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## Through the Trap Door Darkly: Nebraska Exemption Policy and the Bankruptcy Reform Act of 1978

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# Through The Trap Door Darkly: Nebraska Exemption Policy and The Bankruptcy Reform Act of 1978

I will be their vassal for life, and dig in the mine of my imagina[tion] to find diamonds (or what may sell for such) to make good my engagements, not to enrich myself. And this from no reluctance to allow myself to be called the Insolvent, which I probably am, but because I will not put out of the [power] of my creditors the resources, mental or literary, which yet remain to me.<sup>1</sup>

On November 6, 1978, President Carter signed into law the fifth and most recent federal bankruptcy act,<sup>2</sup> the Bankruptcy Reform Act of 1978.<sup>3</sup> The major substantive provisions of the New Act be-

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1. SIR WALTER SCOTT, *THE JOURNAL OF SIR WALTER SCOTT* 80 (1950) (brackets in original). Contrast Sir Walter's sense of duty with one commentator's cynical view of the modern bankruptcy process:

When discussing both collection of the estate and discharge, one should be aware that the debtor and his creditors are engaged in what could be described as a great game. The goal of the game for the debtor is to retain as much property as possible despite the bankruptcy proceeding. The exemption provisions of state and federal law are the most plainly relevant tools for achieving this goal.

Donnelly, *The New (Proposed?) Bankruptcy Act: The Development of Its Structural Provisions and Their Impact on the Interests of Consumer-Debtors*, 18 SANTA CLARA L. REV. 291, 320 (1978) (footnote omitted).

2. See Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226 (1976). The bankruptcy law replaced by the Bankruptcy Reform Act of 1978 was the frequently amended Bankruptcy Act of 1898. Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (repealed 1978) (codified in 11 U.S.C. (1976)) [hereinafter cited as the Bankruptcy Act of 1898 or the Former Act].

3. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), (codified primarily in 11 U.S.C. (Supp. III 1979) and scattered sections of 28 U.S.C. (Supp. III 1979)) [hereinafter cited as the Bankruptcy Reform Act or the New Act]. For an excellent discussion of the legislative history of the Bankruptcy Reform Act, see Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979).

came effective on October 1, 1979.<sup>4</sup>

The Bankruptcy Reform Act is a major achievement and has made many significant changes in the substantive and procedural law of bankruptcy. Perhaps the most important of the substantive revisions made by the New Act is the enactment of a federal bankruptcy exemption policy.<sup>5</sup> However, many of the advantages (or disadvantages depending upon one's point of view) of this federal bankruptcy exemption policy will not apply to bankruptcies in the State of Nebraska as a result of an obscure provision in section 522(b) of the New Act which permits individual states to nullify the federal scheme of exemptions in favor of the local alternative.<sup>6</sup>

## I. FEDERAL BANKRUPTCY EXEMPTION POLICY

To the debtor, the two most important facets of any bankruptcy law are its exemption and discharge policies.<sup>7</sup> Both are critical to the debtor's fresh start in life as he emerges from the bankruptcy process;<sup>8</sup> his discharge permits him to walk away from the burden

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4. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402, 92 Stat. 2682 (1978) (codified at 11 U.S.C. note prec. § 101 (Supp. III 1979)). See 1 COLLIER ON BANKRUPTCY ¶ 7.02 (15th ed. 1979); Klee, *supra* note 3, at 942.

5. 11 U.S.C. § 522 (Supp. III 1979). See generally Hughes, *Code Exemptions: Far-Reaching Achievement*, 28 DE PAUL L. REV. 1025 (1979); Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769 (1980).

6. See notes 25-28 & accompanying text *infra*.

7. See Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678 (1960).

8. The United States Supreme Court discussed the fresh start policy of the Bankruptcy Act of 1898 as follows:

One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes". . . . This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citations & emphasis omitted). Section 522 of the Bankruptcy Reform Act similarly recognizes that "there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start." H.R. REP. NO. 595, 95th Cong., 1st Sess. 126 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6087 [hereinafter cited as HOUSE REPORT]. See *In Re Bradford*, 6 B.R. 741, 744 (D. Nev. 1980) ("The objective of bankruptcy laws is to equitably distribute the bankrupt's assets among creditors and to enable the bankrupt to make a fresh start."). In fact, the policy of the New Act is to bolster the debtor's fresh start by supplying him with an option to choose a federal list of exemptions designed to ensure that his fresh start is not de-

of his pre-bankruptcy debts, and his exemptions allow him to retain at least some of his property free from the claims of his former creditors.<sup>9</sup> The trade-off in bankruptcy is that the debtor is required to surrender his nonexempt assets to the trustee for liquidation and distribution to creditors.<sup>10</sup> So, at least in theory, the bankruptcy process offers something to everyone—the debtor is given his fresh start and his creditors are paid part of their claims from the proceeds of liquidation of the debtor's nonexempt property.<sup>11</sup>

A sound exemption policy in bankruptcy should not lose sight of either the goal of debtor rehabilitation or the goal of equitable distribution to creditors. It should attempt to strike a balance between these often conflicting interests and ensure that neither debtors nor creditors perceive that they have been treated unfairly by the bankruptcy process.<sup>12</sup> Measured against this ideal, the Bankruptcy Reform Act, like its predecessor, the Bankruptcy Act of 1898, has failed.

The Bankruptcy Act of 1898 pursued a course of indirection in attempting to effectuate the federal bankruptcy fresh start policy. It allowed the debtor to claim exemptions in bankruptcy, but abdicated the task of formulating a substantive exemption policy to the states.<sup>13</sup> Section 6 of the Former Act provided that:

This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they

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feated by an obsolete or inadequate state scheme of exemptions. HOUSE REPORT, *supra*, at 126. See also *In re Upright*, 1 B.R. 694, 701 (Bankr. Ct. N.D.N.Y. 1979).

9. See Countryman, *Consumers in Bankruptcy Cases*, 18 WASHBURN L.J. 1, 2 (1978); Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615, 616 (1978).
10. See HOUSE REPORT, *supra* note 8, at 126; Resnick, *supra* note 9, at 616; Comment, *Bankruptcy Exemptions: State Law or Federal Policy*, 35 U. PITT. L. REV. 630 (1974).
11. In practice, the ideal of liquidation of nonexempt assets for distribution to creditors has not been realized. The overwhelming majority of bankruptcy cases are no-asset or nominal-asset cases in which no distribution is made to creditors of the debtor. See D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 20 (1971); Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 435 (1974). In light of the "breadth of exemption opportunities" under the Bankruptcy Reform Act, one commentator has gone so far as to suggest that a lawyer who files anything but a no-asset case may be guilty of professional malpractice. Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-For-Lawyers Bill: Part II: Consumer Bankruptcy*, 1979 UTAH L. REV. 175, 201.
12. See Comment, *supra* note 10, at 630; Comment, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1459 (1959).
13. See Countryman, *supra* note 9, at 2.

have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State . . . .<sup>14</sup>

Thus, instead of providing a uniform scheme of federal exemptions, the Former Act incorporated a local patchwork exemption policy which varied greatly from state to state.<sup>15</sup>

This policy of deferring to state exemption schemes was not favored by commentators. Exemptions in some states were criticized as being obsolete and "parsimonious in the extreme,"<sup>16</sup> while in other states exemptions were perceived as being overly generous to debtors and unfair to creditors.<sup>17</sup> The result was a bankruptcy exemption policy which treated debtors and creditors unequally based solely upon the domicile of the debtor.<sup>18</sup> Another

14. 11 U.S.C. § 24 (1976) (repealed 1978) (Bankruptcy Act of 1898, ch. 541, § 6, 30 Stat. 544, as amended by Chandler Act, ch. 575, § 1, 52 Stat. 847 (1938)).

15. See P. MURPHY, CREDITORS' RIGHTS IN BANKRUPTCY § 17.12 (1980); Countryman, *supra* note 7, at 681. It could be argued that the incorporation of state exemption law into a federal bankruptcy act is violative of the constitutional power of Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. However, this question was resolved in 1902 by the United States Supreme Court in *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902), where the constitutionality of section 6 of the Former Act was upheld. Chief Justice Fuller, writing for the Court, rejected the uniformity attack on the grounds that the uniformity required "is geographical and not personal." *Id.* at 188. This theory should apply with equal force in support of section 522 of the Bankruptcy Reform Act. See *In re Vasko*, 6 B.R. 317 (Bankr. Ct. N.D. Ohio 1980) (upholding constitutionality of Ohio statute creating exemptions only in bankruptcy); Ulrich, *Virginia's Exemption Statutes—The Need for Reform and a Proposed Revision*, 37 WASH. & LEE L. REV. 127, 128 n.6 (1980). But see Hertz, *Bankruptcy Code Exemptions: Notes on the Effect of State Law*, 54 AM. BANKR. L.J. 339, 341-44 (1980) (arguing that the provision of § 522(b)(1) of the New Act that permits the states to opt out of the federal list of exemptions in favor of the local list may be an improper delegation by Congress of its legislative power).

16. Countryman, *supra* note 9, at 2-3. See also COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1, at 171 (1973) [hereinafter cited as COMMISSION REPORT]. This criticism was aimed especially at exemption laws effective in states east of the Mississippi River. See MURPHY, *supra* note 15, at § 17.12; Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 449 (1960).

17. See COMMISSION REPORT, *supra* note 16, at 171; Countryman, *supra* note 9, at 3. To the extent that state exemption laws are excessively generous and protect more of the debtor's property than is necessary for his fresh start, they impede the federal bankruptcy policy of equitable distribution to creditors. See *In re Bradford*, 6 B.R. 741, 744 (D. Nev. 1980); notes 10-12 & accompanying text *supra*. It has also been argued that overly liberal exemption laws may retard consumer credit and foster irresponsible spending habits. See Costa, *Bankruptcy: The Legal Whipping Boy*, 49 ST. JOHN'S L. REV. 52, 67 (1974); Comment, YALE L.J., *supra* note 12, at 1459.

18. See Vukowich, *The Bankruptcy Commission's Proposal Regarding Bankrupts' Exemption Rights*, 63 CALIF. L. REV. 1439, 1441-42 (1975).

objection was that "[s]tate exemption laws are not designed primarily for use in a system of orderly liquidation where all of the debtor's estate is to be converted into cash, but in a system of piecemeal liquidation where each creditor levies upon and sells such property as he can locate."<sup>19</sup> Thus, the bankruptcy courts were left with the difficult task of administering fifty separate schemes of state exemptions that were designed for the typical debt collection process and not for liquidation bankruptcy.

However, the Former Act's deference to nonbankruptcy law for an exemption policy in bankruptcy was not without defenders among the commentators.<sup>20</sup> Thus, it was argued that the individual states are better qualified than Congress to strike the appropriate balance between the interests of local debtors and their creditors<sup>21</sup> and that different bankruptcy and nonbankruptcy exemption policies would result in an increased rate of consumer bankruptcies.<sup>22</sup>

The legislative history of the Bankruptcy Reform Act reflects the debate over federal versus state exemptions in bankruptcy. The Senate version of what became the New Act followed the approach of section 6 of the Former Act and deferred to nonbankruptcy exemption law.<sup>23</sup> The original version of the House bill, on the other hand, contained a provision giving the debtor an option to elect either a federal list of exemptions or those available under nonbankruptcy law.<sup>24</sup> As finally passed, section 522 of the Bankruptcy Reform Act compromises the differences between the House and Senate versions—the debtor is given an option to elect either the federal exemptions enumerated in section 522(d) or the applicable nonbankruptcy exemptions; however, any state may deny the debtor his right to elect the 522(d) exemptions by passing

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19. Countryman, *supra* note 7, at 681. See also Vukowich, *supra* note 18, at 1442.

20. See Kennedy, *supra* note 16; Shanker, *The Abuse and Use of Federal Bankruptcy Power*, 26 CASE W.L. REV. 3 (1975).

21. See Kennedy, *supra* note 16. For example, in formulating an exemption policy, the states would appear to be better qualified than Congress to take into consideration local patterns of credit extension, economic activity and cost of living. See *id.* at 485-86; Neustadter, *Consumer Insolvency Counseling for Californians in the 1980's*, 19 SANTA CLARA L. REV. 817, 852 (1979).

22. When exemptions in bankruptcy are more generous than nonbankruptcy exemptions, debtors are encouraged to file voluntary petitions in bankruptcy in order to protect a greater amount of property. Alternatively, when nonbankruptcy exemptions are more generous than bankruptcy exemptions, creditors have an incentive to force debtors into involuntary bankruptcy in order to reach more of their assets. See Countryman, *supra* note 9, at 3-4; Kennedy, *supra* note 16, at 452; Shanker, *supra* note 20, at 11-12.

23. S. 2266, 95th Cong., 2d Sess., § 522(b) (1977). See S. REP. NO. 989, 95th Cong., 2d Sess. 75 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5861.

24. H.R. 8200, 95th Cong., 1st Sess., § 522(b) (1977). See HOUSE REPORT, *supra* note 8, at 360.

legislation specifically opting out of the federal scheme.<sup>25</sup> The result is the enactment of a deceptive federal exemption policy—a policy that promises the debtor a federal floor of exemptions necessary for a fresh start, but which builds into that federal floor a state-triggered trap door (the opt out proviso) which has already been used to nullify federal exemption policy in a steadily increasing number of states (including Nebraska).<sup>26</sup> The opt out proviso, which was heralded as an “important victory for the rights of States” by Senator Wallop of Wyoming,<sup>27</sup> is not supported by any

25. Section 522 provides, in pertinent part:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C. § 522(b) (Supp. III 1979). Unlike under the Former Act, exempt property under the Bankruptcy Reform Act initially passes into the bankruptcy estate. Section 541 of the Bankruptcy Reform Act provides that the commencement of a bankruptcy case creates an estate. *Id.* at § 541(a). In general, the estate is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” *Id.* at § 541(a)(1). After the property passes into the bankruptcy estate, the debtor is permitted to claim his exemptions under section 522. HOUSE REPORT, *supra* note 8, at 368. See Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-For-Lawyers Bill. Part I: Overview and Legislative History*, 1979 UTAH L. REV. 1, 8-10; Hughes, *supra* note 5, at 1026-28. For a discussion of § 522(d) and the federal list of exemptions, see notes 38-47 & accompanying text *infra*.

26. See, e.g. ARIZ. REV. STAT. ANN. § 33-1133(B) (Supp. 1980); FLA. STAT. ANN. § 222.20 (West Supp. 1980); LA. REV. STAT. ANN. § 13:3881(B) (West Supp. 1980); OHIO REV. CODE ANN. § 2329.66.2 (Page Supp. 1979); NEB. REV. STAT. § 25-15,105 (Cum. Supp. 1980); VA. CODE § 34-3.1 (Supp. 1980). Although the opt out proviso is inartfully drafted, it is clear that affirmative state action is necessary to opt out of the federal scheme, i.e., a state may not opt out of the system by failure to act. *In re Boozer*, 4 B.R. 524, 526 (Bankr. Ct. N.D. Ga. 1980). See 124 CONG. REC. H11095 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 CONG. REC. H11115 (daily ed. Sept. 28, 1978) (remarks of Rep. Butler); 124 CONG. REC. S17412 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini); 3 COLLIER ON BANKRUPTCY ¶ 522.02 (15th ed. 1979).
27. 124 CONG. REC. S17406 (daily ed. Oct. 6, 1978) (remarks of Sen. Wallop). Senator Wallop's elaboration that the opt out proviso “is most important since many States . . . have been responsive to the needs of debtors and have liber-

rational consideration of bankruptcy policy. In fact, it may produce more unequal treatment of debtors than did section 6 of the Former Act, because as states with parsimonious exemption schemes opt out, the gap between exemptions available to debtors in those states and exemptions available to debtors in states that do not opt out may widen as a result of the addition of the federal option to the already more generous state exemptions available to debtors in some of the latter states.<sup>28</sup> Moreover, the perceived unfairness to creditors in states with overly generous exemption schemes is not addressed by the Bankruptcy Reform Act, because the state exemption alternative is always open to the debtor under section 522.

Subject to the opt out proviso, section 522(b) of the Bankruptcy Reform Act provides the debtor a choice of exemption schemes—he may elect the federal list of exemptions specified in section 522(d),<sup>29</sup> or, in the alternative, he may exempt any property that is exempt under state or federal nonbankruptcy law<sup>30</sup> together with

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alized exemptions frequently in recent years," *id.*, misses the point—the most serious potential problem created by the opt out proviso is that *states that have failed to modernize their exemption statutes* may choose to opt out and thereby nullify the attempt of Congress to place a floor of exemptions necessary for a fresh start beneath local debtors. See text accompanying note 28 *infra*. See generally Vukowich, *supra* note 5, at 801-04. But see note 28 *infra*.

28. Some of this inequity may be offset if states, when opting out, use the occasion to reconsider and perhaps update state exemption policy. For example, Nebraska increased the amounts of the homestead exemption and the exemption in lieu of homestead when it opted out of the federal scheme. Act of Apr. 16, 1980, L.B. 940, §§ 2-3, 1980 Neb. Laws 1051 (codified at NEB. REV. STAT. §§ 25-1552, 40-101 (Cum. Supp. 1980)). For an article stating the case in support of states choosing to opt out of the federal exemption scheme, see Lacy, *South Carolina's Statutory Exemptions And Consumer Bankruptcy*, 30 S.C. L. REV. 643 (1979).
29. See notes 38-47 & accompanying text *infra*. Notice that only an "individual debtor" is entitled to exemptions under the Bankruptcy Reform Act. 11 U.S.C. § 552(b) (Supp. III 1979). See *In re Cramer*, 3 B.R. 428, 429 (Bankr. Ct. D. Ariz. 1980).
30. The Bankruptcy Reform Act specifies that the relevant state or local exemption law is that which is:

applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place. . . .

11 U.S.C. § 522(b) (2) (A) (Supp. III 1979). Thus, when the debtor has a domicile in one state and a residence in another during the 180-day period immediately preceding bankruptcy, it is possible that the exemption law of the forum will not be the one applicable to the case. *In re Lockwood*, 6 B.R. 623 (Bankr. Ct. S.D. Fla. 1980) (debtor who filed in Florida allowed to claim exemptions under Texas law). See 28 U.S.C. § 1472 (Supp. III 1979). For a list of some of the items that may be exempted under federal nonbankruptcy law, see HOUSE REPORT, *supra* note 8, at 360.



any interest in property held by the debtor "as a tenant by the entirety or joint tenant to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law."<sup>31</sup> Although not completely free from doubt,<sup>32</sup> it appears that these alternatives are mutually exclusive, i.e., a debtor choosing the federal list of exemptions must forgo not only state and federal nonbankruptcy exemptions, but also any benefit provided by tenancy by the entirety and joint tenancy laws.<sup>33</sup> However, because in a joint bankruptcy case<sup>34</sup> section 522 applies separately to each debtor (i.e., husband and wife),<sup>35</sup> each debtor may elect either the 522(d) exemptions or the state and federal nonbankruptcy exemptions.<sup>36</sup> Accordingly, in a joint case one of the debtors may select the federal bankruptcy exemptions, and his or her spouse may claim the state list.<sup>37</sup>

Section 522(d) of the New Act<sup>38</sup> was enacted for the purpose of

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31. 11 U.S.C. § 522(b)(2)(B) (Supp. III 1979). For the complete text of section 522(b), see note 25 *supra*.
  32. See Note, *The Bankruptcy Code of 1978 and Its Effect Upon Tenancies by the Entireties*, 13 IND. L. REV. 761, 775-78 (1980).
  33. See *In re Nichols*, 4 B.R. 711, 716 (Bankr. Ct. E.D. Mich. 1980); *In re Kimball*, 2 B.R. 560, 561-62 (Bankr. Ct. W.D. La. 1980); 3 COLLIER, *supra* note 26, at ¶522.02; Hughes, *supra* note 5, at 1028-29; Note, *supra* note 31, at 775-78. Nebraska does not recognize the tenancy by the entirety. *Kerner v. McDonald*, 60 Neb. 663, 84 N.W. 92 (1900). Although research did not disclose a case expressly so holding, in Nebraska the interest of an individual joint tenant appears to be subject, during such joint tenant's lifetime, to the claims of his creditors. See NEB. REV. STAT. § 25-1503 (Reissue 1979); Volkmer, *Nebraska Law of Concurrent Ownership*, 13 CREIGHTON L. REV. 513, 536-37 (1979). See also 4A R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* ¶ 618 (1979).
  34. 11 U.S.C. § 302(a) (Supp. III 1979) provides that a joint case may be commenced by the filing of a single petition by an individual and his or her spouse.
  35. *Id.* at § 522(m).
  36. See HOUSE REPORT, *supra* note 8, at 363; 3 COLLIER, *supra* note 26, at ¶ 522.04; Cohen & Klee, *Caveat Creditor: The Consumer Debtor Under the Bankruptcy Code*, 58 N.C. L. REV. 681, 695 (1980); Neustadter, *supra* note 21, at 863.
  37. *In re Ancira*, 5 B.R. 673 (Bankr. Ct. N.D. Cal. 1980). See Neustadter, *supra* note 21, at 865-66. But see *In re Dill*, 6 B.R. 396 (Bankr. Ct. N.D. Ariz. 1980) (where one spouse's equity in residential real property was protected by state homestead exemption claimed by other spouse, the former's wildcard exemption under § 522(d)(1), (5) of the Bankruptcy Reform Act was deemed to have been used to such extent); *In re Ageton*, 5 B.R. 323 (Bankr. Ct. D. Ariz. 1980) (where under Arizona law both spouses were required to join in claim of homestead exemption, the wife could not claim separate federal exemptions in a joint case in bankruptcy).
  38. Section 522(d) provides:
    - (d) The following property may be exempted under subsection (b)(1) of this section:
      - (1) The debtor's aggregate interest, not to exceed \$7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property

setting aside to the debtor "adequate possessions to begin his

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that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed \$1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed \$200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed \$500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed in value \$400 plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property.

(6) The debtor's aggregate interest, not to exceed \$750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmaturing life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value \$4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmaturing life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive—

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401 (a), 403(a), 403(b), 408, or 409).

(11) The debtor's right to receive, or property that is traceable to—

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably

fresh start."<sup>39</sup> The cornerstone of the federal scheme is the \$7,900 wildcard or grubstake exemption, which the debtor may use to exempt any property.<sup>40</sup> The debtor may apply the wildcard to exempt otherwise nonexempt property or to exempt partially exempt property beyond dollar amount limitations.<sup>41</sup> In addition to the wildcard exemption, section 522(d) also provides exemptions for numerous categories of specific property.<sup>42</sup> For example,

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necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed \$7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

11 U.S.C. § 522(d) (Supp. III 1979).

39. HOUSE REPORT, *supra* note 8, at 126. See note 8 *supra*.

40. The \$7,900 wildcard exemption is a result of the combined operation of § 522(d)(1), which provides a homestead exemption of \$7,500, and § 522(d)(5), which gives the debtor an unrestricted exemption in any property in an amount equal to \$400 "plus any unused amount of the exemption provided under paragraph (1) of this subsection." 11 U.S.C. § 522(d)(5) (Supp. III 1979). Thus, as a result of the wording of § 522(d)(5), "[t]he language of the residential allowance provision becomes surplusage, and the unrestricted exemption is, in effect, a \$7,900 allowance." Hughes, *supra* note 5, at 1031. See *In re Nichols*, 4 B.R. 711, 718 (Bankr. Ct. E.D.Mich. 1980); *In re Upright*, 1 B.R. 694, 701 (Bankr. Ct. N.D.N.Y. 1979).

41. See Vukowich, *supra* note 5, at 780-81. For example, in one recent case the debtor was permitted to exempt an automobile valued at \$2,500 by applying part of his wildcard exemption to bridge the difference between the value of the property and the \$1,200 specific exemption "in one motor vehicle" under § 522(d)(3). *In re Bagley*, 1 B.R. 116, 118 (Bankr. Ct. E.D. Pa. 1979). See note 43 & accompanying text *infra*. And in *In re Boozer*, 4 B.R. 524, 528 (Bankr. Ct. N.D. Ga. 1980), the court held that the wildcard could be applied to exempt the debtor's interest in household goods in excess of the \$200 per item exemption created by section 522(d)(3) of the New Act. See note 44 & accompanying text *infra*. In general, the cases have interpreted § 522(d)(5) very liberally in terms of the nature of property which may be exempted through application of the wildcard. See, e.g., *In re Laird*, 6 B.R. 273 (Bankr. Ct. E.D. Pa. 1980); *In re Nichols*, 4 B.R. 711 (Bankr. Ct. E.D. Mich. 1980). But see *In re Smith*, 5 B.R. 500 (C.D. Ill. 1980) (§ 522(d)(5) may be used to exempt only property of the type described in § 522).

42. For an extensive discussion of the various categories of exemptions under § 522(d), see 3 COLLIER, *supra* note 26, at ¶¶ 522.10-20. Most of the specific exemptions under § 522(d) are subject to stated value, use, or need limitations. See Hughes, *supra* note 5, at 1029-35.

the debtor is allowed to exempt (i) his interest, not to exceed \$1,200, in one motor vehicle;<sup>43</sup> (ii) his interest, not to exceed \$200 with respect to any particular item, in household goods, wearing apparel, books and certain other property held primarily for personal, family or household use;<sup>44</sup> (iii) his aggregate interest, not to exceed \$500, in jewelry held primarily for personal, family or household use;<sup>45</sup> and (iv) his aggregate interest, not to exceed \$750, in implements, professional books or tools of his or a dependent's trade.<sup>46</sup> Additionally, subject to specified restrictions and limitations, section 522(d) exempts the debtor's right to receive certain payments in the nature of future earnings (such as social security benefits and alimony, support or separate maintenance), and certain payments which compensate for losses (such as awards under crime victim's reparation laws and wrongful death benefits).<sup>47</sup>

The Bankruptcy Reform Act also seeks to ensure that the debtor's fresh start is not imperiled by contractual provision or nonbankruptcy judicial process. For example, section 522(e) provides that a waiver of exemptions executed in favor of an un-

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43. 11 U.S.C. § 522(d) (2) (Supp. III 1979). The reference in this and other subsections of § 522(d) to the debtor's "interest" in property requires the exclusion of valid liens from the computation of the value of the property which may be exempted. *In re Van Gorkom*, 4 B.R. 689 (Bankr. Ct. D.S.D. 1980) (dictum). See 3 COLLIER, *supra* note 26, at ¶ 522.11; Hughes, *supra* note 5, at 1030; Vukowich, *supra* note 5, at 779. "Thus, for example, a residence worth \$30,000 with a mortgage of \$25,000 will be exemptable to the extent of \$5,000." HOUSE REPORT, *supra* note 8, at 360-61.

44. 11 U.S.C. § 522(d) (3) (Supp. III 1979). There is no limitation on the number of items which may qualify for this exemption. Moreover, because the debtor is free under the Bankruptcy Reform Act to convert nonexempt property into exempt property in contemplation of bankruptcy, see HOUSE REPORT, *supra* note 8, at 361, there is great potential for abuse under § 522(d) (3). See 3 COLLIER, *supra* note 26, at ¶ 522.12. It is also likely that difficult construction problems will arise under § 522(d) (3). See Aaron, *supra* note 11, at 194; Vukowich, *supra* note 5, at 783-85. For example, is a stereo component system one item or several items for purposes of the value limitation? Cf. *In re Beard*, 5 B.R. 429 (Bankr. Ct. S.D. Iowa 1980) (apparently treating each component as a separate item).

45. 11 U.S.C. § 522(d) (4) (Supp. III 1979). Notice that the value limitation with respect to this exemption calls for an aggregate rather than a per item calculation. See 3 COLLIER, *supra* note 26, at ¶ 522.13.

46. 11 U.S.C. § 522(d) (6) (Supp. III 1979). The New Act defines "dependent" as including a "spouse, whether or not actually dependent." *Id.* at § 522(a) (1).

47. *Id.* at § 522(d) (10)-(11). The New Act also provides other specific exemptions for any unmaturing life insurance contract (other than a credit life insurance contract) owned by the debtor; the debtor's aggregate interest, not to exceed \$4,000, in "any accrued dividend or interest under, or loan value of" unmaturing life insurance policies; and professionally prescribed health aids. *Id.* at § 522(d) (7)-(9).

secured creditor is unenforceable in bankruptcy.<sup>48</sup> Moreover, although a waiver of exemptions executed in favor of a secured creditor is not invalidated by the New Act, under section 522(f) the debtor may avoid nonpossessory, nonpurchase-money security interests in household goods, wearing apparel, health aids and certain other categories of favored property, as well as judicial liens on any property, to the extent that any such security interest or lien "impairs an exemption" to which the debtor would otherwise have been entitled.<sup>49</sup> The purpose of these provisions is to protect the debtor's exemptions, particularly his exemptions in essential

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48. *Id.* at § 522(e). One commentator has asserted that exemptions may nevertheless be waived under the New Act by failure to file under applicable state law and by the debtor's omission of a claim for exemption in his schedules. 3 COLLIER, *supra* note 26, at ¶ 522.07. The same authority also argues that a general waiver of exemptions executed by the debtor for the benefit of all general creditors should be enforceable in bankruptcy. *Id.* For a discussion of waiver of exemptions under the Former Act, see 1A COLLIER ON BANKRUPTCY ¶ 6.10 (14th ed. 1978); Currie, *Exempt Property And Bankruptcy: Secured And Waiver Claims*, 31 LA. L. REV. 73, 79-82 (1970); Kennedy, *supra* note 16, at 462-69.

49. Section 522(f) provides:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any—

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

11 U.S.C. § 522(f) (Supp. III 1979). See generally Vukowich, *supra* note 5, at 793-96. Section 522(f) is one of the more controversial provisions of the Bankruptcy Reform Act and has already generated a significant amount of litigation in the bankruptcy courts. See, e.g., *In re Fisher*, 6 B.R. 206 (Bankr. Ct. N.D. Ohio 1980) (sustaining constitutionality of retroactive application of § 522(f)(2) to avoid nonpurchase-money security interest in household goods that had been obtained by creditor prior to enactment of the Bankruptcy Reform Act, and invalidating under the supremacy clause of the United States Constitution an Ohio statute which, in effect, denied Ohio debtors the full benefit of § 522(f)).

The debtor is also given power to avoid and exempt certain involuntary transfers or setoffs of property to the extent that such property could otherwise have been exempted under § 522(b). See 11 U.S.C. § 522(g)-(i) (Supp. III 1979); Hughes, *supra* note 5, at 1037-40. These provisions permit the debtor to protect his exemptions by taking advantage of the trustee's avoiding powers under various sections of the New Act, whether or not such powers are

consumer goods, from overbearing creditors who have obtained an unfair advantage over the debtor and his assets.<sup>50</sup> In particular, section 522(f)(2) is aimed at creditors, such as finance companies, that loan money to a consumer debtor and take back a security agreement covering all of the debtor's belongings.<sup>51</sup>

Theoretically, federal exemption policy concerning waiver and lien avoidance may not be nullified by the states, because the opt out proviso applies only to the 522(d) list of federal exemptions and not to the other provisions of section 522.<sup>52</sup> Thus, exemptions under state law are protected in bankruptcy by the restrictions on waiver under section 522(e) and by the debtor's avoiding powers under section 522(f), whether or not the state elects to opt out of the federal exemption scheme. Unfortunately, however, the waiver and lien avoidance provisions do not operate in a vacuum; they provide relief to overburdened debtors only in concert with substantive exemption law.<sup>53</sup> Thus, by opting out of the federal scheme of exemptions, individual states, particularly those with closefisted exemption laws, may deny their debtors much of the prophylactic effect of sections 522(e) and (f) of the Bankruptcy Reform Act.

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actually exercised by the trustee. See 11 U.S.C. § 522(g)-(i) (Supp. III 1979); Hughes, *supra* note 5, at 1037-40.

50. *In re Fisher*, 6 B.R. 206; 214 (Bankr. Ct. N.D. Ohio 1980); *In re Rodgers*, 5 B.R. 761, 763-64 (Bankr. Ct. W.D. Va. 1980); HOUSE REPORT, *supra* note 8, at 126-27, 362. See COMMISSION REPORT, *supra* note 16, at 173-74.
51. HOUSE REPORT, *supra* note 8, at 127. One of the Former Act's principal shortcomings was its failure to adequately address the impact on the debtor's fresh start of consumer credit secured by nonpurchase-money security interests in household goods and other property essential to the debtor's well-being. See HOUSE REPORT, *supra* note 8, at 125-27; Lacy, *supra* note 28, at 673-74. Such security interests interfered not only with exemption policy in bankruptcy, but with discharge policy as well; creditors, especially under-secured creditors, holding security interests in necessities frequently applied the leverage of their position to exact from their debtors reaffirmation agreements to pay dischargeable pre-bankruptcy debts. See Lacy, *supra* note 28, at 675-76. In response, the Bankruptcy Reform Act reformed not only exemption law, but also the law governing reaffirmation agreements and redemption of collateral. See 11 U.S.C. §§ 522, 524, 722 (Supp. III 1979); Lacy, *supra* note 28, at 673-89.
52. 11 U.S.C. § 522(b)(1) (Supp. III 1979). See *In re Fisher*, 6 B.R. 206 (Bankr. Ct. N.D. Ohio 1980); *In re Hill*, 4 B.R. 310 (Bankr. Ct. N.D. Ohio 1980); *In re Rodgers*, 5 B.R. 761 (Bankr. Ct. W.D. Va. 1980); 3 COLLIER, *supra* note 26, at ¶ 522.29. But see *In re Babcock*, 9 B.R. 475 (Bankr. Ct. W.D. La. 1981).
53. For example, if household goods are not protected by the exemption laws of a state that has opted out of § 522(d), then security interests covering such goods do not impair an exemption. Thus, the avoiding powers of the debtor created by § 522(f)(2) are essentially meaningless in that jurisdiction, because they are dependent upon the existence of a lien which impairs an exemption. See Lacy, *supra* note 28, at 683.

The status of exempt property is carefully provided for under the New Act. Once property of the debtor has been exempted from his bankruptcy estate, it is protected against most pre-petition claims of creditors.<sup>54</sup> However, certain nondischargeable obligations of the debtor with respect to taxes, alimony, maintenance or support may be enforced against exempt property, as may valid liens that are not avoided.<sup>55</sup> Finally, section 522(c)(2)(C) permits tax liens that are avoided under section 545(2)<sup>56</sup> to be enforced against exempt property, provided notice thereof is duly filed.<sup>57</sup>

## II. NEBRASKA EXEMPTION POLICY AND THE BANKRUPTCY REFORM ACT

On April 16, 1980, Nebraska rejected the uniform federal bankruptcy exemptions.<sup>58</sup> The author's view that sound federal bankruptcy policy is disserved by the opt out proviso contained in section 522(b)(1) of the Bankruptcy Reform Act has already been

54. Section 522(c) provides:

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, except—

(1) a debt of a kind specified in section 523(a)(1) or section 523(a)(5) of this title; or

(2) a lien that is—

(A) not avoided under section 544, 545, 547, 548, 549, or 724(a) of this title;

(B) not voided under section 506(d) of this title; or

(C) (i) a tax lien, notice of which is properly filed; and

(ii) avoided under section 545(2) of this title.

11 U.S.C. § 522(c) (Supp. III 1979). See HOUSE REPORT, *supra* note 8, at 361; Hughes, *supra* note 5, at 1035-36; Comment, *Protection of a Debtor's "Fresh Start" Under the New Bankruptcy Code*, 29 CATH. U. L. REV. 843, 852-53 (1980).

55. 11 U.S.C. § 522(c) (Supp. III 1979).

56. Section 545(2) provides that the trustee may avoid a statutory lien on property of the debtor to the extent that such lien "is not perfected or enforceable on the date of the filing of the petition against a bona fide purchaser that purchases such property on the date of the filing of the petition, whether or not such a purchaser exists." *Id.* at § 545(2). See 4 COLLIER ON BANKRUPTCY ¶ 545.04 (15th ed. 1979). Although § 545(2) applies to all statutory liens, including tax liens, § 522(c)(2)(C) is limited to tax liens. Compare 11 U.S.C. § 545(2) (Supp. III 1979) with *id.* at 522(c)(2).

57. 11 U.S.C. § 522(c)(2)(C) (Supp. III 1979).

58. Act of Apr. 16, 1980, L.B. 940, § 1, 1980 Neb. Laws 1051 (codified at NEB. REV. STAT. § 25-15,105 (Cum. Supp. 1980)) provides:

The federal exemptions provided in 11 U.S.C. 522, subsection (d), are hereby rejected by the State of Nebraska. The State of Nebraska elects to retain the personal exemptions provided under Nebraska statutes and the Nebraska Constitution and to have such exemptions apply to any bankruptcy petition filed in Nebraska after April 17, 1980.

noted.<sup>59</sup> However, the decision of a state to exercise its option to reject the uniform bankruptcy exemptions is a different, although not unrelated, issue.

Whether or not there is a uniform federal exemption policy in bankruptcy is a question for Congress to determine, and, in light of the opt out proviso, it is difficult to avoid the conclusion that Congress has decided (perhaps unwisely) against absolute uniformity in exemptions. Therefore, the proper function of any particular state in deciding whether to opt out is not to second guess this Congressional resolution of federal bankruptcy policy; rather, it is to determine whether the section 522(d) exemption scheme strikes a proper balance between the competing interests of local debtors and their creditors.<sup>60</sup>

L.B. 940, the Nebraska opt out bill, followed this approach and sought to compromise the differences between debtor and creditor interests. It rejected the federal list of exemptions as requested by lobbyists for creditor groups.<sup>61</sup> However, in response to consumer recommendations,<sup>62</sup> it increased the amounts of the homestead exemption<sup>63</sup> and the exemption in lieu of homestead.<sup>64</sup>

The main purpose of this article is to examine the substance, logic, and policy of Nebraska exemption law as applicable to the bankruptcy process and to suggest certain changes in the substance of that law where needed to better serve logic and policy. However, it is not a purpose of this article to assay the wisdom of the Unicameral's decision to opt out of the federal bankruptcy exemption system. Although there is clearly at stake a federal interest in providing exemptions necessary for a fresh start, Congress

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59. See notes 26-28 & accompanying text *supra*.

60. See generally note 21 & accompanying text *supra*.

61. Representatives of the Nebraska Banker's Association, the Nebraska Wholesalers-Suppliers Association and the Retail Merchants Association of Greater Omaha urged the legislature to reject the federal bankruptcy exemptions in favor of state exemptions. Essentially, they argued that the federal list is too liberal and would have an adverse impact on the economy of, and consumer credit in, Nebraska. See COMM. ON BANKING, COMMERCE, AND INSURANCE OF THE NEBRASKA UNICAMERAL, 86TH LEGISLATURE, LEGISLATIVE COUNCIL REP. NO. 264, INTERIM STUDY STAFF REP. ON LR 151, III-14 to -15 (1979) [hereinafter cited as INTERIM STUDY]; Omaha World-Herald, Sept. 19, 1979, at 4, col. 1.

62. See INTERIM STUDY, *supra* note 61, at III-15; Omaha World-Herald, Sept. 19, 1979, at 4, col. 1.

63. The dollar amount of the homestead exemption was increased from \$4,000 to \$6,500. Act of Apr. 16, 1980, L.B. 940, § 3, 1980 Neb. Laws 1051 (codified at NEB. REV. STAT. § 40-101 (Cum. Supp. 1980)). For a discussion of the Nebraska homestead exemption, see § II-A of text *infra*.

64. The dollar amount of the exemption in lieu of homestead was increased from \$1,500 to \$2,500. Act of Apr. 16, 1980, L.B. 940, § 2, 1980 Neb. Laws 1051 (codified at NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980)). For a discussion of the Nebraska exemption in lieu of homestead, see § II-B-1 of text *infra*.



has expressly made each state the ultimate arbiter of substantive bankruptcy exemption policy. By replacing the liberal federal bankruptcy exemption scheme with the less generous state list of exemptions,<sup>65</sup> while at the same time increasing the amounts of the homestead exemption and the exemption in lieu of homestead, the Nebraska legislature has struck what appears to be a reasonable balance between debtor and creditor interests. However, by accepting the task of formulating a bankruptcy exemption policy for Nebraska debtors, the Unicameral has undertaken a continuing moral obligation to ensure that those debtors are not denied the fresh start following bankruptcy to which they are entitled.

### A. The Nebraska Homestead Exemption

The homestead exemption, a creation of American law,<sup>66</sup> is rooted in an 1839 statute of the Republic of Texas which

reserved to every citizen, or head of a family, in this republic, free and independent of the power of a writ of *fiery facias*, or other execution . . . fifty acres of land or one town lot, including his or her homestead, and improvements not exceeding five hundred dollars in value. . . .<sup>67</sup>

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65. The federal list of exemptions is clearly more generous to debtors than is the Nebraska list. For example, the combined effect of §§ 522(d)(1) and 522(d)(5) is to provide each debtor with an unrestricted \$7,900 exemption in any property. See note 40 & accompanying text *supra*. The closest Nebraska counterpart of the federal wildcard exemption is the \$6,500 homestead exemption, which is available only to debtors who are heads of families and who satisfy statutory ownership and occupancy requirements. NEB. REV. STAT. § 40-101 (Cum. Supp. 1980). See § II-A of text *infra*. However, the disparity between federal and Nebraska exemptions gives rise to one positive effect of Nebraska's opting out of the federal scheme—the elimination of an incentive for debtors to rush into bankruptcy in order to take advantage of the more generous federal exemptions. See Lacy, *supra* note 28, at 679-80, 688-89. Professor Lacy, in urging the South Carolina General Assembly to enact legislation depriving debtors of the right to select the federal exemption list in bankruptcy, argued that such action would prevent a significant increase in the number of consumer bankruptcies filed in South Carolina and thereby avoid the inevitable result—increased costs and reduced availability of consumer credit. *Id.* at 688-89.

66. "Although exemptions from execution, embracing real and personal property, were known in England at common law and also in this country at an early date, homestead legislation appears to be a uniquely American contribution to the law of real property. . . ." Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950) (footnotes omitted). See Comment, *State Homestead Exemption Laws*, 46 YALE L.J. 1023, 1023-24 (1937). Only six jurisdictions in the United States do not have homestead laws. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 797 (1974); *Uniform Exemptions Act*, 13 U.L.A. CIVIL PROC. & REM. LAWS 368 (1980).

67. Act of Jan. 26, 1839, art. 684, 1839 Laws of the Republic of Texas, 3d Cong., 1st Sess. 113, reprinted in J. SAYLES & H. SAYLES, 1 EARLY LAWS OF TEXAS 318 (2d ed. 1891). See Haskins, *supra* note 66, at 1289; Comment, *supra* note 66, at 1026.

The initial Nebraska homestead exemption law, which was based on the law of Iowa,<sup>68</sup> was enacted in 1855 by the First General Assembly of the Territory of Nebraska.<sup>69</sup> The Nebraska legislature passed several homestead laws between 1855 and 1879, when the present homestead act<sup>70</sup> was enacted in its original form.<sup>71</sup>

The most recent amendment of Nebraska homestead law was contained in L.B. 940, the bill by which the State of Nebraska exercised its right to opt out of the federal bankruptcy exemption scheme.<sup>72</sup> The 1980 amendment increased the dollar amount of the value limitation on the homestead exemption from \$4,000 to \$6,500.<sup>73</sup>

The present version of the homestead exemption provides:

A homestead not exceeding in value six thousand five hundred dollars, consisting of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as provided in sections 40-101 to 40-117.<sup>74</sup>

In order to qualify for the exemption, a homestead claimant must

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68. Act of Mar. 16, 1855, 1855 Neb. Laws 55. See Foster, *The Nebraska Homestead-Part 1*, 3 NEB. L. BULL. 109, 116 (1924). Professor Foster's article, although somewhat dated, remains a very helpful study of Nebraska homestead law.

69. Act of Mar. 16, 1855, § 479, 1855 Neb. Laws 102 (repealed 1860). The act, which was referred to by Professor Foster as "the simplest homestead act ever passed by a legislature," Foster, *supra* note 68, at 116, provides in pertinent part: "If the debtor is the head of a family there is further exempt, his homestead as provided by law . . ." Act of Mar. 16, 1855, § 479, 1855 Neb. Laws 102 (repealed 1860).

70. NEB. REV. STAT. §§ 40-101 to-116 (Reissue 1978 & Cum. Supp. 1980) (originally enacted as Act of Feb. 26, 1879, 1879 Neb. Laws 57).

71. See Foster, *supra* note 68, at 116. For example, in 1860 the Nebraska legislature approved a homestead act which, for the first time, placed an area limitation on the homestead exemption. Act of Jan. 13, 1860, § 1, 1859 Neb. Laws 102 (repealed 1875). The act provided for a rural homestead not exceeding 160 acres, or an urban homestead not exceeding two contiguous lots, and in either case, the dwelling house and appurtenances situated on the homestead land. The rural homestead exemption was further limited to "the homestead mansion and twenty acres of the land whereon the mansion is situate, and land adjoining the same to the extent of five hundred dollars in value, . . . and no more." *Id.*

In 1875 a new Nebraska homestead act was enacted. The 1875 act eliminated the distinction between rural and urban homesteads and provided that, in all cases, the homestead exemption was not to exceed 160 acres in area and \$2,000 in value. Act of Feb. 25, 1875, § 1, 1875 Neb. Laws 45 (repealed 1879).

72. Act of Apr. 16, 1980, L.B. 940, § 3, 1980 Neb. Laws 1051 (codified at NEB. REV. STAT. § 40-101 (Cum. Supp. 1980)).

73. *Id.*

74. NEB. REV. STAT. § 40-101 (Cum. Supp. 1980).

satisfy three requirements:<sup>75</sup> (1) he must be the "head of a family";<sup>76</sup> (2) he must, with one exception, be the "owner" of the homestead property;<sup>77</sup> and (3) he must reside in the dwelling house situated on the homestead tract.<sup>78</sup> Additionally, the homestead exemption is subject to a statutory dollar amount limitation.

### 1. Family Headship Requirement

Section 40-101 of the Nebraska Homestead Act does not expressly require the homestead claimant to be the head of a family. However, the family headship requirement is clearly established from the Act read as a whole<sup>79</sup> as well as from homestead case law.<sup>80</sup> This conclusion also follows from the policy of the homestead exemption, which was discussed by Justice Barnes in *Holmes v. Mason*:<sup>81</sup>

The act exempts homesteads from forced sale to pay the debts of the head of the family, and is "a beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband." It is designed to protect citizens and their families from the miseries and dangers of destitution. It is an enlightened policy, looking to the general welfare, as well as to that of the individual citizen. It is a statutory right purely, created for the benefit of the debtor and his family.<sup>82</sup>

Section 40-115 of the Nebraska Homestead Act defines "head of a family" as including every person who has "residing on the premises with him or her, and under his or her care and mainte-

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75. See *In re Foley*, 97 F. Supp. 843, 844 (D. Neb. 1951).

76. See notes 79-106 & accompanying text *infra*.

77. See notes 107-47 & accompanying text *infra*.

78. See notes 148-85 & accompanying text *infra*.

79. See, e.g., NEB. REV. STAT. §§ 40-102, -105, -115 (Reissue 1978 & Cum. Supp. 1980).

80. E.g., *Brusha v. Phipps*, 86 Neb. 822, 126 N.W. 856 (1910) (widow not entitled to homestead exemption where not head of a family since no one resided with or was dependent on her); *Palmer v. Sawyer*, 74 Neb. 108, 103 N.W. 1088 (1905) (claimant was head of a family at time homestead tract was acquired).

81. 80 Neb. 448, 114 N.W. 606 (1908).

82. *Id.* at 453, 114 N.W. at 608. See Foster, *supra* note 68, at 112; Haskins, *supra* note 66, at 1289; Comment, *supra* note 66, at 1030. Further support for the proposition that the primary purpose of the homestead exemption is protection of the family and not the individual debtor is furnished by the statutory restrictions on alienation of a married person's homestead. NEB. REV. STAT. § 40-104 (Reissue 1978). See Comment, *supra* note 66, at 1030. See also notes 89, 105 & accompanying text *infra*. A probable secondary purpose of the homestead exemption is the encouragement of home ownership. See Haskins, *supra* note 66, at 1289-90; Comment, *supra* note 66, at 1030-31. Encouraging home ownership is no longer a compelling homestead policy in light of the reasonable alternatives to home ownership available to the contemporary debtor. See notes 207-08 & accompanying text *infra*.

nance" any member of certain enumerated classes of relatives.<sup>83</sup> A literal reading of section 40-115, as amended in 1979,<sup>84</sup> excludes from the meaning of "head of a family" both spouses in the case of married couples with no children or other dependents. Thus, a person residing on the homestead property with, and supporting, an unmarried brother or sister may qualify as the head of a family, whereas the same person residing only with a husband or wife apparently does not qualify. This appears to be an unforeseen consequence of the 1979 amendment to section 40-115, which was intended simply to eliminate gender-based discrimination in various sections of Nebraska legislation and not to affect the substantive homestead rights of married couples.<sup>85</sup>

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83. NEB. REV. STAT. § 40-115 (Cum. Supp. 1980). The section provides:

The phrase head of a family, as used in section 40-101 to 40-117, includes within its meanings every person who has residing on the premises with him or her, and under his or her care and maintenance: (1) His or her minor child, or the minor child of his or her deceased wife or husband, (2) a minor brother or sister, or the minor child of a deceased brother or sister, (3) a father, mother, grandfather, or grandmother, (4) the father or mother, grandfather or grandmother of a deceased husband or wife, or (5) an unmarried sister, brother, or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves.

*Id.* Thus, the statute requires that the family member be related to the head of the family by consanguinity or affinity. See Foster, *supra* note 68, at 120.

84. Act of May 22, 1979, L.B. 80, § 103, 1979 Neb. Laws 226. Prior to passage of this amendment, section 40-115 provided, in addition to substantially the current verbiage, that the husband was the head of the family when the claimant was a married person.

85. For example, the act replaces gender-specific terms contained in many sections of Nebraska legislation with gender-neutral terms. See, e.g. Act of May 22, 1979, L.B. 80, § 82, 1979 Neb. Laws 226 (references to "father", "son", "brother", "brother-in-law", "father-in-law" and "son-in-law" in statute relating to disqualification of judges replaced with references to "parent", "child", "sibling" and "in-law"). The stated intent of L.B. 80, the omnibus bill that contained the amendment to section 40-115, was "to continue the ongoing process of removing reference to gender from the statutes." COMM. ON THE JUDICIARY OF THE NEBRASKA UNICAMERAL, 86TH LEGISLATURE, 1ST SESS., STATEMENT ON L.B. 80 (Mar. 14, 1979). At a public hearing on L.B. 80, held on January 15, 1979, Senator Marsh, who introduced the bill, explained its purpose as follows:

The intent of LB 80 is to update language and to remove sexist language from the Nebraska statutes. Included in the changes are policeman to police officer; fireman to firefighter; he to disabled person[]; councilman to council members. . . . The word sexism was coined to denote discrimination based on gender. In its original sense sexism referred to prejudice against the female sex. In a deeper sense the term now indicates any arbitrary stereotyping of males and females on the basis of their gender. LB 80, if passed, will endeavor to eliminate sexist assumptions from statutes. Men and women should be treated primarily as people and not primarily as members of the opposite sex. Their shared humanity and common

Although the Supreme Court of Nebraska has not yet been presented with the issue, hopefully, it will interpret the amended definition of "head of a family" liberally in accordance with the "enlightened policy" of the homestead exemption<sup>86</sup> in order to permit a married couple without children or other dependents to claim the benefit of the homestead exemption. The argument for adoption of this interpretation is further supported by the inclusive nature of the statutory definition of head of a family<sup>87</sup> and by case law broadly construing the family headship requirement.<sup>88</sup> However, interpreting the family headship requirement in a manner which will serve both the liberal exemption policy of the Homestead Act and the policy of eliminating gender-based discrimination from Nebraska laws will not be easy. The courts will be required to determine which spouse is the family head and articulating a standard for making that choice will be difficult, particularly when both spouses are working and contributing to the support of the household. An interpretation which resorts to the traditional presumption that the husband is the head of the family

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attributes should be stressed, not their gender difference. Neither sex should be stereotyped or arbitrarily assigned to a leading or a secondary role. The intent of LB 80 is to update in 15 different chapters the wording of our statutes.

*Public Hearing on L.B. 80 Before the Comm. on the Judiciary of the Nebraska Unicameral*, 86th Legislature, 1st Sess. 1-2 (1979).

86. See note 82 & accompanying text *supra*. "The homestead law has always been liberally construed in this state with a view to promoting its beneficent purposes." *First Nat'l Bank v. McClanahan*, 83 Neb. 706, 711, 120 N.W. 185, 187 (1909).

87. See note 83 *supra*. But see 1 AMERICAN LAW OF PROPERTY § 5.79, at 817-18 (A. J. Casner ed. 1952) (footnotes omitted) [hereinafter cited as A.L.P.]:

Since those seven states [including Nebraska] . . . use words of inclusion in presenting the definition, it might be argued that the definitions are not exclusive, so that a person within the judicial conception of what constitutes family headship might claim an exemption even though he was not strictly within the terms of the statute. However, although the point does not seem to have been expressly raised in appellate litigation, the general tenor of judicial opinion appears to regard the definitions as exclusive.

*Id.*

88. For example, in *Doman v. Fenton*, 96 Neb. 94, 147 N.W. 209 (1914), a claimant was held to qualify as the head of a family where she resided with and maintained the minor children of her deceased sister-in-law, notwithstanding that the pertinent language of the statutory definition extended only to a claimant residing with "the minor child of a deceased brother or sister." *Id.* at 97, 147 N.W. at 210. See also *First Nat'l Bank v. McClanahan*, 83 Neb. 706, 120 N.W. 185 (1909) (under former statute designating husband the head of the family when the claimant was married, deserted wife was entitled to claim homestead exemption). Cf. *In re Estate of Grassman*, 183 Neb. 147, 158 N.W.2d 673 (1968) (under "liberal construction" of former statute providing a personal property exemption in lieu of homestead only to heads of families, a wife contributing to the support of her dependent husband qualified).

will not further the policy of eliminating discrimination based on sex from Nebraska laws. For this reason, if the homestead exemption is to be retained in Nebraska, a legislative response is the preferable solution. The legislature should use this opportunity to reconsider the family headship requirement with a view to its possible elimination, thereby extending the homestead exemption to all individuals who otherwise qualify.<sup>89</sup>

The family headship requirement has not often been the subject of interpretative problems in Nebraska case law. One area of uncertainty is whether a condition of dependency is required between the head of the family and family members residing with him or her on the homestead.

Under the pre-1979 version of section 40-115 of the Homestead Act, the dependency requirement varied according to the marital status of the claimant and category of family member involved.<sup>90</sup> When the claimant was married, former section 40-115(1) simply provided that the husband was the head of the family,<sup>91</sup> there was no express statutory condition that family members be dependent on him. However, when an unmarried claimant attempted to qualify as the head of a family under former section 40-115(2), there was an express dependency requirement delimited according to whether the family member residing with the claimant had attained the age of majority.<sup>92</sup>

Although Professor Foster has stated that "the head of the fam-

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89. A number of states have recently abandoned the family headship requirement and now extend the homestead exemption to single persons without dependents. See 2A R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* ¶ 263[1], at 406.7 (1979); 1 A.L.P., *supra* note 87, § 5.79, at 815-16; Haskins, *supra* note 66, at 1293. For a discussion of Texas law extending the homestead exemption to single adult persons, see Note, *Effects of Extending the Homestead Exemption to Single Adults*, 26 BAYLOR L. REV. 658 (1974). Elimination of the family headship requirement will not, however, solve all problems associated with the homestead exemption. The Unicameral should re-examine the policy of the homestead exemption more generally with a view to its possible repeal and replacement. See notes 194-211 & accompanying text *infra*.

90. Compare NEB. REV. STAT. § 40-115(1) (Reissue 1978) (repealed 1979) with *id.* § 40-115(2) (repealed 1979).

91. *Id.* § 40-115(1) (repealed 1979) provided that the phrase head of a family included "[t]he husband, when the claimant is a married person." This provision has been eliminated from the present version of § 40-115, and the substantive effect of this change on the homestead exemption is a matter of great uncertainty. See notes 83-89 & accompanying text *supra*.

92. NEB. REV. STAT. § 40-115(2) (Reissue 1978) (repealed 1979) provides that the claimant must reside on the homestead premises with, and provide "care and maintenance" for, one or more of the designated relatives in order to qualify as the head of a family. Moreover, when the relative was "an unmarried sister" or any other relative who had "attained the age of majority," former § 40-115(2)(e) added the requirement that the relative must be "unable to take care of or support [himself or herself]." *Id.* § 40-115(2)(e) (repealed 1979).

ily must owe the members of the family or some of them the duty of support . . . [which] may be legal, as in [the] case of a wife or a minor child, or . . . moral, as in the case of a sister,"<sup>93</sup> this conclusion is too simplistic. The issue of dependency has not been frequently litigated in Nebraska, and no Nebraska case has analyzed the distinctions made by former section 40-115 with respect to the dependency relationship required between the claimant and the various categories of family members.<sup>94</sup> However, in *Hyde v. Hyde*,<sup>95</sup> the Nebraska Supreme Court recognized that when a claimant attempts to establish head of family status based upon his relationship with an adult daughter, he must show not only that his daughter resides with him on the homestead, but also that she is "unable to take care of and support herself" and "under his care and maintenance."<sup>96</sup> The court stated that dependency is a question of fact and suggested that the proper test is "actual and necessary dependence by persons unable to earn a livelihood, who have some natural claim."<sup>97</sup> However, the court did not discuss the nature of dependency required between a married claimant and family members in order to establish family headship,<sup>98</sup> or when an unmarried claimant claims head of family status based upon his relationship with a relative who has not attained the age of majority.<sup>99</sup>

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Both of these provisions remain substantially unchanged in the present version of § 40-115. See notes 83-84 & accompanying text *supra*.

93. Foster, *supra* note 68, at 120.

94. For example, in *Chamberlain Banking House v. Zutavern*, 59 Neb. 623, 81 N.W. 858 (1900), the court simply stated that the evidence (not disclosed) was sufficient to establish that certain of the children and grandchildren of the homestead claimant, a widow, resided with her and were under her care and maintenance.

95. 60 Neb. 502, 83 N.W. 673 (1900).

96. *Id.* at 505, 83 N.W. at 674. In *Hyde*, the claimant's daughter was 26 years old, and although the evidence indicated that she was "somewhat eccentric and below the average in intelligence," these handicaps did not prevent her from obtaining "a second grade teacher's certificate in the county of her residence." *Id.* at 504, 83 N.W. at 674. She was also a somewhat proficient stenographer. The court held that sufficient evidence supported the trial court's conclusion that the daughter was not dependent on her father for support.

97. *Id.* at 505, 83 N.W. at 674.

98. For example, it is unclear whether former § 40-115 required a married claimant to show that his family was actually dependent upon him for support. Of course, under Nebraska law the husband has a legal obligation to support his wife and minor children. See NEB. REV. STAT. §§ 28-705 to -706 (Reissue 1979).

This problem is compounded under the present version of § 40-115, because the effect of the 1979 amendatory legislation has been to create a state of total uncertainty as to the nature of the family headship requirement with respect to married claimants. See notes 83-89 & accompanying text *supra*.

99. For example, must an unmarried claimant residing with a minor brother or sister show both actual dependency and the inability of such brother or sister

One final problem concerning the head of family requirement in Nebraska is whether family headship, once acquired, may be lost by the death or independence of members of the family. Suppose, for example, that the homestead claimant is a former family head who now resides alone upon the homestead tract. Is such claimant eligible for the homestead exemption notwithstanding that he no longer appears to qualify as the head of a family? Several decisions of the Nebraska Supreme Court have answered this question in the affirmative.<sup>100</sup>

For example, in *Palmer v. Sawyer*,<sup>101</sup> an action to enjoin an execution sale of a tract of land occupied by the plaintiff, at the time plaintiff purchased and moved onto the property he was a widower and had three minor children living with him. Subsequently, one of the children died, and the others attained majority and left home.<sup>102</sup> Thus, although plaintiff had been the head of the family at the time the lands were purchased, he was living alone with no dependent relatives under his care when the judgment creditor brought suit.<sup>103</sup> Noting that the Homestead Act does not expressly limit the right to claim the homestead exemption "to the time during which the premises are occupied by the dependent members of the family jointly with the owner," the court adopted a liberal construction of the family headship requirement and held that "when a homestead is once acquired, the right to the continuous enjoyment of it can only be defeated by the voluntary act of the claimant."<sup>104</sup> This interpretation of the family headship requirement

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to support himself or herself as in *Hyde*? Or will actual dependency, without more, suffice? Compare NEB. REV. STAT. § 40-115(2) (Cum. Supp. 1980) with *id.* § 40-115(5). See generally 1 A.L.P., *supra* note 87, § 5.79, at 818-19.

100. See, e.g., *Federal Credit Co. v. Reynolds*, 132 Neb. 495, 272 N.W. 397 (1937); *Dorrington v. Myers*, 11 Neb. 388, 9 N.W. 555 (1881); *Foster*, *supra* note 68, at 120-21. See generally 1 A.L.P., *supra* note 87, §§ 5.108-111, at 876-84. In *Dougherty v. White*, 112 Neb. 675, 200 N.W. 884 (1924), the court stated the rule as follows:

The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such. The same rule obtains where the marriage relation has been dissolved by decree of court.

*Id.* at 678, 200 N.W. at 885-86 (citations omitted).

101. 74 Neb. 108, 103 N.W. 1088 (1905).

102. *Id.* at 109, 103 N.W. at 1089.

103. The court stated that the question to be determined was "whether or not a homestead once acquired by the head of a family can be divested by any act other than the voluntary alienation, abandonment or waiver of the right by the party entitled to the exemption." *Id.* at 110, 103 N.W. at 1089.

104. *Id.* at 116, 103 N.W. at 1091. Section 40-101 defines the homestead as "the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated . . . ." NEB. REV. STAT. § 40-101 (Cum. Supp.



accords with the court's apparent view that the purpose of the homestead exemption is to extend protection "to the head of the family as well as to the dependent members."<sup>105</sup> However, it is difficult to rationalize this interpretation of homestead policy with the denial of the homestead exemption to unmarried persons without dependents, who, in at least some cases, are similarly situated to deposed family heads such as the plaintiff in *Palmer*.<sup>106</sup>

## 2. Ownership Requirement

With one exception,<sup>107</sup> the homestead claimant is also required to be the owner of a present possessory interest in the homestead property. This requirement has two facets: (i) the property interest required to support the homestead exemption; and (ii) the type of property which may be claimed as a homestead.<sup>108</sup>

The Nebraska Homestead Act does not specify the nature of the property interest which must be owned by the claimant in order to qualify for the exemption.<sup>109</sup> However, numerous Nebraska cases

1980) (emphasis added). However, § 40-115 defines "head of a family" as "every person who has residing on the premises with him or her, and under his or her care and maintenance" any member of certain designated classes of relatives. *Id.* § 40-115. This language, which could be interpreted as imposing a continuous family headship requirement on the homestead claimant, appears to have been overlooked or disregarded by the *Palmer* court. See also *Id.* § 40-105 (Reissue 1978).

105. 74 Neb. at 114, 103 N.W. at 1091. See also *Foster, supra* note 68, at 112-13. But see *Winter v. Winter*, 95 Neb. 335, 340-41, 145 N.W. 709, 712 (1914) (object of former statute providing a personal property exemption in lieu of homestead only to "heads of families" was "the protection of the family, and not the husband"); *Stout v. Rapp*, 17 Neb. 462, 469, 23 N.W. 364, 368 (1885) ("the purpose of . . . the homestead exemption . . . [is] not . . . so much for the benefit of . . . the head of the family as for the family itself"); 1 A.L.P., *supra* note 87, § 5.79, at 815 ("homestead statutes are generally regarded as justifiable only in terms of the state's interest in preserving a home to a family, rather than in terms of conferring a benefit on an individual property owner").

106. See notes 204-11 & accompanying text *infra*.

107. If the claimant is a married man, the homestead may be selected from his separate property or, if his wife consents, from her separate property. In all other cases, the homestead must be selected from the property of the claimant. NEB. REV. STAT. § 40-102 (Reissue 1978). See also *First Nat'l Bank v. McClanahan*, 83 Neb. 706, 120 N.W. 185 (1909) (under former statute designating husband as the head of the family, a deserted wife was entitled to claim the homestead exemption from her husband's undivided interest in jointly owned property). See generally *Foster, supra* note 68, at 121-28.

108. See *In re Foley*, 97 F. Supp. 843, 844 (D. Neb. 1951).

109. See *Foster, supra* note 68, at 121. Section 40-101 of the Homestead Act provides that the homestead exemption is to consist of property "selected by the owner thereof." NEB. REV. STAT. § 40-101 (Cum. Supp. 1980). Section 40-102 refers to the "property" of the claimant or the claimant's spouse without any designation of the nature of the requisite estate in the homestead property. *Id.* § 40-102 (Reissue 1978).

have bridged this gap and, as a result, the ownership requirement is not particularly controversial or problematical.

The homestead exemption is not limited to property held in fee simple<sup>110</sup> or to legal interests in the homestead.<sup>111</sup> A life estate<sup>112</sup> or leasehold interest<sup>113</sup> in the homestead tract is sufficient, as is "any estate or interest in lands which give [sic] the right of occupancy or possession . . . if coupled with requisite occupancy."<sup>114</sup>

In general, the key to the ownership requirement is the claimant's present right to possession of the homestead.<sup>115</sup> Thus, future interests, such as a remainder following a life estate, are not protected by the Homestead Act.<sup>116</sup> Moreover, even certain present

110. *Giles v. Miller*, 36 Neb. 346, 54 N.W. 551 (1893). In *Giles*, the court stated that in interpreting the ownership requirement a "liberal rule of construction" should be applied in furtherance of the policy of the Homestead Act "to protect the debtor and his family in a home from forced sale on execution or attachment." *Id.* at 349, 54 N.W. at 552. See generally *Haskins*, *supra* note 66, at 1295-96; *Vukowich*, *supra* note 66, at 798-99.

111. "The ownership need not be of an estate in fee-simple, but the owner of the equitable title occupying under a contract of purchase may claim the exemption of the statute." *Giles v. Miller*, 36 Neb. 346, 349, 54 N.W. 551, 552 (1893). See *Alston v. Alston*, 106 Neb. 623, 184 N.W. 82 (1921); *Doman v. Fenton*, 96 Neb. 94, 147 N.W. 209 (1914); *Rawles v. Reichenbach*, 65 Neb. 29, 90 N.W. 943 (1902); *State v. Townsend*, 17 Neb. 530, 23 N.W. 509 (1885). See generally *Haskins*, *supra* note 66, at 1295. But see *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 570, 110 N.W.2d 845, 850 (1961) (purchaser under real estate contract does not have any homestead right "as against the enforcement of the consideration provided for in that contract"). The *Corn Belt Products* case has been cited for the proposition that the homestead right does not attach to the interest acquired under a contract to purchase real property. 2A R. POWELL & P. ROHAN, *supra* note 89, ¶ 263[3], at 406.12(2) n. 4.

112. *Downing v. Hartshorn*, 69 Neb. 364, 95 N.W. 801 (1903).

113. See notes 117-18 & accompanying text *infra*.

114. *Giles v. Miller*, 36 Neb. 346, 349, 54 N.W. 551, 552 (1893).

115. See Comment, *supra* note 66, at 1032.

116. In *Fisher v. Kellogg*, 128 Neb. 248, 258 N.W. 404 (1935), the plaintiff sought to cancel a sheriff's deed transferring his remainder interest in 160 acres of land to the defendant, the purchaser at an execution sale. At the time of the forced sale, plaintiff resided on the property as a tenant pursuant to an oral year-to-year lease with his mother, the holder of the life estate. The court held that plaintiff's estate in remainder was not exempt under the Homestead Act, because it did not entitle plaintiff to immediate occupancy. In explaining its decision, the court noted that plaintiff's right to possession of the property was pursuant to his lease, not his remainder, and that this possession "was in no wise disturbed by the sale of the remainder." *Id.* at 253, 258 N.W. at 406. See generally 1 A.L.P., *supra* note 87, § 5.81, at 823-24; *Haskins*, *supra* note 66, at 1295; *Vukowich*, *supra* note 66, at 798; Comment, *supra* note 66, at 1032 n.73. It is debatable whether or not the decision in *Fisher* as to the scope of the homestead exemption is in accordance with the policy of the Homestead Act. One leading authority has commented as follows:

The question of claiming a homestead in a future interest has been an especially troublesome one. With an occasional exception, the statutes are so worded as not to preclude allowance of homestead

possessory interests of an insubstantial nature, such as the interest of a tenant at will, do not satisfy the ownership requirement.<sup>117</sup>

However, it has been held that a tenant under an oral month-to-month lease of space in a house trailer court has a sufficient inter-

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in such an interest. The courts, however, have recognized that the homestead laws contemplate the protection of an interest in land which is capable of use as a home, and it is probably the general rule that a homestead may not be claimed in a future interest, even when the remainderman is in possession under a lease from the life tenant or otherwise. Some cases, however, have held that when the claimant is presently in possession, a homestead claim may be asserted in the remainder interest, which will be protected from sale on execution. Since this question involves the fundamental policy of the homestead law—the extent of the statute's protection—it is one which calls for some legislative pronouncement. When property is exempted from execution, there must be some clear justification for doing so. A remainder interest can well be withdrawn from the protection of the homestead laws on the ground that it is not immediately capable of use for a home. On the other hand, the fact that it may be so used in the future might justify bringing it within the scope of the statute. One attitude or the other should be taken by the legislatures, and the question should not be made to turn on the fact of whether or not the remainderman is in possession, under a lease or otherwise.

1 A.L.P., *supra* note 87, § 5.81, at 823-24 (footnotes omitted). However, the Nebraska Supreme Court appears to have taken the position in *Fisher* that the homestead policy of protecting the debtor and his dependents in the possession of the family home is not hindered by denying homestead status to future interests, because such interests do not entitle holders thereof to present possession of the property.

117. See *Rank v. Garvey*, 66 Neb. 767, 92 N.W. 1025 (1902), *aff'd on rehearing*, 66 Neb. 767, 99 N.W. 666 (1904); *Howard v. Raymers*, 64 Neb. 213, 89 N.W. 1004 (1902). According to Professor Foster, these cases are correctly decided because a tenant at will has "no assignable interest or interest subject to sale on execution by creditors." Foster, *supra* note 68, at 122. However, in certain situations, this conclusion may be at odds with the homestead policy of protecting the family home from forced sale. For example, the homestead claimant in *Howard* resided with his wife in the home of his parents, which was situated on land adjoining the claimant's 80 acre farm. This living arrangement, as characterized by the court, was pursuant to a "a mutual arrangement made for the convenience of the parties, and terminable at the will of either." *Id.* at 215, 89 N.W. at 1005. The court held that claimant's 80 acre tract was not subject to the homestead exemption, because "if he had no homestead interest in the land on which he lived, no such homestead right would extend to his own property, which adjoined that on which he lived." *Id.* at 215, 89 N.W. at 1005. To the extent that this decision can be read as turning on whether or not claimant's right to occupy his parent's adjoining land was terminable at will, it is difficult to justify in terms of homestead policy. Claimant's ownership of the 80 acre tract was a substantial interest, and its homestead status should have been determined in light of the purpose of the homestead exemption and not by whether claimant's living arrangements with respect to the adjoining property created a tenancy at will or a periodic tenancy. See also notes 118-20 & accompanying text *infra*.

est in land to support his claim for a homestead exemption.<sup>118</sup> In *In re Foley*,<sup>119</sup> the bankrupt claimed a homestead exemption in a "glider house trailer" which was located upon space in a trailer court pursuant to an oral month-to-month land lease. The court distinguished earlier cases denying homestead exemptions to claimants who were tenants at will,<sup>120</sup> and held that a tenant from month-to-month has a sufficient property interest to support his claim for a homestead exemption.

Although *Foley* was decided correctly and in accordance with the purpose of the homestead exemption, the distinction it draws between tenancies at will and periodic tenancies should not be followed. Where, as in *Foley*, the homestead claimant has a substantial property interest in a house trailer located on leased space, the availability of the homestead exemption should be determined in light of the policy of the Homestead Act and not by drawing fine distinctions with respect to the nature of the claimant's leasehold interest in the ground upon which the trailer is situated. Under such a policy analysis, the question would be whether the claimed exemption furthered the legislative goal of protecting the family home. For example, when a vacationing claimant parks his recreational vehicle on leased space in a campground, the homestead exemption generally should not be available, without regard to the nature of the tenancy created by the rental agreement. However, when the claimant locates his permanent house trailer on the land of another, homestead policy is furthered by sheltering the trailer from the claims of his creditors, again, without regard to the nature of the tenancy created by the land lease.

Although some states apparently continue to follow early cases denying homestead protection to concurrently owned property, the general rule today is that the debtor's undivided interest in property may be claimed as his homestead.<sup>121</sup> The Nebraska decisions on this question follow the general rule and hold that the homestead exemption may be claimed in lands held in joint tenancy or tenancy in common.<sup>122</sup> The decision to treat undivided in-

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118. *In re Foley*, 97 F. Supp. 843 (D. Neb. 1951).

119. *Id.*

120. See note 117 & accompanying text *supra*.

121. See 1 A.L.P., *supra* note 87, § 5.81, at 822-23; Haskins, *supra* note 66, at 1295-96.

122. See, e.g., *Edgerton v. Hamilton*, 150 Neb. 821, 36 N.W.2d 258 (1949); *J.H. Melville Lumber Co. v. Maroney*, 145 Neb. 374, 16 N.W.2d 527 (1944); *Doman v. Fenton*, 96 Neb. 94, 147 N.W. 209 (1914); *First Nat'l Bank v. McClanahan*, 83 Neb. 706, 120 N.W. 185 (1909). It could be argued that section 40-102 of the Nebraska Homestead Act, which provides that the homestead of a married claimant may be selected from the "separate property" of the husband or wife, implies that jointly owned property may not be claimed as the homestead. NEB. REV. STAT. § 40-102 (Reissue 1978). However, this contention was rejected by the Nebraska Supreme Court in *Edgerton*, which held that § 40-

terests in real property as eligible for the homestead exemption is in line with the policy of protecting the debtor and his family in the possession of their home. However, it also raises certain conceptual difficulties. For example, if each of two cotenants resides on the commonly owned homestead property with his or her family, may each cotenant claim a homestead in the property? If not, then who may claim the homestead?

In *Giles v. Miller*,<sup>123</sup> the Nebraska Supreme Court held that "an undivided interest in real estate, *accompanied by exclusive occupancy*, will support the homestead claim."<sup>124</sup> Although the *Giles* court did not clarify the meaning of "exclusive occupancy," it is clear that when the head of the family owns the homestead property concurrently with his or her spouse or dependent family members, their residence with him on the property does not preclude the homestead claim.<sup>125</sup> Moreover, there is no requirement that the entire homestead must be occupied by the claimant and his family to the exclusion of everyone else.<sup>126</sup>

Perhaps the exclusive occupancy rule is nothing more than a corollary of another rule, applicable more generally to the homestead exemption, which prescribes "that a homestead cannot be occupied jointly by two families so that both will have homesteads therein."<sup>127</sup> In *Luenenborg v. Luenenborg*,<sup>128</sup> the owner of a 160-acre farm lived on the northwest corner of the property and leased premises on the northeast part of the tract to one of his sons. The son testified that "while he lived in the old set of improvements on the northeast corner of this 160-acre tract, and had farmed the land as his father's renter, . . . his father retained entire control over

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102 refers to the separate property of husband and wife "in the sense of ownership in either the one or the other and not in the sense of the character of the title by which the ownership was acquired." 150 Neb. at 827, 36 N.W.2d at 261.

123. 36 Neb. 346, 54 N.W. 551 (1893).

124. *Id.* at 349, 54 N.W. at 552 (emphasis added). This language has been quoted with approval in numerous subsequent decisions. See, e.g. *J.H. Melville Lumber Co. v. Maroney*, 145 Neb. 374, 379, 16 N.W.2d 527, 529 (1944); *Connor v. McDonald*, 120 Neb. 503, 506, 233 N.W. 894, 896 (1931).

125. See *Connor v. McDonald*, 120 Neb. 503, 233 N.W. 894 (1931) (husband and wife each owned an undivided one-half interest in jointly occupied homestead); *Doman v. Fenton*, 96 Neb. 94, 147 N.W. 209 (1914) (head of family resided on homestead with dependent cotenants); *First Nat'l Bank v. McClanahan*, 83 Neb. 706, 120 N.W. 185 (1909) (prior to the husband's desertion of his wife, they had jointly occupied the homestead as tenants in common).

126. See notes 167-78 & accompanying text *infra*.

127. *Luenenborg v. Luenenborg*, 128 Neb. 624, 630, 259 N.W. 649, 652 (1935). For a general discussion of the homestead occupancy requirement, see notes 148-85 & accompanying text *infra*.

128. 128 Neb. 624, 259 N.W. 649 (1935).

the land.”<sup>129</sup> The court held that the father had a homestead right in the entire 160-acre farm and, by implication, that his son had no homestead right in the property “although . . . [the son] farmed the same [and] occupied with his family another set of buildings thereon.”<sup>130</sup>

Still unresolved, however, is the locus of homestead rights in the relatively rare situation occurring when unrelated cotenants simultaneously reside with their respective families on, and jointly control, the common property.<sup>131</sup>

The second facet of the ownership requirement concerns the type of property which qualifies for the homestead exemption. Section 40-101 of the Nebraska Homestead Act defines the homestead as “the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated . . . .”<sup>132</sup> The homestead is further limited to 160 acres of land, in the case of a rural homestead,<sup>133</sup> or “a quantity of contiguous land not exceeding two lots” in the case of an urban homestead.<sup>134</sup> In either case, the exempt amount of the homestead may not exceed \$6,500.<sup>135</sup>

The Nebraska decisions have taken a liberal view of the type of improvements which satisfy the “dwelling house” requirement. A

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129. *Id.* at 630, 259 N.W. at 652.

130. *Id.* at 631, 259 N.W. at 653.

131. Professor Foster noted that: “It is true that a homestead cannot be occupied jointly by two families so that both will have homesteads therein. Also, it is true that if a tenant in common claims a homestead, he must occupy the property to the exclusion of his co-tenants.” Foster, *supra* note 68, at 130. Although Professor Foster’s conclusion follows logically from the cases discussed above, no Nebraska case has squarely held that neither cotenant may claim the homestead in a situation similar to that hypothesized in the text. Moreover, the policy of the Homestead Act would appear to be better served by protecting both occupying cotenants (and their respective families) in the possession of their homes. See S. THOMPSON, A TREATISE ON HOMESTEAD AND EXEMPTION LAWS, §§ 181, 188 (1878).

132. NEB. REV. STAT. § 40-101 (Cum. Supp. 1980).

133. *Id.* See *In re Thomas’ Estate*, 178 Neb. 578, 585, 134 N.W.2d 237, 242 (1965) (“where two tracts of land [totaling 160 acres] corner with each other, they are contiguous, and, when used as one farm, may be selected as a homestead”). See generally Foster, *supra* note 68, at 137-39.

134. NEB. REV. STAT. § 40-101 (Cum. Supp. 1980). For decisions construing the lot limitation, see *First Trust Co. v. Bauer*, 128 Neb. 725, 260 N.W. 194 (1935) (an apartment house on a lot contiguous to the lot on which the claimant resided with his family was not part of the homestead); *Norfolk State Bank v. Schwenk*, 51 Neb. 146, 149, 70 N.W. 970, 971 (1897) (reference to urban “lots” in Homestead Act is used “in its popular sense, and denotes the subdivisions of a city or village as surveyed and platted”). See generally Foster, *supra* note 68, at 139.

135. NEB. REV. STAT. § 40-101 (Cum. Supp. 1980). See notes 186-96 & accompanying text *infra*.

leading Nebraska case, *Corey v. Schuster*,<sup>136</sup> stated the test as follows:

The law does not contemplate by the word "dwelling house" any particular kind of house. It may be a "brownstone front," all of which is occupied for residence purposes, or it may be a building part of which is used for banking or business purposes, or it may be a tent of cloth. All that the law requires on the subject is that the homestead claimant and his family should reside in this habitation or dwelling house, whatever be its character, on the premises claimed as a homestead.<sup>137</sup>

Property used by the claimant for mixed business and residential purposes was impressed with homestead character in *Corey*. Similarly, Nebraska cases have held that a duplex,<sup>138</sup> an apartment house<sup>139</sup> and a hotel<sup>140</sup> may constitute homestead property, so long as the claimant occupies a portion thereof as the family residence.<sup>141</sup>

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136. 44 Neb. 269, 62 N.W. 470 (1895). In *Corey*, the plaintiffs claimed a 1 1/2-story frame building as their homestead. The first floor of this structure was used by Corey for commercial purposes, and the second floor served as the family residence. The court held that the building and the lot upon which it was situated constituted plaintiffs' homestead.

137. *Id.* at 275-76, 62 N.W. at 472. Professor Foster was critical of the breadth of this language:

Conceding the correctness of the decision, the language of the judge goes far beyond the necessities of the case. It may be that in the eyes of the law an Arab's tent is his dwelling house, but it does not follow that a circus tent should be considered such merely because the owner slept under it. A federal court once held in a case arising in Kansas that a brewery was a family dwelling house. On a parity of reasoning if the brewer sang "Nearer my God to Thee" when brewing his ale, the building would be a "house of religious worship." Where the principal use to which a building is put is commercial or industrial it is not ordinarily described as a "dwelling house." Fairness to creditors and the public with whom the claimant deals would seem to demand that the legal conception of a dwelling house should not differ substantially from the popular one. The homestead act was not passed as a poor debtor's act or for the conservation of business property. The test usually laid down by the authorities is that business use must be incidental, not primary; otherwise, the building is not a dwelling house. In *corey v. Shuster* [sic] and all other Nebraska cases involving mixed use, the results attained could be reached under this test.

Foster, *supra* note 68, at 136 (footnotes omitted).

138. *Hawley v. Arnold*, 137 Neb. 238, 288 N.W. 823 (1939).

139. *Hess v. Eselin*, 110 Neb. 590, 194 N.W. 469 (1923).

140. *Foltz v. Maxwell*, 100 Neb. 713, 161 N.W. 254 (1916).

141. Neither the Nebraska Homestead Act nor the case law thereunder expressly extends the homestead exemption to condominiums or cooperative apartments. However, both the policy of the homestead exemption and the liberal interpretation generally afforded it by the courts point toward its application to such property. If the homestead exemption is to be retained, legislative action is necessary. To remove all traces of uncertainty, the Unicameral should recognize contemporary housing patterns and adopt a modern statutory definition of homestead property. See, e.g. CAL. CIV. CODE § 1237 (West

Another difficult question is posed when the claimant attempts to select a mobile home as the homestead. Some states expressly include mobile homes within the protection of homestead legislation.<sup>142</sup> However, where the statutes are silent, the cases are divided over whether the homestead exemption applies to mobile homes.<sup>143</sup>

In *In re Foley*,<sup>144</sup> the bankrupt claimed an exemption under the Nebraska Homestead Act in a glider house trailer located upon leased space in a trailer court. Chief Judge Donahue, in a very thoughtful opinion, concluded that a house trailer could qualify for the Nebraska homestead exemption and suggested, without clearly holding, that in order to so qualify the house trailer must be permanently annexed to the realty upon which it is located.<sup>145</sup> In light of the policy of the homestead exemption, *Foley* states the better reasoned view because denying the exemption to mobile home dwellers would, no doubt, result often in the displacement of such debtors and their families from their homes.<sup>146</sup> Moreover, as a student author has noted, in states that place sparing dollar limitations on the amount of the homestead exemption, granting homestead status to mobile homes "might very well be the only case in which the exemption actually saves the home of the claimant."<sup>147</sup>

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Supp. 1980); *Uniform Exemption Act*, § 4(c), 13 U.L.A. CIVIL PROC. & REM. LAWS 378 (1980). See generally Vukowich, *supra* note 66, at 798-99.

142. See, e.g., S.D. COMP. LAWS ANN. § 43-31-1, -2 (Supp. 1979). The South Dakota legislation defines "mobile home" as including "any vehicle without motive power which can provide adequate, comfortable, all season quarters for the purpose of making a residence thereof and which vehicle is larger than two hundred forty square feet, measuring at the base thereof." *Id.* § 43-31-2.

143. See 1 A.L.P., *supra* note 87, § 5.80, at 820-21; Note, *Debtors' Estates—Homestead—The Applicability of Homestead Exemption Laws to Mobile Homes*, 7 WAKE FOREST L.REV. 520, 522-25 (1971).

144. 97 F. Supp. 843 (D. Neb. 1951).

145. *Id.* at 846-47. The court noted, however, "that courts should be very liberal in determining that a sufficient attachment to the realty has occurred." *Id.* at 847.

146. See *In re Williams*, 24 F. Supp. 440 (D. Or. 1938) (dictum):

In a final analysis, the law was intended primarily to exempt the place in which a man makes a home for himself and his family. It would not be out of place in this age of migratory homes to construe the old homestead law in the light of changing conditions and give full effect to the true intent and purpose of the law.

*Id.* at 441. See also Haskins, *supra* note 66, at 1295 ("It would seem, however, that if the function of homestead legislation is protection of the home, it should be immaterial whether the home is a mere chattel or has achieved the dignity of an estate in land or a chattel real." (footnote omitted)).

147. Note, *supra* note 143, at 522. See also notes 192-97 & accompanying text *infra*. If the homestead exemption is to be retained in Nebraska, it should be



### 3. *Occupancy Requirement*

Some states require homestead claimants to record a formal declaration of homestead as a condition precedent to the establishment of the homestead exemption.<sup>148</sup> However, no such requirement is prescribed by Nebraska law<sup>149</sup>—a claimant who meets the family headship and ownership requirements<sup>150</sup> and who occupies the premises as a family home qualifies for the homestead exemption.<sup>151</sup> When an execution for the enforcement of a judgment is levied upon homestead property in nonbankruptcy proceedings, the claimant may assert the homestead exemption “at any time prior to confirmation of sale” by applying to the district court in the county in which the property is located for a determination of homestead.<sup>152</sup> In bankruptcy proceedings, the debtor or a dependent of the debtor may claim the homestead by including it in the list of exemptions filed pursuant to section 522(1) of the Bankruptcy Reform Act.<sup>153</sup>

Residential occupancy of the homestead by the debtor is an express statutory requirement.<sup>154</sup> Either actual or constructive occupancy of the homestead will suffice, if accompanied by the claimant's good faith intention to establish a home for his family on the property.<sup>155</sup> Thus, when the claimant occupies the would-

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amended to provide expressly that mobile homes may be claimed as homestead property by debtors who are otherwise qualified for the exemption.

148. See CAL. CIV. CODE §§ 1241, 1262-1265 (West 1954 & Supp. 1980); 2A R. POWELL & P. ROHAN, *supra* note 89, ¶ 263[2], at 406.10; Haskins, *supra* note 66, at 1298.

149. Meyer v. Platt, 137 Neb. 714, 291 N.W. 86 (1940); Foltz v. Maxwell, 100 Neb. 713, 161 N.W. 254 (1916). See Foster, *supra* note 68, at 133-34.

150. See sections II-A-1 to 2 of text *supra*.

151. “In its inception a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it.” Gallagher v. Smiley, 28 Neb. 189, 194-95, 44 N.W. 187, 189 (1889).

152. NEB. REV. STAT. §§ 40-105 to -108 (Reissue 1978). See 5 W. MOORE, NEBRASKA PRACTICE §§ 3710-3711 (1966).

153. 11 U.S.C. § 522(1) (Supp. III 1979). Until new bankruptcy rules are promulgated, the claim should be made in the schedules of property filed by the debtor pursuant to existing Bankruptcy Rules 108 and 403(a). BANKR. R. 108, 403(a). See Pub. L. No. 95-598, § 405(d), 92 Stat. 2685 (1978), *reprinted* at 28 U.S.C. note prec. § 1471 (Supp. III 1979); 1 COLLIER, *supra* note 4, ¶ 7.05[4]; 3 COLLIER, *supra* note 26, ¶ 522.26. The property claimed by the debtor as exempt is exempt “[u]nless a party in interest objects.” 11 U.S.C. § 522(1) (Supp. III 1979).

154. NEB. REV. STAT. § 40-101 (Cum. Supp. 1980). See Davis v. Kelly, 62 Neb. 642, 644, 87 N.W. 347, 347 (1901).

155. “The rule seems to be settled that the occupancy, to entitle the occupant to homestead, must be coupled with an intention to remain thereon and to occupy and claim the land as a homestead.” Rank v. Garvey, 66 Neb. 767, 781, 92 N.W. 1025, 1030 (1902), *aff'd on rehearing*, 66 Neb. 767, 99 N.W. 666 (1904). See Foster, *supra* note 68, at 132-33.

be homestead for the sole purpose of preventing its forced sale on execution and without any intention of making it the permanent family home, the homestead exemption will not be recognized.<sup>156</sup> Similarly, in *Rank v. Garvey*,<sup>157</sup> a tenant in possession of property under a lease "permitting him to occupy the house on the premises until such time as a sale [of the property] could be made, or until the administrator desired possession" was found to be without the requisite intention and, therefore, ineligible for the homestead exemption.<sup>158</sup>

In accordance with its rule of liberal construction of the Homestead Act, the Nebraska Supreme Court has stated that homestead claimants may establish the exemption by showing constructive occupancy of the property.<sup>159</sup> Constructive occupancy generally requires "a present intention to occupy [the property] as a homestead as soon as circumstances reasonably permit, evidenced by acts of preparation indicating such intention."<sup>160</sup> When the claimant's intention to reside on unoccupied property is manifested by physical acts on or directly relating to the property—repairs or improvements made on the property are good examples—the courts should allow the homestead claim.<sup>161</sup> However, the policy considerations blur when the claimant has not taken any physical action directly connected with the would-be homestead. For example, in

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156. See *Clement, Bane & Co. v. Kopietz*, 2 Neb. (Unoff.) 18, 95 N.W. 1126 (1901).

157. 66 Neb. 767, 92 N.W. 1025 (1902), *aff'd on rehearing*, 66 Neb. 767, 99 N.W. 666 (1904).

158. *Id.* at 781, 92 N.W. at 1030. To the extent that *Rank* can be read as holding that a tenant at will does not have a sufficient interest in the property to support a homestead claim, it is subject to criticism on grounds of policy. See note 117 *supra*. However, to the extent that the case rests on the claimant's lack of a good faith intention to occupy the property as a home, it is good policy because it recognizes that the homestead exemption should not be applied to deny creditors access to property except in furtherance of the purposes of the Homestead Act.

159. *Davis v. Kelly*, 62 Neb. 642, 87 N.W. 347 (1901) (dictum); *Hanlon v. Pollard*, 17 Neb. 368, 22 N.W. 767 (1885).

160. *Davis v. Kelly*, 62 Neb. 642, 645, 87 N.W. 347, 347 (1901). See *Filley v. Dickinson*, 110 Neb. 356, 193 N.W. 914 (1923); *Hair v. Davenport*, 74 Neb. 117, 103 N.W. 1042 (1905); *Hanlon v. Pollard*, 17 Neb. 368, 22 N.W. 767 (1885).

161. See *Hair v. Davenport*, 74 Neb. 117, 103 N.W. 1042 (1905); *Davis v. Kelly*, 62 Neb. 642, 87 N.W. 347 (1901). But see *Struemppler v. Peterson*, 190 Neb. 133, 206 N.W.2d 629 (1973) (defendants purchased lot and began construction of house with "announced intention" of moving thereon from existing homestead; homestead not acquired in new property because existing homestead had not been abandoned).

Of course, notwithstanding improvements and other physical acts connected with the land, if other evidence indicates that the claimant does not have the requisite intention to occupy the property as a home, the exemption should be denied. See *Filley v. Dickinson*, 110 Neb. 356, 193 N.W. 914 (1923).

the leading case of *Hanlon v. Pollard*,<sup>162</sup> the plaintiff, a divorced woman with children, was seeking an order enjoining an execution sale of her claimed homestead. Plaintiff had purchased a house located on an eighty acre tract of land in October of 1879; however, the property was then occupied by a tenant with an unexpired lease, and plaintiff was unable to enter into actual occupancy until February 23, 1880, the day on which the tenant vacated the premises and 14 days after the sheriff had levied on the property. Although plaintiff apparently had not made any improvements or taken any other physical action manifesting her intention to make her home on the property, the Nebraska Supreme Court held that she was entitled to the homestead exemption because she had "purchased the premises . . . in good faith for the purpose and with the manifest intention of making them her homestead."<sup>163</sup>

The liberal construction of the occupancy requirement in *Hanlon* comports with homestead policy on the peculiar facts of that case, because the plaintiff was able to explain satisfactorily her failure to take possession of the homestead immediately upon purchase and had entered into actual occupancy as soon as the property was vacated by the former owner's tenant. However, the occupancy requirement should not be disregarded frivolously by the courts, because it has a significant function in homestead law, serving both as the means of establishing the homestead character of property and as a form of notice of homestead to potential purchasers of the property<sup>164</sup> and creditors of the claimant.<sup>165</sup> This notice function is particularly important in Nebraska, since home-

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162. 17 Neb. 368, 22 N.W. 767 (1885).

163. *Id.* at 373, 22 N.W. at 769. The court based its conclusion concerning plaintiff's intended use of the property on "[t]he manner in which she obtained the money to pay for the land, together with a consideration of her circumstances and condition of life, . . . [and] the direct testimony to that effect." *Id.* at 370, 22 N.W. at 768.

164. Under § 40-104 the "homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." NEB. REV. STAT. § 40-104 (Reissue 1978). An attempted conveyance of homestead property not in compliance with § 40-104 is invalid. *Struempfer v. Peterson*, 203 Neb. 173, 277 N.W.2d 691 (1979); *McIntosh v. Borchers*, 196 Neb. 109, 241 N.W.2d 534 (1976); *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973); *Struempfer v. Peterson*, 190 Neb. 133, 206 N.W.2d 629 (1973). See Foster, *The Nebraska Homestead-Part 2*, 3 NEB. L. BULL. 353, 373-76 (1924).

165. It would be an unsafe rule to adopt to say that secret intentions formed in the mind of the purchaser, without any physical act manifesting such intention, would impress upon a tract of land a homestead character, which would either exempt it from levy under legal process or operate to defeat a sale made to other parties.

*Hair v. Davenport*, 74 Neb. 117, 121, 103 N.W. 1042, 1044 (1905). See Foster, *supra* note 68, at 129-30.

owners are not required to record a formal declaration of homestead to establish their entitlement to the exemption.<sup>166</sup>

Although it is sometimes stated that occupancy of the homestead must be exclusive,<sup>167</sup> it is not true that the entire homestead must be occupied by the claimant and his family to the exclusion of everyone else. For example, Nebraska cases have held that a duplex,<sup>168</sup> an apartment house<sup>169</sup> and a hotel<sup>170</sup> may be claimed as homestead property when the claimant and his family reside on the premises. Analysis of the Nebraska joint occupancy cases discloses that when there is a nexus between possession or use of a portion of the claimed homestead by third parties and the claimant's enjoyment of the property, it is likely that the court will find that the claimant's homestead extends to the entire premises. For example, in *Guy v. Downs*,<sup>171</sup> when a horse barn located on claimant's homestead was leased to third parties, the sheriff proceeded to levy a writ of execution upon "the twenty-two feet of the lot on which the said barn stands."<sup>172</sup> The Nebraska Supreme Court affirmed a final decree of the district court enjoining the forced sale of the homestead and explained its holding as follows:

No one will doubt that a homestead . . . would be occupied as such, within the meaning of the statute, by a residence thereon by the debtor and his family in a house of the smallest dimensions, although the entire balance of such land were suffered to go to waste or lie common. And why would it be any the less so occupied if such balance were put to some useful purpose? We can see no reason, even although such purpose might involve the joint occupancy of other persons. It is neither within the letter or the spirit of the statute that the occupancy of the homestead by the debtor should be exclusive. He fulfils the terms of the law by continuing to occupy, and while he does so, he can do or suffer any other lawful thing in reference to the premises not inconsistent with his said occupancy.<sup>173</sup>

However, when the occupancy by third parties of a portion of the claimed homestead is unconnected to the claimant's occu-

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166. See note 149 & accompanying text *supra*.

167. See notes 123-26 & accompanying text *supra*; Foster, *supra* note 68, at 130-31.

168. *Hawley v. Arnold*, 137 Neb. 238, 288 N.W. 823 (1939) (duplex consisting of separate six room apartments; one of the apartments was leased to tenants and had never been occupied by the claimant).

169. *Hess v. Eselin*, 110 Neb. 590, 194 N.W. 469 (1923) (single building consisting of four apartments; claimant and his family resided in one of the apartments).

170. *Foltz v. Maxwell*, 100 Neb. 713, 161 N.W. 254 (1916) (husband and wife "occupied the property and conducted a hotel therein").

171. 12 Neb. 532, 12 N.W. 8 (1882).

172. *Id.* at 533, 12 N.W. at 8.

173. *Id.* at 535-36, 12 N.W. at 9. Although *Guy v. Downs* was decided under previous Nebraska homestead legislation, its reasoning pertains equally to the joint occupancy question arising under the present act. See also *Luenenborg v. Luenenborg*, 128 Neb. 624, 259 N.W. 649 (1935). For a discussion of problems arising from joint occupancy of homestead property by cotenants, see note 131 & accompanying text *supra*.

pancy of the remainder of the tract, the homestead probably will not include the property in the possession of the third parties.<sup>174</sup> This distinction is illustrated by *First Trust Company v. Bauer*.<sup>175</sup> In *Bauer*, the debtor owned two contiguous lots, numbered 5 and 6, and lived with his family in one of several apartments contained in a building located on lot 5. On lot 6 there was a separate building containing several apartments "which were always rented to tenants."<sup>176</sup> The court held that the debtor's homestead did not include lot 6 and the apartment house located thereon.<sup>177</sup> The line drawn by the Nebraska cases is a sensible one and is faithful to the purposes of the homestead exemption. Moreover, to the extent that it apparently permits possible abuse of homestead legislation by allowing debtors to claim a homestead in predominantly non-owner occupied property (e.g., a high-rise apartment building in which the owner resides in one of many apartments), the potential problem is checked by the dollar limitation on the amount of the homestead exemption.<sup>178</sup>

When a homestead exemption is selected from the separate property of the wife of a married claimant, her required consent<sup>179</sup> to the selection will be presumed from evidence establishing that the property was occupied by the family as its home.<sup>180</sup> However, when property is levied upon by creditors of a married man, and his wife objects to selection of the homestead from her separate interest in the property, there will be no presumption of con-

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174. Compare *First Trust Co. v. Bauer*, 128 Neb. 725, 260 N.W. 194 (1935) with *Schroeder v. Ely*, 161 Neb. 262, 73 N.W.2d 172 (1955) and *Hess v. Eselin*, 110 Neb. 590, 194 N.W. 469 (1923). See also *Foster*, *supra* note 68, at 130-32.

175. 128 Neb. 725, 260 N.W. 194 (1935).

176. *Id.* at 726, 260 N.W. at 194. The court stated that "[i]t does not appear that there was any connection between the use of lot 5 and lot 6." *Id.*

177. *Id.* at 727-28, 260 N.W. at 195. The court noted that lot 6 would have been included in the debtor's homestead had it been "a vacant lot and a part of the grounds appurtenant to the dwelling [on lot 5]." *Id.* at 727, 260 N.W. at 195. In contrast, in *Schroeder v. Ely*, 161 Neb. 262, 73 N.W.2d 172 (1955), the debtor's property consisted of an 18 acre tract on which two buildings, a house in which the claimant resided and a motel, were situated. The court held that the debtor's homestead was composed of the entire 18 acre tract and noted that the house and land upon which it was situated could not be segregated from the motel and the remainder of the tract without material injury to "the property as a whole." *Id.* at 266, 73 N.W.2d at 175. See also *In re Thomas' Estate*, 178 Neb. 578, 584-85, 134 N.W.2d 237, 241-42 (1965).

178. See notes 186-93 & accompanying text *infra*.

179. "If the claimant be married, the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property." NEB. REV. STAT. § 40-102 (Reissue 1978).

180. See *In re Nielsen's Estate*, 135 Neb. 110, 280 N.W. 246 (1938); *Hobson v. Huxtable*, 79 Neb. 334, 112 N.W. 658 (1907), *vacated on other grounds*, 79 Neb. 340, 116 N.W. 278 (1908); *Foster*, *supra* note 68, at 127-28.

sent.<sup>181</sup> Thus, in *First National Bank v. McClanahan*,<sup>182</sup> plaintiffs, judgment creditors of Andrew J. McClanahan, levied upon real property owned by McClanahan and his wife, the defendant, as tenants in common. This property had been occupied by the defendant and her husband prior to his desertion of the family; thereafter, it was occupied by Mrs. McClanahan and her family. Defendant sought to have the homestead exemption set off from her husband's undivided one-half interest in the property. The Nebraska Supreme Court held that the defendant's interest in the property should not be treated as part of the homestead, because her consent to the selection of the homestead from her separate property had not been given, and that the then applicable \$2,000 homestead exemption should be set off from the undivided interest of Mr. McClanahan.<sup>183</sup>

The decision in *McClanahan* disregarding the presumption of selection is justified by the family protection policy of the Homestead Act and by the liberal construction accorded the homestead exemption in support of that policy.<sup>184</sup> Since the levying plaintiffs were individual creditors of Mr. McClanahan, the maximum homestead exemption (and thus the maximum protection of the family) was obtainable only by setting off his undivided interest in the property as the homestead.<sup>185</sup>

#### 4. Dollar Limitation

When enacted in 1879, the Nebraska Homestead Act contained a \$2,000 ceiling on the amount of the exemption.<sup>186</sup> This amount was increased to \$4,000 in 1973,<sup>187</sup> and to its present level of \$6,500 in 1980.<sup>188</sup> However, many Nebraska debtors will not be immedi-

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181. See Foster, *supra* note 68, at 127-28.

182. 83 Neb. 706, 120 N.W. 185 (1909).

183. *Id.* at 711-12, 120 N.W. at 186-87. The court stated:

[T]he homestead act . . . authorizes the selection of the homestead from the separate property of either the husband or wife, but from the property of the wife only with her consent. In this case the wife has not consented, and is strenuously objecting to the homestead being selected from her separate property.

*Id.* at 712, 120 N.W. at 187. See also *Connor v. McDonald*, 120 Neb. 503, 233 N.W. 894 (1931); *Klamp v. Klamp*, 58 Neb. 748, 79 N.W. 735 (1899). But see *In re Nielsen's Estate*, 135 Neb. 110, 280 N.W. 246 (1938).

184. See 83 Neb. at 711, 120 N.W. at 187.

185. See Foster, *supra* note 68, at 127.

186. Act of Feb. 26, 1879, § 1, 1879 Neb. Laws 57 (current version at NEB. REV. STAT. § 40-101 (Cum. Supp. 1980)).

187. Act of Feb. 2, 1973, § 1, 1973 Neb. Laws 69, (current version at NEB. REV. STAT. § 40-101 (Cum. Supp. 1980)).

188. Act of Apr. 16, 1980, L.B. 940, § 3, 1980 Neb. Laws 1051 (codified at NEB. REV. STAT. § 40-101 (Cum. Supp. 1980)). Although the maximum amount of the homestead exemption has more than tripled since 1879, the present \$6,500

ately entitled to the full benefit of the 1980 increase, because decisions interpreting the contracts clause<sup>189</sup> of the United States Constitution<sup>190</sup> and Nebraska case law interpreting exemption statutes<sup>191</sup> deny retroactive effect to laws increasing the amount of exemptions. Thus, increased exemptions are generally not effective against obligations predating the increase.

The homestead of the claimant is exempt in its entirety if the debtor's interest therein does not exceed the amount of the homestead exemption.<sup>192</sup> However, if the debtor's interest in the home-

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figure does not even approximate an amount which would keep pace with the more than 100 years of inflation that has occurred since 1879. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1790, HANDBOOK OF LABOR STATISTICS 1973, at 287 (Table 121); 103 MONTHLY LABOR REVIEW, May 1980, at 85 (Table 22). Thus, the homestead exemption is increasingly ineffective as a means of protecting the family home from forced sale. See notes 194-97 & accompanying text *infra*.

189. U.S. CONST. art. I, § 10, cl. 1 provides in pertinent part: "No state shall . . . pass any . . . law impairing the Obligation of Contracts . . . ." See also NEB. CONST. art. I, § 16.
190. See *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *Bank of Minden v. Clement*, 256 U.S. 126 (1921); *Edwards v. Kearzey*, 96 U.S. 595 (1877); *Gunn v. Barry*, 82 U.S. (15 Wall.) 610 (1872). See generally Stern, *State Exemption Law in Bankruptcy: The Excepted Creditor as a Medium for Appraising Aspects of Bankruptcy Reform*, 33 RUTGERS L. REV. 70, 91-93 (1980); Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration*, 9 PAC. L.J. 889 (1978); Comment, *Contracts Clause Prevents Exemption Change*, 1 STAN. L. REV. 350 (1949). Several commentators have suggested that these cases should be reconsidered in light of subsequent developments in the interpretation of the contracts clause by the Supreme Court. Countryman, *supra* note 7, at 727; Neustadter, *supra* note 21, at 878-79; Comment, PAC. L.J., *supra*, at 889; Comment, STAN. L. REV. *supra*, at 353-54; Comment, YALE L.J., *supra* note 12, at 1471-72. See *In re Curry*, 5 B.R. 282, 292-93 (Bankr. Ct. N.D. Ohio 1980); *In re Echavarren*, 2 B.R. 215 (Bankr. Ct. D. Idaho 1980); *Wilkinson v. Carpenter*, 277 Or. 557, 561 P.2d 607 (1977); *Hooter v. Wilson*, 273 So. 2d 516 (La. 1973).
191. See, e.g., *Dewitt v. Wheeler & Wilson Sewing Machine Co.*, 17 Neb. 533, 23 N.W. 506 (1885); *Dorrington v. Myers*, 11 Neb. 388, 9 N.W. 555 (1881). See also Foster, *supra* note 68, at 148. Recent bankruptcy cases denying retroactive effect to increased exemptions include: *Sturgeon v. Steele*, 563 F.2d 1154 (4th Cir. 1977); *Swenor v. Robertson*, 452 F.Supp. 673 (N.D. Cal. 1978); *In re Echavarren*, 2 B.R. 215 (Bankr. Ct. D. Idaho 1980); and *In re Pappas*, 2 B.R. 138 (Bankr. Ct. C. D. Cal. 1980). But see *In re Ageton*, 6 B.R. 727 (Bankr. Ct. D. Ariz. 1980) (debtor allowed to claim increased homestead in effect on date of filing petition in bankruptcy); *In re Curry*, 5 B.R. 282, 292 (Bankr. Ct. N.D. Ohio 1980) (state statute increasing amount of exemption does not violate contracts clause if the resulting "impairment of contract is both reasonable and necessary to serve an important public purpose").
192. If an interest in land less than the fee is sufficient to entitle a claimant to the benefits of the provisions of the homestead act, and there can be no doubt of it, it follows logically that the extent of a homestead is to be determined by the value of the claimant's interest in the land, whatever it may be. In case a valid mortgage upon the

stead exceeds the dollar limitation and the homestead cannot be divided without material injury, the property will be sold under execution and the debtor may exempt the proceeds of the sale in an amount equal to the homestead exemption.<sup>193</sup>

### 5. *Reconsideration of the Homestead Exemption*

The Nebraska homestead exemption no longer serves its primary purpose of protecting the family home. Although the 1879 ceiling of \$2,000 was apparently then adequate to exempt, in its entirety, the family home of the average debtor,<sup>194</sup> the current \$6,500 maximum homestead exemption is inadequate to prevent a forced sale of many, if not most, average family homes.<sup>195</sup> This is particu-

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homestead remains unpaid, the mortgagor is entitled, as against subsequent judgment creditors, to the statutory exemption of \$2,000 over and above the amount of the mortgage lien.

Hoy v. Anderson, 39 Neb. 386, 389, 58 N.W. 125, 126 (1894) (claimant's 160 acre tract, valued at \$2,800 and subject to a \$1,200 mortgage, was exempt from execution under \$2,000 homestead exemption then in effect). See NEB. REV. STAT. § 40-116 (Reissue 1978); J.H. Melville Lumber Co. v. Maroney, 145 Neb. 374, 16 N.W.2d 527 (1944); Hawley v. Arnold, 137 Neb. 238, 288 N.W. 823 (1939).

193. See NEB. REV. STAT. §§ 40-108, -110 to -113, -116 (Reissue 1978); Schroeder v. Ely, 161 Neb. 262, 73 N.W.2d 172 (1955). When an indivisible homestead is sold on execution, the proceeds paid to the claimant with respect to the homestead exemption are protected for a period of six months to the same extent as homestead property. NEB. REV. STAT. § 40-113 (Reissue 1978). In addition, § 40-116 provides:

If the homestead be conveyed by the claimant, or sold for the satisfaction of any lien mentioned in section 40-103 [mortgages and mechanics', laborers', or vendors' liens upon the homestead premises], the proceeds of such sale, beyond the amount necessary to the satisfaction of such lien, and not exceeding the amount of the homestead exemption, shall be entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the claimant which the law gives to the homestead. The sale and disposition of one homestead shall not be held to prevent the selection or purchase of another, as provided in sections 40-101 to 40-117.

*Id.* § 40-116.

194. The debtor's interest in the homestead was found not to be in excess of the amount of the homestead exemption in numerous early Nebraska cases. See, e.g., Radbruck v. First Nat'l Bank, 95 Neb. 288, 145 N.W. 715 (1914); Chamberlain Banking House v. Zutavern, 59 Neb. 623, 81 N.W. 858 (1900); Roberts v. Robinson, 49 Neb. 717, 68 N.W. 1035 (1896); Hoy v. Anderson, 39 Neb. 386, 58 N.W. 125 (1894).
195. For example, if the debtor's equity in the homestead is 20%, a homestead with a value in excess of \$32,500 will not be protected from execution under the current homestead ceiling. However, if the debtor's equity is 50%, a homestead with a value in excess of \$13,000 will not be protected. According to statistics supplied to the author by the Nebraska Department of Economic Development, the average selling price of single family homes in Lancaster and Douglas counties for the year 1979 was, respectively, \$47,191 and \$42,239. Letter from Steve Williams to Richard F. Duncan (July 15, 1980) (copy on file



larly true with respect to older, more established debtors, who are more likely to have built up greater equities in their homes than are younger homeowners.<sup>196</sup>

In effect, the homestead exemption is in danger of becoming a cash exemption available only to owners of residential real property.<sup>197</sup> Therefore, the time is ripe for a reconsideration of the policy of the Nebraska homestead exemption. In responding to this challenge, the Unicameral has at least four options.<sup>198</sup> First, it may choose to retain a fixed-amount homestead exemption with the expectation that legislative action will be taken to increase the limitation from time to time to keep pace with inflation. However, even with the best of intentions, it is unlikely that this course of action will produce a homestead exemption in balance with constantly changing economic conditions.<sup>199</sup>

Second, the legislature could amend the homestead act to eliminate the dollar limitation and to provide for an unlimited homestead exemption subject only to rural and urban area limitations.<sup>200</sup> Although this scheme will effectuate the homestead goal of protecting the family home from forced sale (inflation notwithstanding), it is unacceptable because in many cases it will

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at Nebraska Law Review). According to the United States Department of Housing and Urban Development, the median property value of existing FHA-insured single family homes in the State of Nebraska for the year 1978 was \$29,354. FHA OFFICE OF MANAGEMENT, U.S. DEPT OF HOUS. AND URBAN DEV., *FHA HOMES 1978: DATA FOR STATES AND SELECTED AREAS* (Table 55). This situation results in a dilemma for the Unicameral when faced with determining the appropriate level of the homestead ceiling. If the dollar limitation is set too low, the homestead exemption will fail to achieve its primary purpose of protecting the family home against the claims of creditors. See Vukowich, *supra* note 66, at 806; Comment, YALE L.J., *supra* note 12, at 1466. However, if the dollar limitation is set at a more realistic level, creditors may, with some justification, perceive that they are being unfairly denied access to substantial assets of their debtors. See Vukowich, *supra* note 66, at 807. Cf. *Meisner v. Hill*, 92 Neb. 435, 442, 138 N.W. 583, 586 (1912) (purpose of dollar limitation on homestead exemption is to protect creditors against "excessively valuable" homesteads).

196. See Donnelly, *supra* note 1, at 308; note 195 *supra*.

197. See generally Lacy, *supra* note 28, at 693.

198. See generally Joslin, *Debtors' Exemption Laws: Time For Modernization*, 34 IND. L.J. 355, 356-60 (1959).

199. See *id.* at 356, 365. In any case, setting the dollar limitation at a realistic level may cause creditors of homestead claimants to be unfairly denied access to substantial assets of their debtors. See note 195 *supra*.

200. See, e.g., TEX. CONST. art. 16, § 51; TEX. REV. CIV. STAT. ANN. arts. 3833, 3835 (Vernon Supp. 1980) (rural homestead unlimited as to value). For an interesting discussion of a case involving a Texas bankrupt who claimed a rural homestead consisting of "nearly 200 acres of land, a 250 thousand dollar house, and a 175 thousand dollar 'party barn' against creditors' claims totaling over \$2,000,000, see Note, *Bankruptcy Exemptions: A Full Circle Back to the Act of 1800?*, 53 CORNELL L. REV. 663, 665 (1968).

produce a homestead exemption that is far too generous to debtors and, therefore, unfair to creditors.<sup>201</sup>

The third option is amendment of the homestead exemption to increase the dollar amount to a more realistic level<sup>202</sup> and to provide for its automatic adjustment periodically in accordance with changes in the consumer price index or some other recognized indicator of economic activity.<sup>203</sup> Finally, the legislature could repeal the homestead exemption and replace it with an amended exemption in lieu of homestead applicable to all debtors and to both real and personal property.

If the legislative consensus is that the policy of protecting the homes of Nebraska debtors from forced sale continues to be socially desirable, the third option should be exercised. Thus, the legislature should immediately increase the amount of the homestead exemption to a realistic level and provide for its automatic adjustment to account for the effect of inflation on the value of residential real property.

However, in formulating this policy the legislature should rec-

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201. See Joslin, *supra* note 198, at 365; note 195 *supra*.

202. As previously noted, such an increase may unfairly impact on creditors of homestead claimants. See note 195 *supra*.

203. Several scholars have suggested that exemption statutes should provide for automatic adjustment of dollar limitations on the amount of exemptions to reflect changes in economic conditions. See, e.g., Costa, *supra* note 17, at 69-70; Joslin, *supra* note 198, at 365; Comment, YALE L.J., *supra* note 12, at 1507. The National Conference of Bankruptcy Judges addressed the problem in section 1-105(a) of their proposed bankruptcy act:

The dollar amounts designated in this title shall be adjusted as provided in this section according to and to the extent of changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers: United States City Average, All Items, 1967 = 100, compiled by the Bureau of Labor Statistics, United States Department of Labor, and hereafter referred to as the index. The index for December 197- is the Reference Base Index. If the index is revised after December 197-, the adjustment pursuant to this section shall be calculated on the basis of the revised index. If the index is superseded, the index referred to in this section is one represented by the Bureau of Labor Statistics as reflecting most accurately the changes in the purchasing power of the dollar for consumers.

H.R. 32, § 1-105(a), 94th Cong., 1st Sess. (1975), reprinted in Proposed Bankruptcy Act: Hearings on H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 24 (1975). See H.R. 16643, § 1-105(a), 93d Cong., 2d Sess. (1974). See also *Uniform Exemption Act*, § 2, 13 U.L.A. CIVIL PROC. & REM. LAWS 374-75 (1980). As finally enacted, the Bankruptcy Reform Act does not provide for automatic adjustment of fixed dollar amounts. However, § 104 of the Act does provide that the Judicial Conference of the United States shall periodically recommend to the President and Congress a "uniform percentage adjustment" of dollar amounts. 11 U.S.C. § 104 (Supp. III 1979). Presumably, these recommendations will induce the Congress and the President to approve legislation effecting the adjustments. See Neustadter, *supra* note 21, at 856.

ognize that the Nebraska exemption scheme creates three classes of debtors: (1) family heads who are homeowners; (2) residents of rental property; and (3) single individuals without dependents. Members of the first group, who are generally more affluent than their counterparts in the second and third categories,<sup>204</sup> are entitled to the homestead exemption, while members of the latter two groups are limited to the less generous personal property exemption in lieu of homestead.<sup>205</sup>

When the homestead exemption was originally enacted in this state, home ownership was the rule and renting was a relatively uncommon exception.<sup>206</sup> The homestead policy of protecting the family home from execution developed perhaps in recognition of the plight facing a nineteenth century pioneer family turned out of its home by creditors and having no other place to go. However, in contemporary society, families commonly reside in rental units,<sup>207</sup> and this demographic evolution has prompted one commentator to conclude that the "homestead exemption is now unnecessary and undesirable" because "living in rental units presents a reasonable alternative to home ownership."<sup>208</sup>

Thus, not only is the homestead exemption increasingly ineffectual in achieving its primary purpose of protecting the family home, but it is available only to those family heads who own homes, a distinction which is increasingly difficult to justify in

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204. Homeowners are generally more affluent than non-homeowners in terms of income and net worth. See 1979 STATISTICAL ABSTRACT OF THE U.S. 787 (Table 1385); Shuchman, *An Attempt at a "Philosophy of Bankruptcy,"* 21 U.C.L.A. L. REV. 403, 473 n.199 (1973). The family income of families with a male head is generally greater than the income of single individuals. See 1979 STATISTICAL ABSTRACT OF THE U.S. 451 (Table 740).

205. See notes 212-39 & accompanying text *infra*. Commentators have called attention to the unequal treatment existing between homeowners and non-homeowners under state exemption laws. See, e.g. Drake, *The Judges' Bankruptcy Bill and the Commission's Bill: A Question of Access to the Judicial Process*, 26 MERCER L.REV. 1009, 1028 (1975); Joslin, *supra* note 198, at 365; Shuchman, *supra* note 204, at 473 n.199; Ulrich, *supra* note 15, at 139. See also HOUSE REPORT, *supra* note 8, at 361 (purpose of § 522(d)(5) of the Bankruptcy Reform Act was to eliminate discrimination against the non-homeowner). For a discussion of the federal wildcard or grubstake exemption created by § 522(d)(5) of the New Act, see notes 40-41 & accompanying text *supra*. But see Vukowich, *supra* note 18, at 1463; Vukowich, *supra* note 66, at 831-32. For a suggested legislative response which would eliminate this inequity from Nebraska exemption law, see notes 209-11 & accompanying text *infra*.

206. See C. WRIGHT, *ECONOMIC HISTORY OF THE UNITED STATES* 1022-23 (1941); Vukowich, *supra* note 66, at 805.

207. In 1977, approximately 35% of all occupied housing units were occupied by renters. 1979 STATISTICAL ABSTRACT OF THE U.S. 782 (Table 1377).

208. Vukowich, *supra* note 66, at 805. This conclusion is probably more supportable with respect to urban areas than to rural areas. See Comment, *supra* note 66, at 1040-41.

modern society. Fairness to creditors and all classes of debtors requires a complete overhaul of Nebraska exemption policy. The most appropriate legislative response to the situation is the fourth option discussed above—repeal of the homestead exemption and amendment of the exemption in lieu of homestead<sup>209</sup> to make it applicable to all debtors and to real as well as personal property.<sup>210</sup> Such a policy is fair both to debtors and creditors and would eliminate distinctions based upon family headship and homeowner status without sacrificing any realistic goal of the present homestead exemption.<sup>211</sup>

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209. NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980). *See generally* notes 212-39 & accompanying text *infra*.

210. The present version of the exemption in lieu of homestead provides:

All persons who have neither lands, town lots, or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of twenty-five hundred dollars in personal property, except wages. The provisions of this section shall not, in any manner, apply to the exemption of wages, that subject being fully provided for by section 25-1558.

NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980). In order to achieve the goals discussed in the text, the author proposes that § 25-1552 should be amended to read:

All persons shall have exempt from forced sale on execution the sum of twenty-five hundred dollars in real or personal property, except wages. The provisions of this section shall not, in any manner, apply to the exemption of wages, that subject being fully provided for by section 25-1558.

*See also id.* §§ 30-2322, -2325 (Cum. Supp. 1980). Of course, the Unicameral should also consider whether any increase in the amount of the exemption is desirable under the circumstances and whether such amount should be indexed to reflect changes in the cost of living. *See* note 203 & accompanying text *supra*. Finally, consideration should be given to whether the amount of the exemption should be further increased in the case of debtors who support one or more dependents. *See* Ulrich, *supra* note 41, at 135, 141, 155.

211. One criticism of a grubstake exemption, such as that proposed by this article, is that "highly favored property, such as a homestead . . . receives the same treatment . . . as less favored property such as country club memberships, ski cabins, gambling casino chips, wine cellars, and yachts." Hughes, *supra* note 5, at 1031. *See also* Kennedy, *supra* note 16, at 449; Comment, YALE L.J., *supra* note 12, at 1507-10. However, this same criticism can be made with respect to the practical effect of the present homestead exemption, which is in danger of becoming a cash exemption available only to homeowners. *See* notes 194-97 & accompanying text *supra*. Moreover, since the author's proposed amendment to § 25-1552 merely expands the persons and types of property covered by the provision and does not create a new type of exemption, it should not cause any new questions of policy or procedure to arise. Finally, it is unlikely that many debtors will exempt yachts and casino chips in preference to more essential types of property.

## B. Other Nebraska Exemptions

### 1. *The Exemption In Lieu of Homestead and the Specific Exemption*

The two primary personal property exemption statutes in Nebraska are the \$2,500 exemption in lieu of homestead<sup>212</sup> and the exemption of specific categories of the debtor's personalty.<sup>213</sup> Like the homestead exemption, the exemption in lieu of homestead and the specific exemption are rooted in the policy of family protection.<sup>214</sup> Accordingly, until 1977 both exemptions were available only to family heads.<sup>215</sup> However, in 1977 the family headship requirement was deleted by the Unicameral<sup>216</sup> in order to eliminate discrimination against non-heads of families<sup>217</sup> and in recognition

212. NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980). Both the present version and a suggested revision of § 25-1552 are set forth in full at note 210 *supra*.

213. Section 25-1556 provides:

No property hereinafter mentioned shall be liable to attachment, execution or sale on any final process issued from any court in this state, against any person being a resident of this state: (1) The immediate personal possessions of the debtor and his family; and (2) all necessary wearing apparel of the debtor and his family; all kitchen utensils and household furniture, to be selected by the debtor, not exceeding in value fifteen hundred dollars; all equipment or tools used by the debtor or his family for their own support not exceeding fifteen hundred dollars in value; the provisions for the debtor and his family necessary for six months' support, either provided or growing, or both; and fuel necessary for six months. All of the articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be.

NEB. REV. STAT. § 25-1556 (Reissue 1979). This exemption will be referred to in this article as the "specific personal property exemption" or the "specific exemption."

214. See *In re Estate of Grassman*, 183 Neb. 147, 152, 158 N.W.2d 673, 676 (1968); *Winter v. Winter*, 95 Neb. 335, 340-41, 145 N.W. 709, 712 (1914); *Frazier v. Syas*, 10 Neb. 115, 118, 4 N.W. 934, 935 (1880).

215. Act of Jan. 2, 1973, L.B. 16, §§ 1-2, 1973 Neb. Laws 70 (repealed 1977) (previously codified at NEB. REV. STAT. §§ 25-1552, -1556 (Reissue 1975)) (repealed 1977).

216. Act of Mar. 5, 1977, L.B. 60, §§ 1-2, 1977 Neb. Laws 543 (current version codified at NEB. REV. STAT. §§ 25-1552, -1556 (Reissue 1978 & Cum Supp. 1980)).

217. Senator Fowler, who introduced the bill, discussed its policy at a public hearing before the Judiciary Committee of the Unicameral:

Now, what has come to light in some recent cases . . . is that the way our current exemption statute is written it covers people who are only heads of families. Legally what that means then, if you are a single person, you are a widow or widower living alone, you have no protection. . . . I think this is somewhat discriminatory, I think that it is against the initial concept of exemptions and I would hope that we could clarify or change this language so that exemptions would apply to single people or people who are not heads of families as well as those who are.

*Public Hearing on L.B. 60 Before the Comm. on the Judiciary of the Nebraska Unicameral*, Jan. 19, 1977, 85th Legis., 1st Sess. 2 (1977).

of a modern exemption policy concerned not only with protection of the family, but also with providing a minimum level of subsistence to individual debtors in order to prevent them from becoming "ward[s] of the state and county."<sup>218</sup>

Although under present law the exemption in lieu of homestead and the specific personal property exemption appear to apply to all otherwise qualified persons regardless of marital or family status, there is some uncertainty concerning application of the exemptions in the case of a married couple. The straightforward and better reading of the provisions would allow each spouse to claim the exemptions, just as each single individual may do. However, the legislative history of L.B. 60, the 1977 bill that eliminated the family headship requirement, indicates that the bill was not intended to change pre-existing law as applied to married persons.<sup>219</sup> Accordingly, it can be argued that each family is entitled to only one \$2,500 exemption in lieu of homestead and only one set of specific personal property exemptions and that the effect of L.B. 60 was simply to grant the exemptions to single individuals who are not dependent members of a family.<sup>220</sup> The Nebraska courts should disregard the confusing and inconclusive legislative history of L.B.60 and give effect to the unambiguous language of the act granting the exemptions to every otherwise qualified person without regard to marital or family status.

The exemption in lieu of homestead was enacted, at least in part, "for the purpose of equalizing somewhat the exemption between those who [own] lands and those who [do] not."<sup>221</sup> Thus, it is available to all residents<sup>222</sup> of Nebraska "who have neither lands, town lots or houses subject to exemptions as a home-

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218. *Id.* at 1-2.

219. See *Floor Debate on L.B. 60*, 85th Legis., 1st Sess. 596 (Feb. 17, 1977) (unpublished legislative record available on microfilm in office of Clerk of the Nebraska Legislature, LR #326) (remarks of Senator Fowler).

220. Under former law each head of a family (and thus each family) was entitled to only one exemption in lieu of homestead and only one set of specific exemptions. Act of Feb. 2, 1973, L.B. 16, §§ 1-2, 1973 Neb. Laws. 70 (previously codified at NEB. REV. STAT. §§ 25-1552, -1556 (Reissue 1975)) (repealed 1977). Therefore, if the elimination of the family headship requirement was not intended to affect the law as applied to families, each family and each single individual not attached to a family would be entitled to only one exemption in lieu of homestead and only one set of specific exemptions. For an interesting and somewhat confusing case discussing a similar problem under Virginia exemption law as applied in bankruptcy, see *In re Thompson*, 2 B.R. 380 (Bankr. Ct. E.D. Va. 1980).

221. *Johnson v. Bartek*, 56 Neb. 422, 426, 76 N.W. 878, 880 (1898). See also *Williams v. Golden*, 10 Neb. 432, 6 N.W. 766 (1880).

222. *Woolfson v. Mead*, 96 Neb. 528, 148 N.W. 153 (1914); *People v. McClay*, 2 Neb. 7 (1873).

stead."<sup>223</sup> Ownership of real property, without more, does not disqualify a debtor from claiming the exemption—it is the ownership of *homestead property* which renders the exemption in lieu of homestead inapplicable.<sup>224</sup> Therefore, the homestead exemption and the exemption in lieu of homestead are mutually exclusive.<sup>225</sup> In the case of a married couple, if the family is entitled to a homestead exemption, neither spouse may claim the exemption in lieu of homestead without regard to the locus of title to the homestead property. Thus, where the homestead is owned by the wife as her separate property, her husband can not claim an exemption in lieu of homestead.<sup>226</sup> Moreover, the value (or lack of value) of the debtor's interest in the homestead is of no consequence.<sup>227</sup> Nor does it matter that the debtor owns only an equitable interest in the homestead.<sup>228</sup> In either case, if the debtor has an interest in homestead property, he may not select the exemption in lieu of homestead.

A related question, which appears not to have been raised in Nebraska, is whether a debtor who rents residential property has a homestead interest rendering him ineligible to claim the exemption in lieu of homestead. Although a homestead may be composed of leasehold property,<sup>229</sup> the courts should reject any attempt by creditors (or trustees in bankruptcy) to argue that it therefore follows that debtors who rent living space have a homestead and are thus not entitled to claim the exemption in lieu of homestead. The fact that this question apparently has not arisen in Nebraska is evidence that counsel for creditors must recognize

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223. NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980). See *Axtell v. Warden*, 7 Neb. 182 (1878).

224. *Widemair v. Woolsey*, 53 Neb. 468, 73 N.W. 947 (1898) (plaintiff and his wife owned business property and unoccupied lots, but no homestead; plaintiff eligible for exemption in lieu of homestead).

225. See *Foster*, *supra* note 68, at 143.

226. *Creason v. Wells*, 158 Neb. 78, 62 N.W.2d 327 (1954); *Stout v. Rapp*, 17 Neb. 462, 23 N.W. 364 (1885). See also *In re Nielsen's Estate*, 135 Neb. 110, 280 N.W. 246 (1938). Notice that this result is not compelled by a literal reading of § 25-1552, because that section grants an exemption in lieu of homestead to "*a*/all persons who have neither lands, town lots, or houses subject to exemptions as a homestead." NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980) (emphasis added).

227. *State v. Townsend*, 17 Neb. 530, 23 N.W. 509 (1885) (debtor was not entitled to exemption in lieu of homestead notwithstanding that his homestead was substantially encumbered and he had only an equitable interest therein); *State v. Krumpus*, 13 Neb. 321, 14 N.W. 409 (1882) (debtor was not entitled to exemption in lieu of homestead notwithstanding that his homestead was a "shanty" mortgaged for its full value).

228. *State v. Townsend*, 17 Neb. 530, 23 N.W. 509 (1885); *Axtell v. Warden*, 7 Neb 182 (1878).

229. See notes 113, 117-18 & accompanying text *supra*.

that this argument, although technically supportable, is irrational as a matter of policy—acceptance of this argument would effectively deny renters the protection of both the homestead exemption (since the average debtor's interest in his residential leasehold is without substantial value) and the exemption in lieu of homestead. Sound exemption policy requires that both the homestead exemption and the exemption in lieu of homestead be liberally construed<sup>230</sup> to permit renters who disavow any homestead interest in their leasehold to claim the exemption in lieu of homestead.<sup>231</sup>

In nonbankruptcy proceedings, the debtor may claim the exemption in lieu of homestead "at any time before the sale of the property"<sup>232</sup> by filing "an inventory, under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him,"<sup>233</sup> together with an affidavit "showing his right to the exemption claimed."<sup>234</sup> The debtor's personal property is then appraised,<sup>235</sup> and the debtor is permitted to set aside his exempt property.<sup>236</sup> In bankruptcy proceedings, the debtor or a dependent of the debtor may claim the exemption in the list of exemptions filed pursuant to section 522(1) of the Bankruptcy Reform Act.<sup>237</sup>

The present version of the exemption in lieu of homestead provides for an exemption of \$2,500 in any "personal property, except wages."<sup>238</sup> The exemption in lieu of homestead is, therefore, basi-

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230. "Homestead and exemption laws are invariably construed liberally in favor of the debtor who claims the protection of their provisions." *Widemair v. Woolsey*, 53 Neb. 468, 470, 73 N.W. 947, 948 (1898). See note 86 *supra* (homestead law); *State v. Bank of Crab Orchard*, 122 Neb. 210, 239 N.W. 836 (1932) (exemption in lieu of homestead).

231. See *Widemair v. Woolsey*, 53 Neb. 468, 73 N.W. 947 (1898). The court held that plaintiff was entitled to the exemption in lieu of homestead, because he did not own any property "impressed with the character of a homestead." *Id.* at 470, 73 N.W. at 948. Although the court did not expressly discuss the question presented in the text, it did note that the facts of the case disclosed that "[p]laintiff and his wife lived in rented property, and at no time since their marriage did they reside upon, or occupy as a home, any real estate belonging to them, or either of them." *Id.* at 469, 73 N.W. at 947 (emphasis added).

232. NEB. REV. STAT. § 25-1553 (Reissue 1979).

233. *Id.*

234. *First Nat'l Bank v. Lancaster*, 54 Neb. 467, 471, 74 N.W. 858, 859 (1898). The affidavit should state that the debtor is a resident of the State of Nebraska and "[has] neither lands, town lots, nor houses exempt as a homestead." *Id.* at 471-72, 74 N.W. at 859. See 5 MOORE, *supra* note 152, §§ 3694, 3695 (1966).

235. NEB. REV. STAT. § 25-1553 (Reissue 1979). See 5 MOORE, *supra* note 152, at §§ 3694, 3696 (1966).

236. NEB. REV. STAT. § 25-1554 (Reissue 1979). See 5 MOORE, *supra* note 152, at §§ 3694, 3697 (1966).

237. See note 153 *supra*.

238. NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980). The amount of the exemption



cally a wildcard or grubstake exemption, and the only apparent limitation on the nature of the personalty of the debtor to which the \$2,500 exemption may be applied is that expressly stated in the statute, i.e., the exemption may not be applied to wages.<sup>239</sup>

All Nebraska debtors, both those entitled to the homestead exemption and those entitled to the exemption in lieu of homestead,<sup>240</sup> may exempt additionally the items of personal property specifically enumerated in section 25-1556 of the Revised Statutes of Nebraska.<sup>241</sup> Most of the specific categories of exempt property are designed to enable the debtor to hold, free from the claims of his creditors, property necessary to protect him and his family from impoverishment.<sup>242</sup> For example, the debtor's specific exemptions include: (1) the immediate personal possessions of the debtor and his family;<sup>243</sup> (2) all necessary wearing apparel of the debtor and his family;<sup>244</sup> (3) kitchen utensils and household furniture not exceeding in value fifteen hundred dollars;<sup>245</sup> (4) provisions for the debtor and his family necessary for six months' support;<sup>246</sup> and (5) fuel necessary for six months.<sup>247</sup> At least some of the specifically exempted property is intended to enable the debtor to rehabilitate himself financially.<sup>248</sup> Thus, in addition to the categories of property already mentioned—many of which pro-

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was increased from \$1,500 to \$2,500 in 1980. Act of Apr. 16, 1980, L.B. 940, § 2, 1980 Neb. Laws 1051 (codified at NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980)). However, many Nebraska debtors will not become entitled immediately to the full benefit of the \$1,000 increase under cases denying retroactive effect to laws increasing the amount of exemptions. See notes 189-91 & accompanying text *supra*.

239. NEB. REV. STAT. § 25-1552 (Cum. Supp. 1980). See *Lyons v. Austin*, 126 Neb. 248, 252 N.W. 908 (1934) (exemption in lieu of homestead may not be applied to wages not otherwise exempt); *Jones v. Union Pac. R.R. Co.*, 84 Neb. 121, 125, 120 N.W. 946, 947 (1909) ("personal property" within the meaning of exemption in lieu of homestead includes "goods, chattels, coin, bills and evidences of debt") (dictum); *Mace v. Heath*, 34 Neb. 54, 51 N.W. 317 (1892) (exemption in lieu of homestead may be applied to judgment owing to debtor).

240. The specific personal property exemption may be claimed in addition to the homestead exemption or the exemption in lieu of homestead, whichever is applicable. *Johnson v. Bartek*, 56 Neb. 422, 76 N.W. 878 (1898); *Williams v. Golden*, 10 Neb. 432, 6 N.W. 766 (1880); *Axtell v. Warden*, 7 Neb. 182 (1878) (dictum); *State v. Cunningham*, 6 Neb. 90 (1877).

241. NEB. REV. STAT. § 25-1556 (Reissue 1979). See note 213 *supra*.

242. See notes 214-18 & accompanying text *supra*.

243. NEB. REV. STAT. § 25-1556 (Reissue 1979).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. See *Clay Center State Bank v. McKelvie*, 19 F.2d 308 (8th Cir. 1927); *In re Conley*, 162 F. 806 (D. Neb. 1907).

mote both subsistence of the family and debtor rehabilitation<sup>249</sup>—the debtor is permitted to retain “all equipment or tools used by the debtor or his family for their own support not exceeding fifteen hundred dollars in value.”<sup>250</sup>

The present version of the specific exemption is less than fifteen years old,<sup>251</sup> and a substantial body of case law interpreting its provisions has not yet developed. There are, therefore, many areas of uncertainty concerning the scope of the categories of personal property specifically exempted by the provision. Suppose, for example, that the debtor is a medical doctor and uses his automobile to make emergency house calls and to travel from his office to the hospital. May he exempt the automobile as “equipment or tools” used to support himself?<sup>252</sup> There is no clear answer to this question; however, the starting point for the debtor’s counsel is clear—the specific exemptions are to be liberally construed in favor of the person claiming the exemption.<sup>253</sup>

*In re Conley*<sup>254</sup> is an enlightening case in this regard. The bankrupt, a dealer in poultry, eggs, and farm produce, was allowed to exempt “one horse and buggy and harness” under a former version of the Nebraska specific exemption protecting “[t]he tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business.”<sup>255</sup> The horse and buggy qualified as part of the bankrupt’s “tools and in-

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249. For example, the exemption of all necessary wearing apparel of the debtor obviously promotes the debtor’s rehabilitation by enabling him to pursue income producing opportunities with dignity.

250. NEB. REV. STAT. § 25-1556 (Reissue 1979).

251. In 1969, the Unicameral undertook a major overhaul of the specific exemption and replaced an overly specific and generally archaic provision with language substantially similar to the present version. Act of June 9, 1969, L.B. 1076, 1969 Neb. Laws 778 (current version at NEB. REV. STAT. § 25-1556 (Reissue 1979)). Property exempt under the former statute included: (1) the family Bible, (2) a seat or pew in any house or place or public worship, (3) one cow, three hogs, and all pigs under six months old, and (4) if the debtor was “actually engaged in the business of agriculture,” one yoke of oxen, or a pair of horses; ten sheep “and the wool therefrom”; three months food for the exempt livestock; one wagon, cart or dray; two plows and one drag; “necessary gearing for the team . . . exempted”; and other farming implements not exceeding fifty dollars in value. Act of Feb 12, 1866, 1866 Neb. Laws (repealed 1969) (previously codified at NEB. REV. STAT. § 25-1556 (Reissue 1964)), reprinted in E. ESTABROOK, II LAWS, RESOLUTIONS, AND MEMORIALS PASSED AT THE SESSIONS OF THE TERRITORIAL AND STATE LEGISLATURES OF NEBRASKA 167-68 (1887).

252. See note 250 & accompanying text *supra*.

253. *In re Bailey*, 172 F. Supp. 925 (D. Neb. 1959); *In re Conley*, 162 F. 806 (D. Neb. 1907); *Frazier v. Syas*, 10 Neb. 115, 4 N.W. 934 (1880). See also *State v. Cunningham*, 6 Neb. 90, 92-93 (1877) (statute exempting “one yoke of oxen, or pair of horses” construed to allow debtor to exempt a team of mules).

254. 162 F. 806 (D. Neb. 1907).

255. *Id.* at 806.

struments" because he used them in his business to make pickups and deliveries.<sup>256</sup> The *Conley* case was cited approvingly by the court in *In re Bailey*<sup>257</sup> in support of its holding that the bankrupt, a painting contractor, was entitled to exempt his panel truck, which he used almost exclusively to transport painting supplies and equipment to and from construction sites, as "a tool or instrument kept for the purpose of carrying on his trade or business."<sup>258</sup>

Although *Conley* and *Bailey* were not decided under the present version of the specific exemption, the policy considerations supporting their holdings apply with equal force to the hypothetical case involving the doctor's automobile. To borrow from the court's logic in *Bailey*, if the doctor is denied the use of his automobile he will be about as effective in his profession as a cowboy, on foot, attempting to round up range cattle.<sup>259</sup> It follows that if the policy of debtor rehabilitation is to be served fully by the occupational equipment or tools exemption, both the doctor's automobile and the cowboy's horse should be exempt.

There is no special statutory procedure prescribed for the debtor to claim specific exemptions in nonbankruptcy proceedings.<sup>260</sup> Specific exemptions are claimed in bankruptcy in accordance with the same procedure governing the homestead exemption and the exemption in lieu of homestead.<sup>261</sup>

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256. The court noted that the statute should receive a liberal construction "in order that the heads of families may not be stripped of all means of making a livelihood," *id.*, and concluded that "[i]t would not seem unreasonable that the bankrupt should be allowed one horse and buggy and harness as exempt to him under this statute as part of the tools and instruments of his trade or business." *Id.* at 807. The court also cited with approval New York and New Hampshire decisions construing similar statutes as exempting "[t]he buggy used by a physican in his business." *Id.* Finally, the court cautioned that "[w]hile the bankrupt is entitled to what tools and instruments are necessary to carry on his trade or business, he is not entitled to all that might add convenience." *Id.* at 808.

257. 172 F. Supp. 925 (D. Neb. 1959).

258. *Id.* at 929.

259. *Id.* at 928. See also *In re Goosey*, 10 B.R. 285 (Bankr. Ct. D. Neb. 1981) (automobile of an insurance salesman was a "tool of the trade" under § 522(d)(6) of the New Act).

260. Section 25-1556 provides simply that "[a]ll of the articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be." NEB. REV. STAT. § 25-1556 (Reissue 1979). "An officer seizes property which is specifically exempt at his peril, and when sued for refusing to seize such property on process, it would seem that he might successfully defend himself by showing that it was specifically exempt." *Johnson v. Bartek*, 56 Neb. 422, 425-26, 76 N.W. 878, 880 (1898). See also *Mann v. Welton*, 21 Neb. 541, 32 N.W. 599 (1887); 5 MOORE, *supra* note 152, § 3700.

261. See notes 153, 237 & accompanying text *supra*.

## 2. Wage and Other Exemptions

Section 541 of the Bankruptcy Reform Act generally excludes from the estate in bankruptcy all property of the debtor acquired after the commencement of the case.<sup>262</sup> Moreover, wages earned by an individual debtor for services performed after commencement of the case are expressly excluded from the bankruptcy estate.<sup>263</sup> Thus, creditors may not look to future earnings of the debtor for satisfaction of claims discharged by the bankruptcy proceedings.<sup>264</sup> However, wages earned before commencement of the bankruptcy proceedings are included in the bankruptcy estate.<sup>265</sup> Accordingly, it is necessary to consider the applicability in bankruptcy of wage exemption statutes.

In 1970 Congress passed the Consumer Credit Protection Act<sup>266</sup> to limit the amount of the earnings<sup>267</sup> of an individual debtor which may be subjected to garnishment.<sup>268</sup> The Consumer Credit Protection Act was designed to prevent consumers from being forced into bankruptcy by a combination of harsh state garnishment laws and predatory extensions of credit.<sup>269</sup> Congress was also concerned that "application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor."<sup>270</sup> In general, the

262. 11 U.S.C. § 541 (Supp. III 1979). *But see id.* § 541(a)(5)-(7).

263. *Id.* § 541(a)(6). It is essential to the fresh start policy of the Bankruptcy Reform Act that the debtor be left "free after the date of his petition to accumulate new wealth in the future." *Segal v. Rochell*, 382 U.S. 375, 379 (1965). However, if the debtor elects to file a wage-earner plan under Chapter 13 of the Bankruptcy Reform Act, his after-acquired property and post-petition earnings will be included in the bankruptcy estate. 11 U.S.C. § 1306(a) (Supp. III 1979).

264. *See* 4 COLLIER, *supra* note 56, ¶ 541.05.

265. The debtor has a "legal or equitable interest" in wages that he or she has earned by labor or services performed prior to commencement of the bankruptcy case. 11 U.S.C. § 541(a)(1) (Supp. III 1979). *See Aaron, supra* note 11, at 190. This was also true under § 70a of the Former Act. 11 U.S.C. § 110(a) (1976) (repealed 1978). *See In re Aveni*, 458 F.2d 972 (6th Cir. 1972), *cert. denied sub nom. Aveni v. Reckman*, 409 U.S. 877 (1972); *Kolb v. Berlin*, 356 F.2d 269 (5th Cir. 1966); *In re Griffin*, 1 B.R. 653 (Bankr. Ct. M.D. Tenn. 1979); *Plumb, The Recommendations Of The Commission On The Bankruptcy Laws—Exempt And Immune Property*, 61 VA. L. REV. 1, 20-21 (1975).

266. 15 U.S.C. §§ 1671-1677 (1976 & Supp. III 1979).

267. The term "earnings" is defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." *Id.* § 1672(a) (1976).

268. The term "garnishment" is defined as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." *Id.* § 1672(c).

269. *See id.* § 1671; *Kokoszka v. Belford*, 417 U.S. 642, 650-51 (1974).

270. 15 U.S.C. § 1671(a)(2) (1976). Congress concluded that this loss of employment caused "disruption of employment, production, and consumption

Consumer Credit Protection Act restricts wage garnishments to an amount not exceeding the lesser of (a) twenty-five percent of the debtor's disposable earnings<sup>271</sup> for any workweek or (b) the amount by which disposable earnings for that week exceed thirty times the federal minimum hourly wage.<sup>272</sup> This federal response to wage garnishment pre-empts all less restrictive state legislation,<sup>273</sup> unless an exception for a particular state is made by regulation of the Secretary of Labor after a determination that the laws of that state provide restrictions on garnishment which are "substantially similar" to those provided by the Consumer Credit Protection Act.<sup>274</sup> However, more restrictive state wage garnishment laws are unaffected by the Consumer Credit Protection Act.<sup>275</sup>

In 1972 the Unicameral followed the lead of Congress and amended the Nebraska wage garnishment statute to conform substantially to the Consumer Credit Protection Act.<sup>276</sup> The Nebraska act limits the amount of wages which may be subjected to garnishment to the lesser of (a) twenty-five percent of the debtor's disposable earnings for any workweek, (b) the amount by which disposable earnings for that week exceed thirty times the federal minimum hourly wage, or (c) if the debtor is a head of a family,<sup>277</sup>

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[which] constitutes a substantial burden on interstate commerce." *Id.* Thus, Congress exercised both its commerce and bankruptcy powers when it enacted the Consumer Credit Protection Act. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

271. The term "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." 15 U.S.C. § 1672(b) (1976).

272. *Id.* § 1673(a). *See* 29 C.F.R. § 870.10 (1980).

273. 15 U.S.C. § 1673(c) (1976 & Supp. III 1979). *See* U.S. CONST. art. VI, cl. 2.

274. 15 U.S.C. § 1675 (1976 & Supp. III 1979). *See* 29 C.F.R. §§ 870.50-57 (1980).

275. 15 U.S.C. § 1677(1) (1976). "Whichever law is the more restrictive and results in the smaller garnishment is the one which must be applied in any given situation." *First Nat'l Bank v. Columbia Credit Corp.*, 179 Colo. 242, 246, 499 P.2d 1163, 1164 (1972). *See also* *Evans v. Evans*, 429 F. Supp. 580 (W.D. Okla. 1976); *Crane v. Crane*, 417 F. Supp. 38 (E.D. Okla. 1976); *United States v. Dumont*, 416 F. Supp. 632 (D. Mont. 1976); *Hodgson v. Hamilton Municipal Court*, 349 F. Supp. 1125 (S.D. Ohio 1972); *Hodgson v. Cleveland Municipal Court*, 326 F. Supp. 419 (N.D. Ohio 1971).

276. Act of Mar. 30, 1972, L.B. 1032, § 133, 1972 Neb. Laws 333 (codified at NEB. REV. STAT. § 25-1558 (Reissue 1979)).

277. "Head of a family" is statutorily defined as "an individual who actually supports and maintains one or more individuals who are closely connected with him by blood relationship, relationship by marriage, by adoption, or by guardianship, and whose right to exercise family control and provide for the dependent individuals is based upon some moral or legal obligation." NEB. REV. STAT. § 25-1558(4)(d) (Reissue 1979). This definition has not yet been construed by the Nebraska Supreme Court, and it is uncertain how it will be applied to a married couple when both spouses are wage earners contributing to the support of the household. For example, will both spouses be treated as a head of a family, or will the court devise some means of determining which

fifteen percent of his disposable earnings for that week.<sup>278</sup>

The Nebraska act is more restrictive than the Consumer Credit Protection Act,<sup>279</sup> because it gives additional protection (i.e., it provides greater limitations on wage garnishment) to debtors with dependents.<sup>280</sup> Since wage garnishment laws are designed, at least in part, to ensure that wage earners receive enough of their earnings to meet the basic needs of their families,<sup>281</sup> this policy is generally supportable, because, presumably, wage earners with dependents incur more necessary expenses than do wage earners without dependents.<sup>282</sup> However, in fairness to creditors,<sup>283</sup> the Nebraska legislature ought to consider whether some limitation should be placed on the extra protection from wage garnishment provided heads of families.<sup>284</sup> For example, section 25-1558 might be amended to provide that not more than fifteen percent of the first \$125 (or such other amount as the legislature considers to be the appropriate ceiling) of the weekly disposable earnings of a

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of the spouses is the head of the family? In the case of a working couple without children, it could also be argued that neither spouse is the head of the family, because each spouse is self-supporting. A legislative answer to these questions is required; however, in the absence of such a response, the courts should construe the family headship requirement liberally and in a manner which insures that its purpose of protecting debtors with families is fully effectuated.

278. *Id.* § 25-1558(1).

279. See notes 273-75 & accompanying text *supra*.

280. NEB. REV. STAT. § 25-1558(1)(c) (Reissue 1979).

281. See *In re Kokoszka*, 479 F.2d 990, 996-97 (2d Cir. 1973), *aff'd sub nom. Kokoszka v. Belford*, 417 U.S. 642 (1974); Vukowich, *supra* note 66, at 816.

282. See Vukowich, *supra* note 66, at 820. One commentator concludes that when a wage garnishment statute "treats individuals without dependents the same as persons supporting others [it follows] . . . either that the latter are being treated inadequately or the former are granted protection in excess of that which is necessary." Ulrich, *supra* note 15, at 135. The same commentator has proposed that debtors with dependents should receive extra protection from wage garnishment up to a designated ceiling—he suggests that the first \$500 of monthly disposable income should be subjected to varying degrees of additional protection from garnishment according to the number of persons dependent on the debtor—and that earnings above the ceiling should be subjected to garnishment at the standard rate. *Id.* at 135. Another commentator has suggested that "the percentage exemption could be increased five percent for each dependent up to a maximum of three dependents and the multiple of the minimum hourly wage could be increased by five for each dependent." Vukowich, *supra* note 66, at 820.

283. See Vukowich, *supra* note 66, at 781.

284. For example, it is difficult to argue that a person earning \$1,000 per week requires, or deserves, extra protection from wage garnishment in order to meet the basic needs of his family. However, such a person is presently entitled to special protection under the Nebraska wage garnishment statute, if he qualifies as the head of a family. NEB. REV. STAT. § 25-1558(1)(c) (Reissue 1979). See Ulrich, *supra* note 15, at 135.

head of a family could be subjected to garnishment, and that the standard rate of garnishment would apply to earnings above the ceiling.<sup>285</sup>

The legislature should also consider whether there are any circumstances in which the wage garnishment law fails to provide sufficient protection to wage earners. For example, handicapped persons and persons affected by illness in the family may need additional income to meet their special needs.<sup>286</sup> The current Nebraska wage garnishment statute is inflexible in this respect and should be amended to permit debtors to exempt a greater portion of their wages upon proof of special circumstances.<sup>287</sup>

In bankruptcy proceedings, a Nebraska debtor may attempt to exempt wages under either the Consumer Credit Protection Act or section 25-1558.<sup>288</sup> However, in *Kokoszka v. Belford*,<sup>289</sup> the Supreme Court implied, without clearly deciding, that the Consumer Credit Protection Act was not an exemption law within the meaning of section 6 of the Former Act. The *Kokoszka* Court reasoned that Congress passed the Consumer Credit Protection Act with a view to decreasing the number of consumer bankruptcies by eliminating harsh, non-uniform garnishment laws and not for the purpose of creating a new bankruptcy exemption.<sup>290</sup> The same rationale was expressed by the Ninth Circuit in *In re Brissette*,<sup>291</sup> which clearly held that the Consumer Credit Protection Act did not create an exemption under the Bankruptcy Act of 1898.<sup>292</sup>

*Kokoszka* and *Brissette* appear to preclude the use of the Consumer Credit Protection Act to exempt wages under section 522(b)(2)(A) of the Bankruptcy Reform Act.<sup>293</sup> Accordingly, the issue in Nebraska bankruptcy proceedings is whether the Ne-

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285. See note 282 *supra*.

286. See Vukowich, *supra* note 66, at 818.

287. See CAL. CIV. PROC. CODE § 723.051 (West 1980).

288. 11 U.S.C. § 522(b)(2)(A) (Supp. III 1979) provides that the debtor may exempt from the bankruptcy estate any property that is exempt under either federal nonbankruptcy law or applicable state or local law. This section provides, in effect, the same exemptions formerly recognized by § 6 of the Bankruptcy Act of 1898. 11 U.S.C. § 24 (1976) (repealed 1978). See Hughes, *supra* note 5, at 1028 n.15; Neustadter, *supra* note 21, at 853; Ulrich, *supra* note 15, at 136; note 14 & accompanying text *supra*.

289. 417 U.S. 642 (1974).

290. *Id.* at 650-51. See Plumb, *supra* note 265, at 21; Vukowich, *supra* note 5, at 791-92.

291. 561 F.2d 779 (9th Cir. 1977).

292. The court stated: "The draftsmen of the CCPA were concerned only with the problem of imposing uniform limitations on wage garnishment and did not intend to create a federal bankruptcy exemption." *Id.* at 785.

293. See Ulrich, *supra* note 15, at 136-38. But see Aaron, *supra* note 11, at 190 ("[p]resumably . . . the language of new section 522(b)(2)(A) encompasses the Consumer Credit Protection Act").

braska wage garnishment act constitutes a state exemption law for purposes of incorporation in bankruptcy under section 522(b)(2)(A) of the New Act.<sup>294</sup> The same question arose in *Brisette* with respect to a former California statute which, in effect, incorporated by reference the Consumer Credit Protection Act and provided that earnings "shall be exempt from execution" to that extent.<sup>295</sup> In holding that the California statute was an exemption statute for purposes of section 6 of the Bankruptcy Act of 1898, the Ninth Circuit emphasized that the provision employed the term "exempt" and had "been routinely treated as an exemption statute."<sup>296</sup>

Under the same analysis, the Nebraska wage garnishment statute appears to be a proper bankruptcy exemption. Although section 25-1558(1) tracks the Consumer Credit Protection Act and refers to the protection of wages "subject to garnishment,"<sup>297</sup> the magic word "exemption" is used in sections 25-1558(3) and 25-1558(5).<sup>298</sup> Moreover, wage garnishment laws in Nebraska tradi-

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294. "The general rule is that unless the state law shields the protected property against all forms of creditor process, it is not an exemption law, and the property claimed as exempt passes to the trustee." Ulrich, *supra* note 15, at 136. See also *In re Brissette*, 561 F.2d 779, 786 (9th Cir. 1977); Plumb, *supra* note 265, at 21; Vukowich, *supra* note 66, at 788-92. State law controls the question whether a particular state law is an exemption statute. *In re Brissette*, 561 F.2d 779, 786 (9th Cir. 1977). See 1A COLLIER, *supra* note 48, ¶ 6.03, at 799-801. But see Vukowich, *supra* note 66, at 789 n.60.

295. 561 F.2d at 785 n.10, 786.

296. *Id.* at 786. The court noted that the effect of its decision was to permit the Consumer Credit Protection Act to become a bankruptcy exemption "for all practical purposes via California law." *Id.* Circuit Judge Hufstедler defended the logic of this interpretation:

The process of double adoption, however, is entirely consistent with Bankruptcy Act policy. The CCPA purports to do only what California permits it to do—namely, to set the levels of maximum garnishment. The California statute continues to function as an exemption statute, both for the purposes of state law and for the purposes of Section 6. Section 6 adopts, as an exemption, any state law which would shield the property in question from execution by a creditor in a non-bankruptcy proceeding and thus adopts California's adoption of the CCPA.

*Id.*

297. NEB. REV. STAT. § 25-1558(1) (Reissue 1979).

298. Section 25-1558(3) provides: "No court shall make, execute, or enforce any order or process in violation of this section. The exemptions allowed in this section shall be granted to any person so entitled without any further proceedings." *Id.* § 25-1558(3) (emphasis added). The last quoted sentence is not contained in the Consumer Credit Protection Act. Similarly, section 25-1558(5), which also is not part of the Consumer Credit Protection Act, provides: "Every assignment, sale, transfer, pledge, or mortgage of the wages or salary of an individual which is exempted by this section, to the extent of the exemption provided by this section, shall be void and unenforceable by any process of law." *Id.* § 25-1558(5) (emphasis added).



tionally have been recognized as creating exemptions from all forms of creditor process.<sup>299</sup>

Even without resort to this mode of analysis, if deference is given to policy, section 25-1558 should be construed as a bankruptcy exemption. Section 25-1558 is designed to ensure that wage earners retain enough of their income to meet the basic needs of their families.<sup>300</sup> This purpose is completely consistent with the bankruptcy policy of affording "debtors protection from their creditors in bankruptcy pursuant to provisions of state law."<sup>301</sup> Moreover, the Consumer Credit Protection Act was enacted solely to "set the levels of maximum garnishment"<sup>302</sup> and was not intended to otherwise affect the functioning of state wage exemption law.<sup>303</sup> Therefore, the fact that section 25-1558 is modeled on the Consumer Credit Protection Act should not prevent it from being treated as an exemption in bankruptcy under section 522(b)(2)(A) of the Bankruptcy Reform Act.

This analysis of Nebraska exemption law has focused on the primary exemptions of most general application created by state law—the homestead exemption, the exemption in lieu of homestead, the specific personal property exemption and the wage exemption. However, in counseling debtors who are contemplating bankruptcy, practitioners should also consider the potential significance of exemptions not discussed in this article. These additional exemptions include certain insurance cash values and benefits,<sup>304</sup> all annuities or benefits payable under the State Employees Retirement Act,<sup>305</sup> and certain burial lots, crypts, tombs or vaults if used solely for burial purposes and not with a view to profit.<sup>306</sup>

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299. For example, the former Nebraska wage garnishment statute, which was repealed following enactment of the Consumer Credit Protection Act, was clearly an exemption statute. It provided in pertinent part:

The wages of all persons who are heads of families, in the hands of those by whom such persons may be employed, both before and after such wages shall be due, *shall be exempt from the operation of attachment, execution and garnishee process* to the extent of eighty-five per cent of the amount of such wages . . .

Act of Feb 20, 1969, L.B. 73, § 1, 1969 Neb. Laws 779 (repealed 1972) (previously codified at NEB. REV. STAT. § 25-1558 (Cum. Supp. 1969)) (repealed 1972) (emphasis added). See also *Live Stock Nat'l Bank v. Jackson*, 137 Neb. 161, 288 N.W. 515 (1939).

300. See note 281 & accompanying text *supra*.

301. *In re Brissette*, 561 F.2d 779, 787 (9th Cir. 1977).

302. *Id.* at 786.

303. See *id.* See also Aaron, *supra* note 11, at 190-91.

304. See NEB. REV. STAT. §§ 44-371, -754, -1029 (Reissue 1978 & Cum. Supp. 1980).

305. See *id.* § 84-1324 (Reissue 1976).

306. See *id.* §§ 12-517, -605 (Reissue 1974).

### III. CONCLUSION

The Bankruptcy Reform Act establishes a somewhat disingenuous exemption policy that first creates, and then allows the individual states to nullify, uniform federal bankruptcy exemptions. The State of Nebraska has chosen to opt out of the federal exemption scheme thereupon assuming a continuing moral obligation to ensure that its exemption policy does not deny Nebraska debtors the fresh start following bankruptcy to which they are entitled. The Unicameral should undertake an immediate reconsideration of Nebraska exemption law with a view to possible elimination of the homestead exemption in favor of an expanded exemption in lieu of homestead to be available to all debtors without regard to marital or family status and applicable to real as well as personal property. The legislature should also consider whether any increase in the amount of the exemption in lieu of homestead is justified, whether such amount should be indexed to reflect changes in the cost of living from time to time, and whether special consideration should be given to debtors who support one or more dependents. Finally, the Unicameral ought to consider whether the Nebraska wage garnishment statute should be amended to limit the additional protection given to affluent heads of families and to increase the protection accorded wage earners afflicted with handicaps, illness, or other hardships.