34 U. ARK. LITTLE ROCK L. REV. 173 (2011).

PROPERTY LAW—HOMESTEAD EXEMPTION—A BENEFICIARY INTEREST CAN SUPPORT A HOMESTEAD EXEMPTION IN ARKANSAS AND A LOOK AT OTHER INTERESTS SUFFICIENT TO SUPPORT A HOMESTEAD EXEMPTION. *Fitton v. Bank of Little Rock*, 2010 Ark. 280, ___ S.W.3d ___.

I. INTRODUCTION

Consider the following scenario. Husband and Wife each transfer their respective shares of the marital home into separate revocable trusts as part of their estate plan. They are both trustees and beneficiaries of their respective trusts. The couple then files for a divorce, but before the court grants the divorce, Husband obtains a loan using his part of the family home as security for the loan. As part of the divorce settlement, Wife receives Husband's share of the home and deeds this share to her trust, which already owns her other share of the home. Husband then defaults on the loan. Wife claims a homestead exemption with respect to the home when the bank forecloses on the property. However, the bank argues there is no exemption because the trust owns the home. Thus, according to the bank, Wife owns an interest in the trust, not in the property as required by homestead law. Should Wife lose the home simply because she transferred it to a trust?

Due to the increased use of trusts,[1] this question presents an important issue for estate planning, and its answer is critical to provide individuals using trusts some certainty in their homesteads. The Arkansas Supreme Court answered this question in *Fitton v. Bank of Little Rock*.[2] In *Fitton*, the court allowed the beneficiary of a revocable trust to claim the homestead exemption.[3] This decision led to confusion among lawyers, banks, and title companies; as a result, many routine procedures, from executing the correct deeds to obtaining the appropriate waivers, were called into question.

The homestead exemption provides protection to two groups of beneficiaries.[4] First, the exemption prevents creditors from taking the family's home if the family becomes insolvent.[5] Second, it protects immediate family members after the death of the head of the family by ensuring that they can continue to live in their home.[6]

This note discusses the latter form of protection provided by the homestead exemption. The discussion begins with the background of the homestead exemption,[7] placing particular emphasis on Arkansas's homestead exemption.[8] This note then addresses the interests to which a homestead exemption will attach.[9] Next, it looks at the Arkansas Supreme Court's decision in *Fitton* and explains how that decision further defines the interests to which homestead rights attach.[10] The note then examines the law in other jurisdictions that have decided cases similar to *Fitton*.[11] Finally, the note explains how *Fitton* affects banks, title companies, and lawyers.[12]

II. BACKGROUND ON HOMESTEAD EXEMPTIONS IN THE UNITED STATES

While still an independent territory,[13] Texas began the homestead exemption movement in 1839 as a way to attract new settlers.[14] In 1841, Georgia and Mississippi followed, enacting the first homestead exemption laws in the United States.[15] The homestead exemption spread to almost all American states by 1858.[16] This spread was facilitated by political groups like the anti-slavery Liberty Party, which sought to diversify its appeal, and the post-civil war Republican party, which supported the exemption to gain support among white voters.[17] Today, all but two states have adopted some form of homestead exemption.[18]

The idea behind the exemption centers on protecting the family's home from an unpredictable economy.[19] The exemption helps provide the family with the security of a home[20] and promotes stability and independence by assuring homeowners a place to live regardless of any economic situation.[21] Moreover, it encourages enterprise because homeowners do not fear losing their home to creditors.[22]

Although homestead attaches to the property, it is not an encumbrance on the land.[23] Instead, it serves as an encumbrance on creditors[24] as it prohibits them from executing on certain debts.[25] The exemption generally applies to debts the debtor incurred both before and after the homestead is acquired.[26]

Once a homestead attaches, it generally remains attached to the property for the benefit of the owner until the property's use as a homestead is demonstrably terminated.[27] The divorce or death of a spouse does not cause the homestead to terminate.[28] Some states do not require continuous occupancy for the homestead to continue,[29] and some states even require the owner to have the intent to renounce and forsake the homestead in order for the right to be terminated.[30]

Homestead statutes usually limit the amount of the exemption, which restricts the monetary value of the homestead.[31] Generally, states have not increased the limit to keep up with inflation.[32] However, in states that place restrictions only on the acreage of the homestead, the exemption is unlimited in value.[33] Other states set the limitation depending on the location of the homestead.[34]

A. General Requirements for the Homestead Exemption

While homestead exemption is established by state law and varies from state to state, the laws generally require the owner to have a family, own some interest in the land,[35] and use the property as a residence.[36] Some states also require the homeowner to formally declare the property to be his or her homestead.[37]

The family requirement relates to the traditional purpose of the homestead exemption in providing stability for the family.[38] While the family requirement originally required some sort of blood relation or support obligation,[39] states have begun to extend the exemption to more than just traditional families.[40] Some states have extended the exemption to heads of household.[41] To determine whether one qualifies as the head of the household, courts look to factors such as the individual's obligation to support those in the home, the dependence of those in the home on the individual, and whether the individual is in a role of authority.[42] Other states have extended the exemption to any resident[43] or natural person.[44]

Homestead statutes generally require the property to be occupied as a residence.[45] This serves the function of putting creditors on notice that the land may be the occupant's homestead.[46] In some jurisdictions, it does not matter if the land is used for any other purpose so long as it is used as a residence.[47] Furthermore, homestead law does not require a set length of occupancy.[48]

While most states only require the homeowner to occupy the property as a residence, a few require a more formal form of dedication in addition to occupancy.[49] In those states, formal declaration of homestead usually encompasses a notation on the deed or a separate declaration that is executed and recorded.[50] However, in some states that require dedication, failure to dedicate does not always cause the owner to lose the exemption.[51]

B. Arkansas Homestead

The Arkansas homestead law constitutes the entirety of article nine of the Arkansas Constitution.[52] The exemption applies to any resident who is either married or the head of a household.[53] The Arkansas Supreme Court has interpreted the latter to mean that the exemption applies to any resident, whether married or not, so long as he or she is the head of a household.[54] Furthermore, the law requires the person claiming the exemption to own and occupy the property as a residence.[55]

The Arkansas homestead exemption contains limitations on both the largest and smallest share of land that can comprise a homestead.[56] The exemption has minimums of eighty acres outside a city,[57] and one-quarter of an acre within a city, disregarding value.[58] The exemption allows a maximum of 160 acres outside a city,[59] and one acre within a city,[60] subject to a monetary cap of $2500.[61] The maximum amount is practically irrelevant as almost all homesteads in Arkansas are worth more than $2500; thus, the minimum limitations provide the amount of the exemption because property in excess of $2500 may be exempted up to eighty acres outside a city and one-quarter of an acre inside a city.[62]

III. REQUIRED INTEREST FOR A HOMESTEAD EXEMPTION TO ATTACH TO REAL PROPERTY

As previously mentioned, homestead exemptions require the person claiming the exemption to have some interest in the land.[63] This is generally not a high burden to meet as essentially any possessory interest will satisfy this requirement;[64] however, future interests do not meet this requirement.[65] The nature of the required interest revolves around the idea that the interest must be enough that if not for the homestead exemption, then the interest could be sold to satisfy one's debts.[66]

Depending on the jurisdiction, a leasehold interest may satisfy the homestead exemption requirements.[67] A court in Nebraska held that a month to month tenancy was sufficient to establish a homestead although a tenancy at will could not support the exemption.[68] However, a Florida court held that a leasehold did not meet the requirements because a lease does not constitute ownership.[69] Moreover, a tenant cannot claim a homestead exemption against the landlord after the expiration of the lease.[70] In contrast, the life tenant of a life estate does own enough of an interest to support the exemption.[71] The remainderman, however, generally cannot claim the homestead exemption.[72] Nevertheless, some states make an exception where the remainderman is in exclusive possession of the property.[73]

Courts have held that an equitable interest is a sufficient interest to support a homestead claim.[74] This includes those purchasing under a contract of sale so long as they have possession of the land.[75] This requirement of a right to possession seems to be triggered when claiming any equitable interest as the basis for the exemption.[76]

A majority of the states hold that a cotenancy interest in land, either as joint tenants or as tenants in common, is enough of an interest for a homestead exemption to attach.[77] However, one cotenant cannot claim a homestead exemption against another cotenant.[78] A minority of states follow the rule that homestead does not attach to a joint tenancy or a tenancy in common.[79] These courts reason that the homestead exemption requires a specific piece of land, and the homestead cannot be carved out of an undivided interest.[80] A tenancy by the entirety is enough of an interest to support a claim for a homestead exemption.[81]

IV. *FITTON V. BANK OF LITTLE ROCK* – A BENEFICIAL INTEREST IS ENOUGH TO CLAIM THE HOMESTEAD EXEMPTION IN ARKANSAS

Fitton v. Bank of Little Rock[82] held that an individual who is the settlor, trustee, and a beneficiary of a revocable trust can claim a homestead exemption in the residence that is part of a trust.[83] The story of *Fitton* began in the late 1800s when courts began to allow the homestead exemption to attach to interests less than fee simple.[84] To understand *Fitton*, this section will first

look at the Eighth Circuit's decision in *Richardson v. Klaesson*,[85] which predicted the outcome in *Fitton*.

A. *Richardson v. Klaesson* – The Precursor to *Fitton*

In *Richardson*, the plaintiff had a judgment against the Klaessons and their family trust in the United States District Court for the District of Hawaii.[86] When Richardson registered the judgment in the United States District Court for the Western District of Arkansas, the Klaessons claimed the property was their homestead.[87] The Klaesson Family Trust owned the property while the Klaessons occupied the property as a residence.[88] The Klaessons were the settlors of the trust and trustees, but they were not beneficiaries of the trust.[89] They only occupied the home because they had a contract with the trust that required them to live in the home.[90]

The Klaessons argued that an equitable interest or mere naked possession should allow them to apply the homestead exemption to property owned by a revocable trust.[91] The court agreed in part, stating that a beneficiary interest or occupation with the permission of the owner would support a claim of homestead under Arkansas law.[92] However, the court said that these did not apply because Richardson sought to execute on the trust's fee interest in the property, not the Klaessons' interest.[93] Thus, the Eighth Circuit's decision in *Richardson* set the stage for the Arkansas Supreme Court's decision in *Fitton*.

B. The *Fitton* Case

In *Fitton*, the Fittons originally owned their home as joint tenants with the right of survivorship.[94] Later, they each transferred their undivided one-half interest into their respective revocable trusts as tenants in common.[95] The Fittons eventually separated; however, Mr. Fitton, while still married, obtained a loan that was secured "by the undivided one-half interest [in the home] owned by his revocable trust."[96] As part of the settlement agreement in their divorce, Ms. Fitton received Mr. Fitton's interest in the home.[97] She deeded Mr. Fitton's interest to her trust, but she did not pay Mr. Fitton's mortgage.[98] A short time later, the bank foreclosed on the property, arguing that because the trust owned the residence the homestead exemption could not apply.[99] The trial court found for the bank and issued a decree foreclosing on the mortgaged interest.[100] Ms. Fitton appealed.[101]

On appeal, the Arkansas Supreme Court first noted that in Arkansas, neither the husband nor the wife can sell or encumber the homestead property without the other spouse joining in the transfer.[102] Because the bank never received Ms. Fitton's waiver of her homestead interest in the property, Ms. Fitton still had a homestead right to the property when Mr. Fitton took out the loan.[103]

The court then looked at an Arkansas statute regarding property tax assessment, which provided that the term homestead included "a dwelling owned by a revocable trust and used as the principal place of residence of a person who formed the trust."[104] This statute lends credence to the Eighth Circuit's determination in *Richardson* that a beneficiary interest in property is enough of an interest for homestead to attach.[105] Finally, the court in *Fitton* considered the reasoning in *Richardson*, along with decisions from two other jurisdictions that also addressed whether beneficiary interests are sufficient to support a homestead exemption,[106] and it held that a beneficiary interest coupled with other statutory requirements[107] supports a homestead exemption.[108]

The bank also argued that Ms. Fitton abandoned the homestead by transferring title to the property to the trust.[109] The court noted that the presumption is against abandonment of a homestead and that abandonment depends on the intention of the owner.[110] With respect to Ms. Fitton, the court looked at the fact that she maintained the home as her residence, which suggested that she did not intend to waive her homestead. [111]

C. The Significance of *Fitton*

Fitton's significance stems from the increased use of trusts as an estate planning tool.[112] If the court decided *Fitton* against the homeowners, many Arkansans who placed the ownership of their homes in revocable trusts would suddenly find their homes less secure. Moreover, the court's decision in *Fitton* is consistent with the line of reasoning that a homestead interest attaches to an interest that a creditor might seek to execute on in order to satisfy a debt.[113]

The *Fitton* decision also emphasizes the purpose of homestead "to protect the family from dependence and want."[114] Moreover, the court furthered the idea of liberally construing the homestead exemption for the protection of the family's interest.[115] Finally, this decision shows that modern courts still recognize the need to protect the family's home.

V. CASES FROM OTHER JURISDICTIONS REGARDING A BENEFICIARY INTEREST SUPPORTING A HOMESTEAD EXEMPTION

Other jurisdictions have considered cases with facts similar to *Fitton*. Some jurisdictions have reached a holding similar to that of the Arkansas Supreme Court while others have decided the issue differently. The decisions that differ do so because the interest owned is not in the property but rather in the trust, and the trust owns the property. This section examines the decisions made by courts in Connecticut, Florida, and Kansas with regard to the issue of whether a beneficiary interest can support a homestead exemption.

A. The Bankruptcy Court of Connecticut's Decision in *In re Estarellas*

In re Estarellas[116] was a bankruptcy case concerning a debtor who placed her home in a revocable trust.[117] The debtor was both the beneficiary and the trustee of the trust, and the parties stipulated that the home was her principal residence.[118] In her bankruptcy filings, she listed the home under interest in a trust and claimed a homestead exemption based on Connecticut homestead law.[119]

The bankruptcy trustee objected because the trust was the owner of the home and argued the debtor could not now claim a homestead exemption because the home was transferred to the trust via quitclaim deed.[120] In opposition, the debtor cited a statute providing the definition of property included property in which a judgment debtor had an interest that could be assigned or transferred. [121] The debtor claimed this definition indicated that she maintained an interest in the property after transferring it to the trust.[122]

The court found the debtor's argument unpersuasive, stating that the statute did not make the debtor the owner of the property.[123] Thus, the court held the debtor's interest in the trust could not support a homestead exemption.[124]

B. The District Court of Appeals of Florida's Decision in *Engelke v. Estate of Engelke*

In *Engelke v. Estate of Engelke*,[125] the decedent's son became the successor trustee to the decedent's trust, which contained an undivided one-half interest in the decedent's home and cash.[126] The trust instrument provided that the trustee was to pay the expenses of the decedent's estate if the residuary proved insufficient to do so.[127] The personal representative of the decedent's estate moved to compel the son to pay the charges.[128] The son responded that the trust's liquid assets could not pay the charges, and the residence was a homestead.[129] The trial court ordered the son, as trustee, to pay the charges.[130]

On appeal, the son argued the one-half interest in the residence held by the trust was constitutionally protected as a homestead.[131] The court looked at Florida's homestead law, which provides that the homestead interest survives the death of the original owner of the homestead to pass to the surviving spouse or heirs.[132] Also, the court noted that Florida courts have applied the term "heir" to mean anyone within the class of people who are addressed in the state's intestacy statutes.[133] The court then stated the decedent's right of revocation while he was alive allowed him to maintain ownership of the home despite the fact that title was in the name of his trust.[134] This meant the decedent had a homestead while he was alive that, according to Florida homestead law, survived his death and passed to his heirs.[135]

At the end of the opinion, the court commented on the case's significance to the use of trusts for the purpose of holding title to homes:

> Here, [the decedent] used a revocable living trust to hold title to his homestead. We do not think that the use of the trust removes the homestead protection to his heirs, to whom the property ultimately passes. Revocable living trusts are widely used will-substitute devices that provide flexibility in managing the settlor's assets during his or her lifetime. In other contexts, revocable trusts are treated similarly to wills.[136]

C. The Kansas Supreme Court's Decision in *Redmond v. Kester*

In *Redmond v. Kester*,[137] the Kesters transferred title to their home to a revocable trust using a quitclaim deed.[138] Mrs. Kester was the trustee of the trust while both Mr. and Mrs. Kester were beneficiaries.[139] They eventually filed for bankruptcy, claiming a homestead exemption for the home.[140] The bankruptcy trustee objected, but the court held the homestead exemption was valid despite the fact that the home was part of the trust.[141] The trustee appealed to the bankruptcy court appellate panel, which affirmed the lower court's decision.[142] The trustee appealed again, and the Tenth Circuit certified the question for the Kansas Supreme Court.[143] The specific question before the Kansas Supreme Court was whether a debtor who is the settlor and the beneficiary of a revocable living trust may claim a homestead exemption for real property placed in the trust.[144]

The Kansas Supreme Court began its analysis by looking at Kansas cases that discussed the interest necessary to support a homestead exemption.[145] The court held that, in Kansas, any interest in real property supports a homestead exemption.[146] This left the court with the question of "whether a trust beneficiary has any interest in real estate held by the trust."[147] The court determined that a beneficiary holds an equitable interest in the real property of the trust "regardless of whether the beneficiary is also the settlor and the trustee of the trust."[148] Because an equitable interest is enough to support a homestead, the court found that a beneficiary has a sufficient interest to support a homestead exemption.[149]

To support its finding, the court looked to a Kansas statute,[150] which provides that if a settlor is a beneficiary of a trust, transferring property to the trust does not affect the homestead exemption.[151] However, the statute also requires that such transfer take place via warranty deed.[152] While the transfer here was done by quitclaim deed, the court found that the statute showed the intent of the legislature to construe the ownership requirement broadly.[153] Also, the court recognized the idea that an interest sufficient for execution by a creditor to satisfy debts is an interest sufficient for homestead exemption.[154]

VI. WHAT NOW?

Although the decision in *Fitton* provides some certainty to estate planners, it also creates confusion for banks, title companies, and lawyers. Banks must now decide how to best ensure that their mortgages attach to homes. Title companies must research beyond trust ownership to ensure homeowners waived their homestead interest when necessary. On the other hand, lawyers must consider how clients will retain their homestead exemption while also carrying out the clients' plans for their homes. This section will first look at the problems banks and title companies face in determining whether a homestead interest still exists. Then, the section will turn to lawyers' problems in drafting trusts and related documents to ensure the trust is structured to carry out the settlor's plans.

A. Banks and Title Companies

Banks must now obtain both the husband's and the wife's waiver of homestead when making loans for homes that are part of a trust even if both spouses are not the trustees of the trust. This extra step solves the situation in *Fitton* because in that case, the bank only obtained the husband's waiver.[155] However, a loan agent may not know if there is a spouse, or the situation could be like the one in *Fitton* where the couple is in the middle of a divorce.

The *Fitton* decision also complicates the job of title companies as they must now conduct more research when a trust owns the family's principal residence. Title companies can no longer rely on the fact that a trust cannot claim a homestead exemption because trusts cannot marry or fulfill a role as the head of a household. Thus, title companies must ensure that both spouses waived their homestead rights when the real property subject to a homestead exemption was transferred to the trust; otherwise, they must obtain the waivers. Additionally, title companies must be cautious of situations like *Fitton* where a couple splits their undivided one-half interests into separate trusts because each spouse must waive their right to homestead with respect to the other's undivided interest. This means that title companies will need to be more diligent in their searches when the home is owned by trusts. If title companies fail to ensure that both the husband and the wife waive their homestead interest, title companies may face liability for any issues concerning defects in title or for the unenforceability of a mortgage lien against the property.

B. Lawyers

When lawyers advise clients, they must pay particular attention to residences that are owned by trusts. Lawyers must ensure that both husband

and wife waive their homestead interest either when they transfer their residence to the trust or when the trust sells the home. Moreover, lawyers must consider whether inchoate dower applies to a home owned by a revocable trust just as homestead now attaches to homes in revocable trusts. While this issue is not addressed in *Fitton*, the reasoning in *Fitton* may be extended to allow a claim of inchoate dower when a home held in trust is sold to a third party.

In Arkansas, lawyers should also be aware of the transfer of property through a beneficiary deed.[156] Arkansas law with respect to beneficiary deeds is codified in the Arkansas Code at section 18-12-608:

> A beneficiary deed is a deed without current tangible consideration that conveys upon the death of the owner an ownership interest in real property other than a leasehold or lien interest to a grantee designated by the owner and that expressly states that the deed is not to take effect until the death of the owner.[157]

As provided in the statute above, a beneficiary deed transfers property to a chosen beneficiary on the death of the owner.[158] Therefore, the property avoids probate.[159] These deeds are recorded, which makes them easier to track than trusts.[160] Moreover, like revocable trusts and wills, these deeds can be revoked or the beneficiary changed.[161] To revoke or change the deed, the owner must execute and record a new deed or revocation before his or her death.[162] In the case of multiple beneficiary deeds for the same property, the most recently signed deed is effective at the grantor's death.[163] A beneficiary deed cannot, however, be revoked or changed by decedent's will.[164]

A beneficiary deed that names the trust as the beneficiary allows the owner to maintain complete control over the residential property during his or her life, including retaining the homestead exemption, as long as the other conditions are met. At the owner's death, the property avoids probate and transfers to the trustee. This seemingly accomplishes the same goals as transferring the residence to a revocable trust during the owner's life as the home will still be distributed according to the rules of the trust upon the death of the homeowner. Moreover, the Arkansas Code provides a sample form for a beneficiary deed as well as a sample form for a revocation of a beneficiary deed.[165]

However, the beneficiary deed option is not without drawbacks. First, because beneficiary deeds are new to Arkansas, case law regarding such deeds is sparse. Furthermore, the surviving spouse's homestead still attaches to property at the death of the other spouse. Thus, the surviving spouse still has a homestead interest in the property upon the death of the owner even if the owner executed a beneficiary deed prior to his or her death. Beneficiary deeds may also cause problems in obtaining title insurance.[166] Title companies must develop guidelines to handle having a beneficiary deed in the chain of title.[167]

VII. CONCLUSION

The *Fitton* decision provided more certainty to individuals using trusts as part of an estate planning by ensuring that their home would continue to be exempt from execution for debt even when the home is owned by a trust. Moreover, *Fitton* furthered the purposes of homestead—stability and security of the home. Additionally, the court decided *Fitton* in accord with the historical idea that the homestead exemption attaches to any interest in a principal residence that a creditor might seek to execute in satisfaction of a debt. This decision provides a basis for lower courts to determine which interests are sufficient to support the exemption. However, the decision did not provide much guidance to banks and title companies, and it left lawyers with questions regarding how to proceed. In sum, *Fitton* provided relief to homeowners while leaving more experienced groups with questions concerning how to protect themselves.

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1. Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191, 191 (2005).
2. 2010 Ark. 280, ___ S.W.3d ___.
3. *Id.* at 8, ___ S.W.3d at ___.
4. Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 246 (2006).
5. *Id.*
6. *Id.*
7. *See infra* Part II.
8. *See infra* Part II.B.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. *See infra* Part VI.
13. The United States did not annex Texas until 1845. Jean Carefoot, *Narrative History of Texas Annexation*, TEXAS STATE LIBRARY & ARCHIVES COMMISSION WEBSITE (April 1997), http://www.tsl.state.tx.us/ref/abouttx/annexation/index.html.
14. Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880*, 80 J. AM. HIST. 470, 470, 477 (1993); Morantz, *supra* note 4, at 252. Texas also used free land grants to recruit settlers. *Id.*
15. Goodman, *supra* note 14, at 478; Morantz, *supra* note 4, at 253.
16. *See* Morantz, *supra* note 4, at 253–254. The states in the Far West region of the nation were the slowest to enact homestead exemptions. *Id.* at 254. "Although California enacted homestead exemption immediately after entering the Union in 1850, its neighboring states did not begin to follow suit until the 1860s." *Id.* (citing Goodman, *supra* note 14, at 492).

17. Goodman, *supra* note 14, at 478–91 (listing Whigs, Democrats, Liberty Party, anti-slavery leaders, Free-Soil Democrats, women's rights supporters, Republicans, and other groups as supporting a homestead exemption at some point); *See also* Morantz, *supra* note 4, at 254–55 (describing how the "homestead exemption became intertwined with several broader social movements").

18. Morantz, *supra* note 4, at 255 n.37 (stating that Pennsylvania and Rhode Island are the only two states that have not adopted a homestead exemption).

19. Goodman, *supra* note 14, at 470.

20. Jonathan D. Colan, *You Can't Take That Away from Me: The Sanctity of the Homestead Property Right and Its Effect on Civil Forfeiture of the Home*, 49 U. MIAMI L. REV. 159, 163–64 (1994).

21. Ryan P. Rivera, *State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws*, 39 REAL PROP. PROB. & TR. J. 71, 73 (2004).

22. Goodman, *supra* note 14, at 478 (According to Supreme Court Justice Hemphill, "[t]he man who failed . . . could readily 'commence again, Antaeus-like, with renewed energy and strength and capacity for business.'").

23. RUFUS WAPLES, A TREATISE ON HOMESTEAD AND EXEMPTION 102 (1892).

24. *Id.*

25. *See* George L. Haskins, *Homestead Exemptions*, 63 HARV. L. Rev. 1289, 1299 (1950); 97 U. PA. L. REV. 677, 678 (1949) "Social or economic policies which outweigh the desire to protect the home dictate that many liabilities of the owner be enforceable against his homestead because of the nature of the transaction out of which they arise." *Id.* Excluded debts (not subject to homestead exemptions) generally include purchase money mortgages, taxes and assessments, and liens from the repair or improvement of the property. *Id.*

26. *Id.* at 1300, 97 U. OF. PA. L. REV. 677, 678 (1949).

27. *In re* Kimball, 270 B.R. 471, 479 (Bankr. W.D. Ark. 2001) (citing *In re* Jones, 193 B.R. 503, 506 (Bankr. E.D. Ark. 1995)); *Accord* Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 465 (Tex. App. 1981) (citing Burk Royalty Co. v. Riley, 475 S.W.2d 566 (Tex. 1972); Sullivan v. Barnett, 471 S.W.2d 39 (Tex. 1971)).

28. *E.g.*, Middleton v. Lockhart, 344 Ark. 572, 581–82, 43 S.W.3d 113, 120 (2001) (citing Jones v. Thompson, 204 Ark. 1085, 166 S.W.2d 1036 (1942); Butt v. Walker, 177 Ark. 371, 6 S.W.2d 301 (1928); Gray v. Patterson, 65 Ark. 373, 46 S.W. 730 (1898); Stanley v. Snyder, 43 Ark. 429 (1884)).

29. *See generally* Hammond v. Shipp, 289 So.2d 802, 807 (Ala. 1974) (allowing homestead exemption when wife left homestead after she separated from her husband; they did not divorce); *Eggemeyer*, 623 S.W.2d at 465 (allowing homestead exemption when husband left the home during course of divorce).

30. *See* Monroe v. Monroe, 250 Ark. 434, 438, 465 S.W.2d 347, 349–50 (1971).

31. Haskins, *supra* note 25, at 1291.

32. *See id.* at 1293 (arguing value limits should not remain fixed) ("One thousand dollars does not represent much of a home today, and has not for several years past."). *See generally* ARK. CONST. art. IX, §§ 4–5 (Arkansas's homestead exemption); See *infra* Part II.B for an explanation regarding the confusing limitations and minimums of the Arkansas homestead exemption.

33. Rivera, *supra* note 21, at 86–91 (highlighting Texas and Florida as two states that allow for an almost unlimited exemption).

34. *E.g.*, ARK. CONST. art. IX, §§ 4–5.

35. *See* discussion *infra*.

36. Haskins, *supra* note 25, at 1293.

37. *Id.*

38. *Id. See also* WAPLES, *supra* note 23, at 57.

39. WAPLES, *supra* note 23, at 58–60.

40. Some states have extended the homestead exemption to all persons. *See In re* Lashley, 206 B.R. 950, 953 (Bankr. E.D. Mo. 1997) (citing MO. REV. STAT. § 513.475(1) (1994)). Other states only require that the person claiming the exemption be the head of a household. *See, e.g.*, ARK. CONST. art. IX, § 3.

41. *E.g.*, ARK. CONST. art. IX, § 3 (allowing either the family or the head of the family to claim the exemption).

42. *See In re* Collins, 152 B.R. 570, 572 (Bankr. W.D. Ark. 1992) (stating that the individual does not have to be a parent but requiring the household to be more than a mere aggregation of individuals).

43. *See In re* Fromal, 151 B.R. 730, 732 (Bankr. E.D. Va. 1993) (stating that Virginia's homestead exemption extends to any "householder," meaning any resident of the state).

44. Colan, *supra* note 20, at 164. Following the purpose of the exemption, to protect the home, Florida extended the exemption to any natural person. *Id.*

45. *E.g.*, ARK. CONST. art IX, §§ 4–5.

46. Haskins, *supra* note 25, at 1297.

47. *Id.* (stating that some courts have held that even if residential use is incidental to business use, the occupancy requirement is still satisfied).

48. WAPLES, *supra* note 23, at 177 (stating that occupancy of only one day may be sufficient to establish the homestead).

49. *Id.* at 160.

50. Haskins, *supra* note 25, at 1298; *see e.g.*, IOWA CODE § 561.4 (2011) (requiring the homeowner seeking the exemption to record the selected plat with the county).

51. *E.g.*, IOWA CODE § 561.4 (2011) (failure to select the plat for the homestead does not, by itself, mean the home loses its exemption status).

52. Arkansas has a homestead exemption statute that mirrors the constitutional exemption sections of the Arkansas Constitution. *See* ARK. CODE ANN. § 16-66-210 (LEXIS Repl. 2005).

53. ARK. CONST. art. IX, § 3.

54. *See* Monroe v. Monroe, 250 Ark. 434, 436, 465 S.W.2d 347, 349 (1971) (citing Thompson v. King, 54 Ark. 9, 14 S.W. 925 (1890)).

55. ARK. CONST. art. IX, §§ 4–5.

56. *Id.*

57. *Id.* § 4 ("[I]n no event shall the homestead be reduced to less than eighty acres, without regard to value.").

58. *Id.* § 5 ("[I]n no event shall such homestead be reduced to less than one-quarter of an acre of land, without regard to value.").

59. *Id.* § 4.

60. *Id.* § 5.

61. *See* ARK. CONST. art. IX, §§ 4–5.

62. Robert Laurence, *Mobile Homesteads, and in Particular the Exempt Status of Mobile Homes Located on Rented Lots: The Laws of Arkansas, Mississippi, Nebraska, and Utah Compared and the Principle of the Liberal Construction of Exemption Statutes Analyzed*, 57 ARK. L. REV. 221, 222–23 (2004).

63. *See* Haskins, *supra* note 25, at 1294–95. This comes from the requirement of most jurisdictions that the person seeking the exemption must have some "specified interest in the property." *Id.* at 1293. *See also* WAPLES, *supra* note 23, at 108.

64. *See* Haskins, *supra* note 25, at 1295–96; White Sewing-Mach. Co. v. Wooster, 66 Ark. 382, 385, 50 S.W. 1000, 1001 (1899) (citing Robson v. Hough, 56 Ark. 621, 20 S.W. 523 (1892); Thompson v. King, 54 Ark. 9, 14 S.W. 925 (1890); Ward v. Mayfield, 41 Ark. 94 (1883); Rockafellow v. Peay, 40 Ark. 69 (1882); Sims v. Thompson, 39 Ark. 301 (1882) (holding that a life tenancy is enough of an interest to support a homestead claim).

65. Haskins, *supra* note 25, at 1295 (stating that as a general rule a homestead cannot be claimed in a future interest even if the claimant is in possession under a lease).

66. *See generally* WAPLES, *supra* note 23, at 109 (explaining that absolute ownership is not required to secure a valid homestead exemption).

67. *See* Robson v. Hough, 56 Ark. 621, 624, 20 S.W. 523, 524 (1892). *See also In re* Hellman, 474 F. Supp. 348, 350 (D. Colo. 1979) (citing 89 A.L.R. 555 (1984) as supplemented in 74 A.L.R.2d 1378 (1960) (stating that a leasehold interest is supported by numerous other jurisdictions)).

68. *In re* Foley, 97 F. Supp. 843, 845 (D. Neb. 1951) (citing Howard v. Raymers, 89 N.W. 1004 (Neb. 1902); Rank v. Garvey, 92 N.W. 1025 (Neb. 1902)). The *Foley* court analogized a month to month tenancy to a year to year tenancy. *Id.* (citing 1 HERBERT T. TIFFANY & BASIL JONES, TIFFANY REAL PROPERTY § 170 (2010)).

69. *In re* Tenorio, 107 B.R. 787, 788–89 (Bankr. S.D. Fla. 1989). Florida requires that the ownership interest be in real property, and it considers a year to year lease to be a chattel, not real property. *Id.* (citing De Vore v. Lee, 30 So. 2d 924 (Fla. 1947)).

70. WAPLES, *supra* note 23, at 115.

71. White Sewing-Mach. Co. v. Wooster, 66 Ark. 382, 385, 50 S.W. 1000, 1001 (1899) (holding that a life estate interest supported a homestead exemption even though the life tenant had possession through another tenant who leased the property from him). *Id.*

72. Middleton v. Lockhart, 344 Ark. 572, 580, 43 S.W.3d 113, 119 (2001) (citing Brooks v. Goodwin, 123 Ark. 607, 186 S.W. 67 (1916)).

73. *See* Carolyn S. Bratt, *Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?*, 76 KY. L.J. 387, 398 (1987) (citing Howard v. Mitchell, 105 S.W.2d 128, 133–34 (Ky. Ct. App. 1936)) ("Kentucky follows the general rule that naked possession, without any title, is sufficient to support a homestead claim as against all the world except the true owner or one having better title."); *see also* Panagopulos v. Manning, 69 P.2d 614, 620 (Utah 1937) (holding homestead exemption was appropriate where the remainderman had exclusive possession and occupancy).

74. Childs v. Lambert, 230 Ark. 366, 368, 323 S.W.2d 564, 566 (1959) (citing Watson v. Poindexter, 176 Ark. 1065, 5 S.W.2d 299 (1928)).

75. *See* Watson v. Poindexter, 176 Ark. 1065, 1070, 5 S.W.2d 299, 301 (1928) (holding husband's assignment of homestead property, which was under contract of purchase, void when he used the home to secure a loan without wife's signature or consent).

76. *See* WAPLES, *supra* note 23, at 118.

77. *See* Haskins, *supra* note 25, at 1295–96. *See generally* Elms v. Hall, 214 Ark. 601, 603, 215 S.W.2d 1021, 1023 (1948) ("Arkansas follows the rule supported by the weight of authority that a tenant in common or joint tenant may acquire a homestead in the undivided premises."); Wuicich v. Solomon-Wickersham Co., 157 P. 972, 974 (Ariz. 1916) (allowing heads of families holding a home as joint tenants or tenants in common served to further the purpose of the homestead statute); Nelson v. Stocking, 121 P.2d 215, 216–17 (Kan. 1942) (allowing a cotenant to claim one quarter of his 160 acre property as homestead).

78. *See* Cooley v. Shepherd, 225 P.2d 75, 77 (Kan. 1950) (citing Cole v. Coons, 178 P.2d 997 (Kan. 1947)).

79. *See generally* Kellar v. Kellar, 221 S.W. 189, 190 (Tenn. 1920) (holding that a tenancy in common between husband and wife cannot support a homestead claim); Henderson v. Hoy, 26 La. Ann. 156, 157 (1874) (holding that an undivided one-sixth interest is "incorporeal" and thus "cannot be the object of the operation of the homestead act").

80. Wolf v. Fleischacker, 5 Cal. 244, 245 (1855). *See also* Bates v. Bates, 97 Mass. 392, 395–96 (1867) (reasoning that because a widow petitioned for the dower share of her husband's estate, which created a tenancy in common, she could not later be assigned a separate piece of the estate for her homestead).

81. Coleman v. Williams, 200 So. 207, 208 (Fla. 1941) (citing Menendez v. Rodriguez, 143 So. 223, 226 (Fla. 1932)); Waddy v. Waddy, 291 S.W.2d 581, 581 (Tenn. 1956) (citing Jackson, Orr & Co. v. Shelton, 16 S.W. 142 (Tenn. 1890)).

82. 2010 Ark. 280, ___ S.W.3d ___.

83. *Id.* at 7–8, ___ S.W.3d at ___.

84. *See supra* Part III.

85. 210 F.3d 811 (8th Cir. 2000).

86. *Id.* at 812.

87. *Id.*

88. *Id.* at 813.

89. *Id.*

90. *Id.* Per the terms of the contract, the trust could end the occupancy with only fifteen days notice. *Id.*

91. *Richardson*, 210 F.3d at 813.

92. *Id.*

93. *Id.* at 813–14. The court concluded by stating that the Klaessons' right of occupation would be exempt as a homestead and that a purchaser of the property would be subject to the Klaessons' right to occupy the home per the contract. *Id.* at 814. The purchaser could, however, terminate the Klaessons' occupancy on fifteen days notice. *Id.*

94. Fitton v. Bank of Little Rock, 2010 Ark. 280, at 1–2, ___ S.W.3d ___,___.

95. *Id.* at 2, ___ S.W.3d at ___.

96. *Id.*, ___ S.W.3d at ___.

97. *Id.*, ___ S.W.3d at ___.

98. *Id.*, ___ S.W.3d at ___.

99. *Id.* at 2–3, ___ S.W.3d at ___.

100. Fitton, 2010 Ark. 280, at 3, ___ S.W.3d at ___.

101. *Id.*, ___ S.W.3d at ___.

102. *Id.* at 4–5, ___ S.W.3d at ___ (citing ARK. CODE ANN. § 18-12-403 (LEXIS Repl. 2003), which requires both husband and wife to sign the deed or the other spouse to convey their homestead interest via a separate document in order for a sale or an encumbrance to be valid against the homestead).

103. *Id.* at 9, ___ S.W.3d at ___. The bank received Mr. Fitton's waiver of his homestead interest in the mortgage papers he signed. *Id.* at 2, ___ S.W.3d at ___.

104. *Id.* at 6, ___ S.W.3d at ___ (citing ARK. CODE ANN. § 26-26-1122(a)(1)(B) (LEXIS Supp. 2011)).

105. *See* Ark. Code Ann. § 26-26-1122(a)(1)(B); Richardson v. Klaesson, 210 F.3d 811, 813 (2000).

106. The court cited decisions of Florida and Kansas courts, which will be discussed in the next section. *See infra* Part V.B–C.

107. She was married at all relevant times, and she occupied the property as her residence. *Fitton*, 2010 Ark. 280, at 8, ___ S.W.3d at ___. *See generally* Haskins, *supra* note 25 at 1293 (discussing the traditional requirements for homestead).

108. *Fitton*, 2010 Ark. 280, at 8, ___ S.W.3d at ___ ("Mary Fitton was entited to a homestead exemption even though the title to the property was held by her trust").

109. *Id.*, ___ S.W.3d at ___.

110. *Id.* at 8–9, ___ S.W.3d at ___ (citing Parker v. Johnson, 368 Ark. 190, 195, 244 S.W.3d 1, 6 (2006)).

111. *See id.* at 9, ___ S.W.3d at ___.

112. *See* Foster, *supra* note 1, at 191.

113. *See* WAPLES, *supra* note 24, at 109–10.

114. *Fitton*, 2010 Ark. 280, at 5, ___ S.W.3d at ___.

115. *Id.*, ___ S.W.3d at ___.

116. 338 B.R. 538 (Bankr. D. Conn. 2006).
117. *Id.* at 540.
118. *Id.*
119. *Id.* at 540–41. S*ee also* CONN. GEN. STAT. § 52-352b(t) (1977) (allowing a homestead exemption of up to $75,000).
120. *In re* Estarellas, 338 B.R. at 541.
121. *Id.* at 542–43. *See also* CONN. GEN. STAT. § 52-350a(16) (1983).
122. *In re* Estarellas, 338 B.R. at 542–43.
123. *Id.* at 543; *see* CONN. GEN. STAT. § 52-352a(e) (1977) (defining homestead as a home that is "owner-occupied").
124. *In re* Estarellas, 338 B.R. at 543.
125. 921 So. 2d 693 (Fla. Dist. Ct. App. 2006).
126. *Id.* at 694–95.
127. *Id.* at 694.
128. *Id.* at 695. The charges included the court-ordered allowance for the wife. *Id.*
129. *Id.*
130. *Id.*
131. *Engelke*, 921 So.2d at 695.
132. *Id.* (quoting FLA. CONST. art. X, § 4).
133. *Id.* at 696 (citing Snyder v. Davis, 609 So. 2d 999, 1001–02 (Fla. 1997).
134. *Id.*
135. *Id.*
136. *Id.* at 697.
137. 159 P.3d 1004 (Kan. 2007).
138. *Id.* at 1006.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Redmond*, 159 P.3d at 1006.
144. *Id.*
145. *Id.* at 1007–09.
146. *Id.* at 1009.
147. *Id.*
148. *Id.*
149. *Redmond*, 159 P.3d at 1010.
150. KAN. STAT. ANN. § 58a-1107 (2004).
151. *Redmond*, 159 P.3d at 1010 (citing KAN. STAT. ANN. § 58a-1107 (2004)).
152. *Id.*
153. *Id.*
154. *Id.* at 1011 (stating that "if a debtor's interest in real estate is sufficient to include the real estate in the bankruptcy estate, it is also sufficient for the application of the homestead exemption as long as the debtor occupies the real estate").
155. *See* Fitton v. Bank of Little Rock, 2010 Ark. 280, at 2, ___ S.W.3d ___,___.
156. *See* ARK. CODE ANN. § 18-12-608 (LEXIS Repl. 2003) (establishing a beneficiary deed); Christopher Barrier, *The Uncertain Gift: Arkansas' New Beneficiary Deed*, ARK. LAWYER, Spring 2006 20, at 20.
157. ARK. CODE ANN. § 18-12-608(a)(1)(A) (LEXIS Supp. 2011).
158. Barrier, *supra* note 156, at 20.
159. *Id.*
160. *See id.*
161. *Id.*

162. ARK. CODE ANN. § 18-12-608(d)(2).
163. *Id.* § 18-12-608(e).
164. *Id.* § 18-12-608(d)(4).
165. *Id.* § 18-12-608(g).
166. *See* Barrier, *supra* note 156, at 25.
167. *Id.*

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