.” The case ultimately ruled that where a wife owned legal title, but her husband constructed a home (for the family) on the property, resided there and maintained the property and paid taxes and insurance, he had sufficient equitable interest to sustain homestead status.

Menendez v. Rodriguez, 106 Fla. 214, 221, 143 So. 223, 226 (Fla. 1932), Whitfield concurring, stated:

The Constitution limits the homestead land area that may be exempted, but it does not define or limit the estates in land to which homestead exemption may apply; therefore, in the absence of controlling provisions or principles of law to the contrary, the exemptions allowed by section 1, article 10, may attach to any estate in land owned by the head of a family residing in this state, whether it is a freehold or less estate, if the land does not exceed the designated area and it is in fact the family home place.

The holding in *Menendez* determined that entireties homestead was exempt from joint creditors under (now) article X, s. 4(a).

Finally, an argument might be made that a leasehold could form the basis of a homestead based on *Southern Walls, Inc. v. Stilwell Corp.*, 810 So.2d 566 (Fla. 5th DCA 2002). *Southern Walls* was a creditor’ case where the creditor attempted to levy on Mr. Stilwell’s cooperative apartment. He defended that the apartment was his permanent residence and thereby protected under article X, s. 4(a) of the Florida Constitution the same as a condominium is protected. Faced with *Wartels* that had decided a co-op unit was not an interest in real property on nearly identical facts, the 5th DCA said

Under the cooperative form of ownership, the owner receives shares in the cooperation and a long term lease as evidence of his or her title rather than a deed of conveyance. For purposes of the homestead exemption, we find that this is a distinction without a difference.

At page 572.

The author respectfully disagrees. It took a statutory enactment and a constitutional amendment to make a co-operative unit qualify for the article VII s. 6 homestead tax exemption because a co-up was not an interest in real property. No such constitutional amendment or statute has been adopted related to article X, s. 4 and no court, much less a court of appeal, can make that equitable conversion. *Southern Walls*, like *Geraci*, fly directly in the face of *Wartels* and *Holden*. (See *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) "To allow a District Court of Appeal to overrule controlling precedent . . . would be to create chaos and uncertainty in the judicial forum, particularly at the trial level.) Also see *Phillips*, *supra*. where the 3rd DCA, presented with nearly identical facts with *Southern Walls*, held:

. . . we note that the language of the Florida Supreme Court in *Wartels* is of relatively recent vintage and sweeping in its tone. If we were to exhibit disagreement with *Wartels*--a sentiment that should not be taken from this opinion--we potentially would throw the law of this state into havoc.

(*Phillips*, *supra*, at page 430.)

Finally, F.S. 222.05 allows a homestead exemption from levy and sale for a "dwelling house . . . used as a residence, or modular home" on leased land. One state court case, *Miami Country Day School v. Bakst*, 641 So.2d 467 (Fla 3d DCA 1994), relying on F.S. 222.05, found that a houseboat was exempt from levy as "homestead." The court strained to construe the statutory terms in F.S. 222.05, "dwelling house" and "modular home" on leased land to include a houseboat tied to a leased dock. If this characterization is correct, the exemption under F.S. 222.05 is applicable even though the article X, s. 4(a)(1) exemption is not.

A later bankruptcy opinion addresses in depth the matter of a leasehold interest qualifying as constitutional homestead. This case traces the history of both article X, s. 4 and F.S. 222.05 relating to homesteads on leased, as opposed to owned land.

In 1869, one year after the Constitution of 1868 was ratified, the Florida Legislature adopted Chapter 1,715 as an act of the legislature. Apparently recognizing that a homestead on land that was leased did not qualify for the constitutional homestead exemption for a homestead on land that was owned, the legislature provided that 'a person owning and occupying any dwelling house on land not his own, which he may possess rightfully by lease or otherwise, and

claiming such house as his homestead, is entitled to the exemption of the house from levy and sale.

In re Lisowski, 395 B.R. 771, 775 (Bankr. M.D. Fla. 2008)

That provision became F.S. 222.05 and it protects “[a]ny person owning and occupying any dwelling house . . . used as a residence . . . on land not his or her own . . . and claiming such house . . . as his or her homestead” As the *Lisowski* court observed,:

As described above, the homestead exemption provided by Article X, Section 4(a)(1) of the Florida Constitution applies to improved land or real property owned by a debtor, provided the debtor's residence is situated on the land. Section 222.05 of the Florida Statutes, on the other hand, expressly applies to persons who do not own the land upon which their mobile home is situated.

Since the Constitutional exemption requires land ownership, and the statutory exemption specifically excludes land ownership, the Court finds that the statute does not simply "implement" the Constitutional exemption. On the contrary, the Court finds that the homestead exemption provided by the Florida Constitution is separate and distinct from the exemption provided by § 222.05 of the Florida Statutes.

id. at page 779.

It is clear that F.S. 222.05 would shelter Ms. Ceraci's homestead on leased land during her lifetime. However, upon the death of the homesteader, that shelter ends and the homestead (which is not protected homestead under the definition in F.S. 731.201(33)) becomes an asset in the hands of the personal representative for payment of creditors. F.S. 733.607, 733.608. F.S. 222.05 would also have sheltered Mr. Stilwell's co-op apartment against the claim of Southern Walls, although that opinion never discussed the shelter provided in F.S. 222.05.

Unlike the exemption under article X, s. 4(a), that inures to the spouse and heirs following death in article X, s. 4(b), there is no post-death benefit under F.S. 222.05. Ms. Geraci's estate is liable for her debts, and her homestead on leased land is one of the assets in the hands of the personal representative for that payment.

Conclusion:

In the light of the clear and binding decisions of the Florida Supreme Court in *Wartels* and *Holden v. Gardiner*, and the historical precedent discussed in *Lisowski*, there can be no continuing argument that a leasehold residence meets the definition of owned land in article X, s. 4.

Rohan Kelley

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Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Second District.
Lawrence **GERACI**, Jr., as Personal Representative
of the Estate of Mary J. **GERACI**, Deceased, Appellant,
v.
SUNSTAR EMS, an unregistered fictitious name of
Pinellas County Emergency Medical Services Authority,
and Agency for Health Care Administration,
Appellees.

No. 2D11-1234.
June 27, 2012.

Appeal from the Circuit Court for Pinellas County;
[Lauren C. Laughlin](#), Judge.
[Russell R. Winer](#), St. Petersburg, for Appellant.

No appearance for Appellees.

[SILBERMAN](#), Chief Judge.

***1** Lawrence **Geraci**, Jr., as personal representative of the Estate of Mary J. **Geraci**, seeks review of the order determining that the deceased's condominium is not a "homestead" exempt from forced sale under [article X, section 4 of the Florida Constitution](#). The question before this court is whether a condominium that is subject to a long-term leasehold may qualify as a homestead to be protected from forced sale to pay the creditors of the deceased owner. We answer this question in the affirmative and, therefore, reverse the trial court's order.

The property at issue is a condominium in the "On Top of the World" development in Pinellas County. The trial court determined that the condominium is the subject of a 100-year lease agreement from 1976, and the decedent owned the remaining term on the lease. Upon her death, the appellees filed claims against the decedent's estate as creditors. **Geraci** filed a petition to

determine whether, under [article X, section 4\(a\)-\(b\) of the Florida Constitution](#), the condominium qualified as a homestead and was therefore exempt from a forced sale to pay the creditors' claims. The trial court determined that the condominium did not qualify as a homestead because it is a leasehold and not a fee simple interest in land. **Geraci** challenges this ruling on appeal.

There are three contexts in which the homestead has significance in Florida law: (1) taxation, (2) exemption from forced sale, and (3) descent and devise. [Snyder v. Davis](#), 699 So.2d 999, 1001-02 (Fla.1997). The applicable context for the homestead in this case is the exemption from forced sale, which is set forth in [article X, sections 4\(a\)-\(b\) of the Florida Constitution](#).

Those provisions provide as follows:

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

According to these provisions, a homestead owner's heirs are entitled to claim an exemption from

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its forced sale to pay creditors of the decedent owner's estate. The question in this case is whether the leasehold interest in the condominium qualifies as a "homestead" for purposes of this exemption.

*2 [Article X, section 4\(a\)](#) does not distinguish between the different kinds of ownership interests that are entitled to the homestead exemption against forced sale. [In re Alexander](#), 346 B.R. 546, 549–50 (Bankr.M.D.Fla.2006); [Cutler v. Cutler](#), 994 So.2d 341, 344 (Fla. 3d DCA 2008); [S. Walls, Inc. v. Stilwell Corp.](#), 810 So.2d 566, 571 (Fla. 5th DCA 2002). And the Florida Supreme Court has long since adopted the general rule that a fee simple estate is not necessary to this exemption. See [Bessemer Props., Inc. v. Gamble](#), 27 So.2d 832, 833 (Fla.1946); [Coleman v. Williams](#), 200 So. 207, 209 (Fla.1941). In fact, "any beneficial interest in land" may entitle its owner to the exemption. [Bessemer Props., Inc.](#), 27 So.2d at 833.

In considering the exemption from forced sale, a court must instead "focus on the debtor's intent to make the property his homestead and the debtor's actual use of the property as his principal and primary residence." [In re Dean](#), 177 B.R. 727, 729 (Bankr.S.D.Fla.1995). When a lessee's interest in a leasehold estate includes the right to use and occupy the premises for a long term and the lessee has made the residence his principal and exclusive residence, such an interest is entitled to Florida's homestead exemption from forced sale. [Id.](#) at 729–30; see also [In re McAtee](#), 154 B.R. 346, 348 (Bankr.N.D.Fla.1993) (finding a long-term lease to be subject to the exemption from forced sale because it constituted an interest in real property and was more than a "simple possessory interest"); [S. Walls](#), 810 So.2d at 572 (finding a co-op to be subject to the exemption from forced sale because "a co-op owner owns the unit, pays valuable consideration for it, and has the right to the exclusive use and possession of it for the duration of the lease"). This construction of the homestead exemption from forced sale is consistent with "important public policy considerations such as promoting the stability and welfare of the state by encouraging property ownership and the independence of its citizens by preserving a home where a family may live beyond the reaches of economic misfortune." [In re McAtee](#), 154 B.R. at 347–48.

In this case, the trial court declined to apply the homestead exemption to the condominium based on

its determination that the homestead protection at issue is actually that of descent and devise. The court appeared to recognize that the condominium may qualify as homestead for purposes of the homestead exemption from forced sale but explained that, in the context of descent and devise, the supreme court has held that the property interest must be a fee simple interest in land. See [In re Estate of Wartels](#), 357 So.2d 708, 710 (Fla.1978) (holding that a co-op is not a homestead for purposes of descent because it is not "an interest in realty").

The trial court's decision is erroneous because the homestead protection at issue in this case is not that of descent and devise. [Article X, section 4\(c\)](#) ^{FN1} prohibits the devise of the homestead if the owner is survived by a spouse or minor child. In this case, there is no question of a surviving spouse or minor child's right to prohibit descent or devise. Instead, this case involves the application of the homestead exemption from forced sale as set forth in [article X, section 4\(a\)\(1\)](#), to satisfy the appellee creditors' claims. Cf. [Cutler](#), 994 So.2d at 344 (analyzing whether property held in trust that was devised to an heir constituted homestead property for purposes of determining whether it was protected from forced sale under [article X, section 4\(a\)\(1\)](#)). Thus, [Wartels](#) is inapposite, and the general rule that a fee simple estate is not necessary to the forced sale exemption applies. See [Dean](#), 177 B.R. at 730; [S. Walls](#), 810 So.2d at 572.

[FN1](#). That provision provides as follows:

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

See also §§ 732.401(1) (statutory homestead exemption pertaining to descent), .4015 (statutory homestead exemption pertaining to devise), Fla. Stat. (2009).

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*3 We recognize that at least two courts have refused to so distinguish *Wartels*. See [In re Lisowski](#), 395 B.R. 771, 777 (Bankr.M.D.Fla.2008) (concluding that, under *Wartels*, the homestead exemption from forced sale applies only to improved land or real property that is owned by the debtor); [Phillips v. Hirshon](#), 958 So.2d 425, 430 (Fla. 3d DCA 2007) (holding that a co-op did not qualify for homestead exemption for purposes of descent and devise because it was not an interest in realty under *Wartels*). However, we do not find the reasoning of these cases persuasive because they do not adequately reconcile the supreme court's decision in *Wartels* with the court's jurisprudence extending the exemption from forced sale to other beneficial interests in land and not limiting the exemption to a fee simple interest.

In conclusion, the trial court erred in determining that the decedent's condominium was not a homestead for purposes of the exemption from forced sale because it was not a fee simple interest in land. Accordingly, we reverse the denial of **Geraci's** petition to determine homestead status with directions for the court to afford the condominium homestead status under [article X, section 4 of the Florida Constitution](#) in relation to the creditor appellees' claims.

Reversed and remanded.

[KELLY](#) and [BLACK](#), JJ., Concur.

Fla.App. 2 Dist.,2012.

Geraci ex rel. Geraci v. Sunstar EMS

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