

# VERMONT'S NEW DEBTOR'S EXEMPTION STATUTE

## INTRODUCTION

In the 1988 Session, the Vermont Legislature amended the personal property exemption statute.<sup>1</sup> The exemption<sup>2</sup> statute pro-

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1. VT. STAT. ANN. tit. 12, § 2740 (Supp. 1988). The new statute provides:

The goods or chattels of a debtor may be taken and sold on execution, except the following articles, which shall be exempt from attachment and execution, unless turned out to the officer to be taken on the attachment or execution, by the debtor:

(1) the debtor's interest, not to exceed \$2,500.00 in aggregate value, in a motor vehicle or motor vehicles;

(2) the debtor's interest, not to exceed \$5,000.00 in aggregate value, in professional or trade books or tools of the profession or trade of the debtor or a dependent of the debtor;

(3) a wedding ring;

(4) the debtor's interest, not to exceed \$500.00 in aggregate value, in other jewelry held primarily for the personal, family or household use of the debtor or a dependent of the debtor;

(5) the debtor's interest, not to exceed \$2,500.00 in aggregate value, in household furnishings, goods or appliances, books, wearing apparel, 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;

(6) growing crops, not to exceed \$5,000.00 in aggregate value;

(7) the debtor's aggregate interest in any property, not to exceed \$400.00 in value, plus up to \$7,000.00 of any unused amount of the exemptions provided under subdivisions (1), (2), (4), (5) and (6) of this sub-section;

(8) one cooking stove, appliances needed for heating, one refrigerator, one freezer, one water heater, sewing machines;

(9) ten cords of firewood, five tons of coals or 500 gallons of oil;

(10) 500 gallons of bottled gas;

(11) one cow, two goats, 10 sheep, 10 chickens, and feed sufficient to keep the cow, goats, sheep or chickens through one winter;

(12) three swarms of bees and their hives with their produce in honey;

(13) one yoke of oxen or steers or two horses kept and used for team work;

(14) two harnesses, two halters, two chains, one plow, and one ox yoke;

(15) the debtor's interest, not to exceed \$700.00 in value, in bank deposits or deposit accounts of the debtor;

(16) the debtor's interest, not to exceed \$10,000.00 in aggregate value, in self-directed retirement accounts of the debtor;

(17) professionally prescribed health aids for the debtor or a dependent of the debtor;

(18) any unmaturred life insurance contract owned by the debtor, other than a credit life insurance contract;

(19) property traceable to or the debtor's right to receive, to the extent reasonably necessary for the support of the debtor and any dependents of the debtor:

(A) Social Security benefits;

fects a quantity of an individual's personal property<sup>3</sup> from attachment<sup>4</sup> and execution.<sup>5</sup> The amendment is a welcome replacement to the outdated and virtually useless superceded statute.<sup>6</sup> The former statute was drafted to protect the property of debtors living in an agrarian society.<sup>7</sup> The new statute exempts the types of per-

(B) veteran's benefits;

(C) disability or illness benefits;

(D) alimony, support or separate maintenance;

(E) compensation awarded under a crime victim's reparation law;

(F) compensation for personal bodily injury, pain and suffering or actual pecuniary loss of the debtor or an individual on whom the debtor is dependent;

(G) compensation for the wrongful death of an individual on whom the debtor was dependent;

(H) payment under a life insurance contract that insured the life of an individual on whom the debtor was dependent on the date of that individual's death;

(I) compensation for loss of future earnings of the debtor or an individual on whom the debtor was or is dependent;

(J) payments under a pension, annuity, profit-sharing, stock bonus, or similar plan or contract on account of death, disability, illness, or retirement from or termination of employment.

*Id.*

2. One commentator has defined exemption as "a right given by law to a debtor to retain portions of his property free from the claims of creditors." Hertz, *Bankruptcy Code Exemptions: Notes On the Effect of State Law*, 54 AM. BANKR. L.J. 339, 339 (1980).

3. Personal property is anything that is not land or an interest in land. This includes "goods, chattels, money, notes, bonds, stocks, and choses in action generally, including intangible property." BLACK'S LAW DICTIONARY 1096 (5th ed. 1979).

4. An attachment is "[a] remedy ancillary to an action by which plaintiff is enabled to acquire a lien upon property or effects of defendant for satisfaction of judgment which plaintiff may obtain." *Id.* at 115.

5. Execution upon a judgment is "the legal process of enforcing the judgment, usually by seizing and selling property of the debtor." *Id.* at 510. Statutes empower Vermont courts to levy execution. VT. STAT. ANN. tit. 12, § 2681 (Supp. 1988) (supreme and superior courts); *id.* § 2683 (district courts).

6. Note, *A Problem of Post-Judgment Executions in Vermont—Sheriff's Liability*, 2 VT. L. REV. 117, 121 (1977).

7. The superceded exemption statute survived in essentially the same form since it was originally drafted in 1787. *Id.* at 120. The superceded statute provided:

The goods or chattels of a debtor may be taken and sold on execution, except the following articles, which shall be exempt from attachment and execution, unless turned out to the officer to be taken on the attachment or execution, by the debtor; such suitable apparel, bedding, tools, arms and articles of household furniture, as may be necessary for sustaining life, one sewing machine kept for use; one cow not exceeding in value \$100.00; the best swine or the meat of one swine; sheep not exceeding in number ten, nor in value \$100.00, and one year's product of such sheep in wool, yarn or cloth; forage sufficient for keeping not exceeding ten sheep, one cow and two oxen or horses, as the debtor may select, through one winter; ten cords of fire wood or five tons of coal; twenty bushels of potatoes; the pistols, side arms and

sonal property important to a modern debtor, and reasonably limits the value of the exempt property. The new exemption scheme gives a debtor meaningful protection when faced with economic hardship, whether the debtor's property is threatened with attachment or levy of execution, or whether the debtor turns to the bankruptcy court for relief.<sup>8</sup>

This note examines the new statute,<sup>9</sup> explains the provisions, and makes some suggestions for debtors relying on the statute. This note also suggests possible interpretations of the statute. Part I briefly discusses the general policies supporting exemption statutes. Part II examines the structure of the new statute and discusses the possible impact of some provisions. Part III considers the implication of the exemption statute when joint debtors file for bankruptcy.

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equipment of a soldier in the service of the United States, and kept by him or his heirs as mementoes of his service; growing crops; ten bushels of grain; one barrel of flour; three swarms of bees and their hives with their produce in honey; two hundred pounds of sugar; lettered gravestones; the Bibles and other books used in a family; one pew or slip in a meetinghouse or place of religious worship; live poultry not exceeding in value \$10.00; the professional books and instruments of physicians and dentists to the value of \$200.00; the professional books of clergymen and attorneys at law, to the value of \$200.00; one tool chest kept for use by a mechanic; one yoke of oxen or steers, as the debtor may select; two horses kept and used for team work, and such as the debtor may select in lieu of oxen or steers, but not exceeding in value the sum of \$300.00; one two-horse wagon with whiffletrees and neck yoke or one one-horse wagon used for teaming, or one ox-cart, as the debtor may choose; one sled or one set of traverse sleds, either for oxen or horses, as the debtor may select; two harnesses, two halters, two chains, one plow, and one ox yoke, which, with the oxen or steers or horses which the debtor may select for team work, shall not exceed in value \$350.00; but personal property shall not be exempt from attachment on an action brought to recover payment for the purchase price thereof, or for material or labor expended on the same.

VT. STAT. ANN. tit. 12, § 2740 (1973), amended by VT. STAT. ANN. tit. 12, § 2740 (Supp. 1988).

8. See *infra* notes 57-64 and accompanying text.

9. Debtors may benefit from other Vermont exemption statutes not discussed in this note: VT. STAT. ANN. tit. 3, § 476 (1985) (state employee annuity and pension plan payments exempt); VT. STAT. ANN. tit. 8, § 3709(a)(2) (1984) (payments under annuity contract, up to \$350.00 per month, exempt); *id.* § 4086 (up to \$200.00 per month disability payments exempt or unlimited exemption if there is lump sum payment); *id.* § 4478 (absolute exemption for any benefits received from any benefit society); VT. STAT. ANN. tit. 11, § 1282(b)(3) (1984) (partnership property is subject only to partnership debts); VT. STAT. ANN. tit. 16, § 1946 (1982) (certain teacher's annuity and pension plan payments exempt); VT. STAT. ANN. tit. 21, § 681 (1987) (workers' compensation exempt); *id.* § 1367 (unemployment compensation exempt); VT. STAT. ANN. tit. 27, § 101 (Supp. 1988) (homestead exempt up to \$30,000.00 in value); VT. STAT. ANN. tit. 33, § 2575 (1981) (public assistance exempt). Property held as a tenancy by the entirety is exempt from the sole creditors of each title holder. *Lowell v. Lowell*, 138 Vt. 514, 419 A.2d 321 (1980).

## I. THE POLICIES BEHIND EXEMPTION STATUTES

The fundamental policy underlying exemption statutes is to protect a debtor against total poverty without excessively restricting a creditor's right to collect debts. Society has an interest in preventing a debtor from burdening the public welfare system.<sup>10</sup> Exemption laws further that interest by ensuring the ownership and useful possession of property essential to maintaining life and earning income. Some exemption statutes protect a portion of the earnings of debtors.<sup>11</sup> By assuring the debtor a modicum of economic independence, the debtor does not become a public charge.<sup>12</sup> Preserving the means to pursue gainful employment, and the rewards of gainful employment, gives debtors the opportunity for financial rehabilitation and the possible repayment of debts.<sup>13</sup>

An additional policy, often cited to support exemption statutes, is the protection of the family.<sup>14</sup> This policy is reflected in the fact that in many states exemptions are allowed only to the head of the household.<sup>15</sup> Studies show that financial crisis often leads to divorce.<sup>16</sup> Exemption laws reduce the strain on family relations by preserving assets and income, and therefore may reduce the incidence of divorce.

Despite the fact that many exemption laws protect the family, many also apply to individuals regardless of familial status.<sup>17</sup> Ver-

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10. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 786 (1973-1974).

11. VT. STAT. ANN. tit. 12, §§ 3168-3172 (Supp. 1988).

12. Vukowich, *supra* note 10, at 786-87.

13. Rombauer, *Debtors' Exemption Statutes—Revision Ideas*, 36 WASH. L. REV. 484, 486 (1961). The Vermont Supreme Court recognizes many of the benevolent policies cited in support of exemption statutes. In *Leavitt v. Metcalf*, 2 Vt. 342 (1829), the court wrote:

[An exemption statute] is properly a remedial statute, evidently intended to prevent families from being stripped of the last means of support, and left to suffer, or cast as a burden upon the public; and to rescue them from the hands of unfeeling creditors; and the better to enable such poor debtors to satisfy the just demands against them. The statute must be liberally expounded in favor of humanity . . . As people emerge from a barbarous to a civilized and refined state, they are less cruel towards the unfortunate, and hold out stronger inducements to industry and economy, and are more reluctant to permit the creditor to torture his poor debtor, or reek his vengeance, without a prospect of obtaining his debt.

*Id.* at 343.

14. Vukowich, *supra* note 10, at 784.

15. *Id.*

16. H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 264-67 (1976).

17. Vukowich, *supra* note 10, at 785.

mont's exemption statutes are an example. In Vermont, any "debtor"<sup>18</sup> may claim the personal property exemptions and any "natural person"<sup>19</sup> may claim the homestead exemption.

In furthering the goals of debtor rehabilitation and self-sufficiency, exemption statutes must not excessively restrict creditors' right to collect debts. A commercial society depends on credit and the integrity of contractual relationships.<sup>20</sup> If too many assets are protected from seizure, then the risks of unsecured lending increase.<sup>21</sup> Exemption laws that are overly favorable to debtors could make lenders more cautious and result in excessive restrictions on credit.<sup>22</sup> Creditors, however, profit from lending, and are expected to absorb some of the loss resulting from debtors' hardships.<sup>23</sup> The interests of creditors and debtors must be balanced in arriving at appropriate exemptions.

## II. THE NEW STATUTE

Vermont's new personal property exemptions were signed into law on May 26, 1988.<sup>24</sup> The types and values of property exempt from attachment and execution are enumerated in nineteen subdivisions. The statute is a mosaic of exemptions suggested by interested parties and pieced together by the Senate Judiciary Committee.<sup>25</sup> The Vermont Bar Association Bankruptcy Committee drafted the bill introduced as S. 298, which, after several revisions, was passed into law.<sup>26</sup> As initially proposed, S. 298 had eight sub-

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18. VT. STAT. ANN. tit. 12, § 2740 (Supp. 1988).

19. VT. STAT. ANN. tit. 27, § 101 (Supp. 1988). See *Hyser v. Mansfield*, 72 Vt. 71, 47 A. 105 (1899) (marriage not needed to acquire a homestead).

20. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. 1, at 70-71 (1973) [hereinafter COMMISSION REPORT].

21. Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1459 (1958-1959).

22. See COMMISSION REPORT, *supra* note 20, at 71.

23. To a certain extent the law expects creditors to subsidize the impoverished debtor. Professor MacLachlan stated it cynically: "[E]xemption laws may be recognized as legalized frauds on creditors, in the sense that they declare a public policy in favor of having debtors retain certain essential aids to their support in preference to the satisfaction of creditors' claims." J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 162 (1956).

24. Vermont Slip Laws, Act 233, 59th Leg., 1987, Adjourned Sess., Bill introduced as S. 298 (1988) (codified as amended at VT. STAT. ANN. tit. 12, § 2740 (Supp. 1988)).

25. *An Act Relating to Exemptions for Attachment and Execution: Hearings on S. 298 Before the Senate Judiciary Comm.*, 59th Leg., Adjourned Sess., 1987 Vermont (Feb. 18, 1988 and Feb. 24, 1988) [hereinafter *Senate Hearings*].

26. *Id.*

sections.<sup>27</sup> The original bill provided exemptions to an individual for one motor vehicle, trade books or tools, jewelry, furnishings, apparel, bank deposits, health aids, unmaturred life insurance contracts, and various support payments.<sup>28</sup> During hearings in the Senate Judiciary Committee, parties testified and urged revisions.<sup>29</sup> A representative of Vermont Legal Aid lobbied for retaining exemptions on property necessary for subsistence farming.<sup>30</sup> A bankruptcy judge submitted a proposed statute and urged the Senate Judiciary Committee to increase the value of most exempt property listed in S. 298.<sup>31</sup> The present statute incorporates many of the suggestions.

The exemptions in the new statute can be categorized into three groups. The first group includes the "wild card" exemption and those exemptions subsumed under the wild card. The second group includes properties exempt with no limitation as to the dollar value of the property. The final group of exemptions includes intangible property or income.

### A. *The Wild Card Provision*

#### 1. *How it Works*

A significant innovation of Vermont's exemption statute is the wild card exemption.<sup>32</sup> The wild card exemption allows a debtor to

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27. S. 298, 59th Leg., Adjourned Sess. (1987 Vermont).

28. *Id.*

29. *Senate Hearings*, *supra* note 25.

30. *Id.* Jack McCullough of Vermont Legal Aid recommended that exemptions for farm animals and equipment found in the old statute be incorporated into the new statute. The reason suggested for these exemptions was to preserve small family farms. The Senate Judiciary Committee incorporated these suggestions into the statute. *Id.* at 34.

31. *Id.* Judge Francis Conrad, United States Bankruptcy Judge for the District of Vermont, testified and submitted a draft statute. The text of this draft is not part of the legislative record. Judge Conrad suggested that the values of exempt property be increased above the values in S. 298 as originally introduced. *Id.* at 11-12.

32. VT. STAT. ANN. tit. 12, § 2470(7) (Supp. 1988). *See supra* note 1. The federal exemption scheme, applicable in bankruptcy, also has a wild card provision. 11 U.S.C. § 522(d)(5) (Supp. IV 1986). The federal wild card transfers the unused value of the federal residence exemption to other property. *Id.* The federal scheme assures equal treatment between residence owning debtors and debtors who do not own their residence. Haines, *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 ARIZ. ST. L.J. 1, 21.

The Vermont wild card allows the transfer of the value of certain types of personal property to other personal property. A provision allowing Vermont debtors to transfer a portion or all of the unused homestead exemption to other property would achieve fairer treatment of debtors. As the law now stands, debtors who own a homestead can protect the

transfer the value of unclaimed exemptions to other property when the debtor does not exempt property enumerated in some subsections of the statute. Vermont's wild card exemption allows a debtor to exempt up to \$7,000.00 of the unused portions of exemptions in subsections (1), (2), (4), (5), and (6) of the exemption statute.<sup>33</sup> The subsections subsumed under the wild card provision list those items, such as motor vehicles, clothing, and tools, which most debtors are likely to own and would most want to protect. An exemption for \$5,000.00 worth of growing crops is also transferable under the wild card.

The effect of the wild card provision is to guarantee all debtors a minimum value of exempt property regardless of the type of property the debtor owns. An example illustrates how the provision works: Assume a debtor has one motor vehicle valued at \$2,500.00, clothing and furniture valued at \$2,500.00, and professional trade books valued at \$5,000.00. The debtor can exempt the full value of the motor vehicle, books, clothing, and furniture. The hypothetical debtor has not exempted jewelry or growing crops. The value of these exemptions total \$5,500.00 and is transferable to other property under the wild card.

The wild card provision of the statute is beneficial to debtors because it allows the debtor flexibility to exempt the property that the debtor wants most to protect. If a debtor owns the full value of all of the property listed in the subsections appurtenant to the wild card subsection, then the debtor may waive<sup>34</sup> some of these

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value of that homestead plus benefit from all of the personal property exemptions. A "wild card" provision allowing the use of otherwise unused portions of the homestead exemption would resolve this disparate treatment of debtors.

33. VT. STAT. ANN. tit 12, § 2740(7) (Supp. 1988).

34. In general, exemption waivers are criticized because they undermine the purpose of exemption statutes. Note, *supra* note 21, at 1494-95. In spite of this, some states permit contractual waiver of exemption rights in favor of a particular creditor. See, e.g., ALA. CONST. art. X, § 210; DEL. CODE ANN. tit. 10, § 4912 (1974). Under some state laws a failure to make a timely claim for an exemption results in a waiver. Note, *supra* note 21, at 1494. In other states, exemption waivers are unenforceable. See, e.g., ALASKA STAT. § 09.38.105 (1983).

Vermont's exemption statute protects property "unless turned out to the officer" by the debtor. VT. STAT. ANN. tit. 12, § 2740 (Supp. 1988). In *Luce v. Hoisington*, the Vermont Supreme Court stated that a debtor who "turned out" property lost any right of action against a constable for wrongful possessory attachment of the property. 55 Vt. 341 (1883). The same language remains in the current statute. In *Luce*, the debtor relinquished physical possession of the property. It is not clear whether property subject to a non-possessory writ of attachment or levy is lost to a creditor if the debtor does not object to the attachment. Although the Vermont exemption statute permits waiver of exemptions, the same statute

exemptions in order to transfer the value to other properties through the wild card. Also, the wild card ensures that debtors who do not own the types of property most commonly exempted are able to protect other property. The provision thus ensures equal opportunity for debtors to avail themselves of the benefit of the exemption law.

## 2. *Exemptions and the Judicial Enforcement of Claims*

It is not clear how the wild card exemption squares with state law enabling judicial enforcement of claims. The exemption statute provides that property may be "turned out to the officer."<sup>35</sup> It is uncertain, however, when property is considered "turned out to the officer."

A creditor, when attaching or levying a debtor's property, must inform the debtor that exemptions are available to protect property. A creditor seeking to satisfy claims can attach the property of a debtor in the possession of the debtor,<sup>36</sup> or property of a debtor in the hands of third parties.<sup>37</sup> A creditor can move for an attachment during any action.<sup>38</sup> On five days notice to a debtor, after a hearing at which the court finds a reasonable likelihood that the creditor will prevail, an order of approval will issue.<sup>39</sup> A court can grant an ex parte motion for attachment.<sup>40</sup> If an ex parte writ of attachment issues, a debtor may demand, on two days notice to the creditor, a hearing to seek dissolution of the attachment.<sup>41</sup>

Upon service of a motion for writ of attachment, due process requires that the debtor, and the trustee, if the property is held by a third party, be served with a list of exemptions.<sup>42</sup> In addition,

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can be administered in a federal bankruptcy proceeding where no waivers of exemptions are permitted. 11 U.S.C. § 522(e) (Supp. IV 1986).

35. VT. STAT. ANN. tit. 12, § 2740 (Supp. 1988).

36. VT. R. CIV. P. 4.1 (Supp. 1988).

37. *Id.* 4.2.

38. *Id.* 4.1(a), 4.2(a).

39. *Id.* 4.1(b)(2), 4.2(b)(2).

40. *Id.* 4.1 (b)(3), 4.2(b)(3). Due process requires that in order to grant an ex parte writ of attachment there must be extraordinary circumstances indicating an immediate danger that a defendant will liquidate or destroy assets to avoid judgment. *Filter Equip. Co. v. International Business Machs.*, 142 Vt. 499, 458 A.2d 1091 (1983).

41. VT. R. CIV. P. 4.1(e)(1), 4.2(e) (Supp. 1988).

42. In order to inform a debtor of available property protection, due process requires the service of a list of exemptions. *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985).

personal property may be taken and sold to satisfy final judgments.<sup>43</sup> Due process also requires that the creditor notify the debtor of exemptions if property will be taken to satisfy a judgment.<sup>44</sup>

Because the wild card exemption does not protect specific property, the debtor must designate the exempt property. Failure to designate the property that the debtor wants to protect may result in loss of that exemption. When the debtor relinquishes physical possession of exempt property, the debtor loses that exempt property.<sup>45</sup> Filing a writ of attachment or execution in some respects has the same effect as possessory attachment.<sup>46</sup> Creditors can argue that the exemption statute phrase "turned out to the officer" means that an exemption is waived if the debtor does not object to non-possessory attachment or levy. In support of this argument, creditors can point to the fact that debtors have an opportunity to assert their exemption rights at the required due process hearings.

The updated exemption statute will have a renewed impact on debtor/creditor relations. The issue of when a debtor turns out property has the potential to affect significantly the property rights of debtors. This issue will have to be considered in light of the attachment hearings discussed above. Rather than risk the loss of an exemption, cautious debtors should assert their rights to exemptions at the earliest opportunity.

### *B. Exemptions Not Limited in Value*

Many exemptions in the new statute have no dollar value limit. These exemptions include household appliances, heating devices, fuel, health aids, and a variety of farm animals and equipment.<sup>47</sup> Many of these exemptions were in the superceded exemption law or are items considered important to life in Vermont.<sup>48</sup>

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The Reporter's Notes of VT. R. Civ. P. 4.1 and 4.2 recommend the use of VT. R. Civ. P. Form 34 to give the debtor notice of exemptions. In order to comport with the spirit of due process to give adequate notice of the exemptions available, creditors should alter Form 34 to reflect the new exemptions.

43. VT. STAT. ANN. tit. 12, § 2731 (1973).

44. *McCahey*, 774 F.2d at 549.

45. See *supra* note 34.

46. VT. STAT. ANN. tit. 12, § 3251 (1973).

47. VT. STAT. ANN. tit. 12, § 2740(8), (9), (10), (11), (17) (Supp. 1988).

48. *An Act Relating to Exemptions for Attachment and Execution: Hearing on S. 298*

Other exemptions in this statute limit the debtor to his or her interest in the property.<sup>49</sup> In contrast, the exemptions without dollar value limits are not limited to the debtor's interest in the property and appear absolute. This could be interpreted as interfering with contractually secured purchase money or non-purchase money liens in the property. It is unlikely that such a result was intended. Exemptions are not intended to prevent a person from giving security in any property he or she may choose.<sup>50</sup> If property purchased with credit secured by a proper lien cannot be repossessed, borrowing power will be severely curtailed.<sup>51</sup>

### C. Exemptions for Intangible Property or Income

The last group of exemptions includes unmatured life insurance contracts,<sup>52</sup> and a variety of payments which may be a debtor's only means of support. Sources of these payments include social security, veterans benefits, pension plans, disability payments, alimony, and child support.<sup>53</sup> This group of exemptions is similar to exemptions for intangible property found in the federal Bankruptcy Code.<sup>54</sup>

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*Before the House Judiciary Comm., 59th Leg., Adjourned Sess., 1987 Vermont (April 7, 1988) [hereinafter House Hearings] (remarks of Jack McCullough).*

49. VT. STAT. ANN. tit. 12, § 2740 (1), (2), (4), (5), (7) (Supp. 1988).

50. 31 AM. JUR. 2D Exemptions § 125 (1967).

51. See *supra* notes 20-23 and accompanying text.

52. VT. STAT. ANN. tit. 12, § 2740(18) (Supp. 1988).

53. *Id.* § 2740(19).

54. The relationship between Vermont's exemption statute and the federal statute is apparent from the similarities of the provisions. Some subdivisions of the Vermont statute track the federal statute word for word. The following are corresponding provisions:

VT. STAT. ANN. tit. 12, § 2740(1) (Supp. 1988) and 11 U.S.C. § 522(d)(2) (1982) (\$2,500.00 interest in a motor vehicle under Vermont statute, \$1,200.00 under federal statute);

VT. STAT. ANN. tit. 12, § 2740(2) and 11 U.S.C. § 522(d)(6) (1982) (professional trade books or tools: up to \$5,000.00 interest under Vermont statute, \$750.00 under federal statute);

VT. STAT. ANN. tit. 12, § 2740(4) and 11 U.S.C. § 522(d)(4) (1982) (up to \$500.00 of debtor's jewelry protected under both statutes);

VT. STAT. ANN. tit. 12, § 2740(5) and 11 U.S.C. § 522(d)(3) (Supp. IV 1986) (sundry personal property including household furnishings, goods or appliances, books, wearing apparel, animals, crops, and musical instruments: up to \$2,500.00 interest under Vermont statute, \$200.00 per item under federal statute);

VT. STAT. ANN. tit. 12, § 2740(7) and 11 U.S.C. § 522(d)(5) (Supp. IV

Exemptions of these sources of income, or property derived therefrom, are limited "to the extent reasonably necessary for the support of the debtor and any dependents of the debtor."<sup>55</sup> Other statutes protect a debtor's interest in support payments or insurance contracts.<sup>56</sup> The exemptions under some of these statutes are not limited to payments that are "reasonably necessary." Debtors, therefore, should use these statutes whenever they are more beneficial than this personal property exemption statute.

### III. JOINT DEBTORS IN BANKRUPTCY

#### A. State Exemption Statutes in Bankruptcy

While the Vermont exemption law limits the power of creditors to attach or enforce judgments against a debtor's property, it also can aid the debtor who seeks the protection of the federal Bankruptcy Code.<sup>57</sup> A debtor filing for bankruptcy forfeits all assets to a bankruptcy estate.<sup>58</sup> The property of the estate is used to satisfy the claims of creditors.<sup>59</sup> The debtor must designate exempt property which is excluded from the estate.<sup>60</sup>

The Bankruptcy Code provides a menu of exemptions which includes personal property exemptions and a residence exemption.<sup>61</sup> Federal exemptions are available to debtors filing for bank-

1986) ("wild card" exemption, unused portion of certain enumerated exemptions can be applied to property designated by the debtor up to \$7,000.00 interest under Vermont statute, \$3,750.00 under federal statute);

Vt. STAT. ANN. tit. 12, § 2740(17) and 11 U.S.C. § 522(d)(9) (1982) (professionally prescribed health aids);

Vt. STAT. ANN. tit. 12, § 2740(18) and 11 U.S.C. § 522(d)(7) (1982) (unmatured life insurance contract).

The Vermont Supreme Court "will look to federal decisions interpreting the federal act for guidance" when interpreting some Vermont statutes that parallel federal statutes. *In re Local 1201, AFSCME*, 143 Vt. 512, 515, 469 A.2d 1176, 1179 (1983). When the language of Vermont's exemption statute parallels the federal exemption statute, practitioners can urge Vermont courts to look to federal case law interpreting similar provisions.

55. Vt. STAT. ANN. tit. 12, § 2740(19) (Supp. 1988).

56. See *supra* note 9 for other Vermont laws that exempt property from creditors. There are many federal statutes other than the Bankruptcy Code which protect property from creditors. See generally 3 Collier on Bankr. (MB) § 522.02 (Nov. 1987).

57. 11 U.S.C. § 101 (1982).

58. *Id.* § 541 (1982 & Supp. IV 1986).

59. *Id.*

60. *Id.* § 522.

61. *Id.* § 522(d).

ruptcy in states that have not expressly prohibited their use.<sup>62</sup> Prior to the enactment of the new exemption statute, Vermont debtors in bankruptcy usually relied on the federal exemptions.<sup>63</sup> Vermont debtors will likely elect to claim exemptions under the new Vermont exemption scheme, as opposed to the federal exemption scheme, because the Vermont scheme provides fair and comprehensive protection of property and more realistically meets debtors' needs.<sup>64</sup>

In bankruptcy, married debtors may file jointly for relief from creditors.<sup>65</sup> The bankruptcy subsection governing the application of the federal or state exemption statutes states that "this section shall apply separately with respect to each debtor in a joint case."<sup>66</sup> It is clear that joint debtors who have the option of using the federal bankruptcy exemption menu may each exempt the property listed.<sup>67</sup> Joint debtors relying on state exemption statutes may be limited to one set of exemptions.

Federal courts interpreting state exemption statutes in bankruptcy have reached different holdings as to whether joint debtors may each claim the menu of exemptions provided by state law.<sup>68</sup>

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62. *Id.* § 522(b)(1). A congressional compromise resulted in the provision allowing states to impose exemption schemes in bankruptcy and to prohibit the use of the federal exemption scheme. This is commonly referred to as the opt-out provision. See Haines, *supra* note 32, at 5-6. Vermont is one of fifteen jurisdictions that allow debtors to rely on the federal exemption scheme if they so choose. See generally 3 Bankr. Serv. (L. Ed) §§ 22-120 to 22-172 (Oct. 1983 & Supp. 1988) [hereinafter Bankr. Serv.] (appendix listing states' treatment of opt-out clause).

63. Prior to the enactment of the new personal property exemption statute, Vermont debtors in bankruptcy had two choices. The first was a Vermont exemption scheme which failed to protect personal property important to modern life, but which protected up to \$30,000.00 worth of homestead. The second was a federal bankruptcy scheme which protected a large variety of personal property, but had only a \$7,500.00 homestead exemption. Vermont debtors usually chose the federal scheme of exemptions in order to protect their personal property. Telephone interview with Attorney Gleb Glinka, Vermont (Nov. 10, 1988).

64. *Id.* As of the November 10, 1988 interview, all of Attorney Glinka's clients filing for bankruptcy relief receive more protection from Vermont's new exemptions than from the current federal exemptions. *Id.*

65. 11 U.S.C. § 302(a) (1982) allows joint filings "commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse." *Id.*

66. *Id.* § 522(m) (Supp. IV 1986).

67. The House Report for the Bankruptcy Reform Act of 1978 commenting on 11 U.S.C. § 522(m) states that "each debtor is entitled to the Federal exemptions provided under this section or to the State exemptions, whichever the debtor chooses." H.R. REP. No. 95-595, 95th Cong., 1st Sess. 363 (1977).

68. See, e.g., *Talmadge v. Duck* (*In re Talmadge*), 832 F.2d 1120 (9th Cir. 1987) (Cali-

The different holdings result from the fact that each state's exemption law is unique.<sup>69</sup> Some states expressly prohibit joint debtors from each claiming the state exemptions in a joint bankruptcy.<sup>70</sup> Vermont's personal property exemption statute does not expressly address the question.

Debtors and creditors can resolve the issue of whether each joint debtor in bankruptcy can claim Vermont's personal property exemptions by contrasting this statute with Vermont's homestead exemption statute and by considering the general policies supporting exemption statutes. The remainder of this note reviews the arguments for and against allowing each joint debtor in bankruptcy to claim the personal property exemptions. This note argues that the personal property exemptions provide separate exemptions for each joint debtor in bankruptcy.

### *B. Vermont Joint Debtors are Limited to a Single Shared Homestead Exemption*

In *D'Avignon v. Palmisano*,<sup>71</sup> the Federal District Court for the District of Vermont affirmed a bankruptcy appeal interpreting Vermont's homestead exemption statute. The statute exempts from the claims of creditors up to \$30,000.00 of the homestead of a "natural person."<sup>72</sup> In *Palmisano*, the debtors, a husband and wife,

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fornia law; joint debtors allowed only one set of exemptions); *Stevens v. Pike County Bank*, 829 F.2d 693 (8th Cir. 1987) (Arkansas law; each debtor can not claim homestead in joint case); *Granger v. Watson (In re Granger)*, 754 F.2d 1490 (9th Cir. 1985) (Oregon law; joint debtors can not aggregate homestead exemptions above statutory limit); *First Nat'l Bank of Mobile v. Norris*, 701 F.2d 902 (11th Cir. 1983) (Alabama law; joint debtors can not aggregate homestead exemption); *Pitrat v. Unkefer (In re Unkefer)*, 44 Bankr. 55 (Bankr. D. Ariz. 1984) (Arizona law; joint debtors precluded from aggregating homestead exemption). *But see, e.g., John T. Mather Memorial Hosp. v. Pearl*, 723 F.2d 193 (2d Cir. 1983) (New York law; debtors may aggregate homestead exemption); *Cheeseman v. Nachman*, 656 F.2d 60 (4th Cir. 1981) (Virginia law; joint debtors can each claim separate homestead exemption in the same home); *In re Smith*, 27 Bankr. 30 (Bankr. D. Ariz. 1982) (Arizona law; joint debtors may each claim state personal property exemptions).

69. Bankr. Serv., *supra* note 62.

70. CAL. CIV. PROC. CODE § 703.140 (West 1987); *see Talmadge*, 832 F.2d at 1120 (upholding California exemption statute against equal protection challenge).

71. 34 Bankr. 796 (D. Vt. 1982), *aff'g In re D'Avignon*, 34 Bankr. 790 (Bankr. D. Vt. 1981).

72. VT. STAT. ANN. tit. 27, § 101 (Supp. 1988) provides:

The homestead of a natural person consisting of a dwelling house, out-buildings and the land used in connection therewith, not exceeding \$30,000.00 in value, and owned and used or kept by such person as a homestead together with the rents, issues, profits and products thereof, shall be exempt from attachment and execution except as hereinafter provided.

resided in the same home. They claimed that as "natural persons" under the statute they were each entitled to a homestead exemption of \$30,000.00, and therefore the statute protected them from creditors for up to \$60,000.00 of their home's value. The court dismissed the debtors' argument that the exemption was a personal right. The court noted that, contrary to the debtors' claim, "natural person" was probably intended as a classification precluding corporations or other legal entities from claiming the exemption.<sup>73</sup> The court held that married couples in joint bankruptcy are only entitled to one homestead exemption.

The *Palmisano* court gave two reasons for reaching its holding. First, the district court agreed with the bankruptcy memorandum and order which emphasized that the homestead is intended to preserve the family unit.<sup>74</sup> The bankruptcy court stressed that "the owners of a residence [held] as tenants by the entirety may not . . . each be allowed a homestead exemption but are limited to a single one for both."<sup>75</sup> Second, the district court reasoned that the statute vesting the homestead interest in the surviving spouse<sup>76</sup> would be redundant if each spouse "had a separate vested interest in the homestead during the lifetime of both."<sup>77</sup>

### C. *Structure and Purpose of the Personal Property Exemption Statute Differs from the Homestead Exemption Statute*

Although *Palmisano* interprets the homestead statute, creditors could argue that it mandates a similar result for the personal property exemptions. The result in *Palmisano*, however, should not govern the interpretation of the personal property exemption statute. There are several reasons why the personal property exemption statute should be construed as creating a personal right for each individual in a joint bankruptcy.

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*Id.*

73. *Palmisano*, 34 Bankr. at 800.

74. *Id.* (citing D'Avignon, 34 Bankr. 790, 793 (Bankr. D. Vt. 1981)).

75. *In re D'Avignon*, 34 Bankr. 790, 794 (Bankr. D. Vt. 1981).

76. VT. STAT. ANN. tit. 27, § 105 (Supp. 1988) provides:

If a person dies leaving a surviving spouse, his or her homestead to the value aforesaid shall pass to and vest in the surviving spouse without being subject to the payment of debts of the deceased, unless legally charged thereon in his or her lifetime; and the surviving spouse shall take the same estate therein of which her husband or his wife dies seised.

*Id.*

77. *Palmisano*, 34 Bankr. at 800.

The personal property exemption does not have the statutory scheme which the *Palmisano* court found persuasive in reaching its holding. Unlike the homestead exemption, the personal property exemption does not have the companion subsection transferring exemption rights to a debtor's surviving spouse. The personal property exemptions, therefore, may create property rights for an individual as opposed to a single set of property rights for married couples.

Other structural characteristics of the personal property exemption statute also indicate that exemptions belong to individual debtors. The opening sentence of the statute and ten of the nineteen subsections use the singular pronoun, debtor, to designate to whom the exemption belongs. The use of the singular pronoun indicates that each exemption is a personal right belonging to each individual debtor, not to a married couple.

Policy considerations also support an interpretation of the personal property exemption statute different than the homestead exemption. Personal property exemptions, by their nature, are aimed at preserving individual dignity and the ability to earn income. In drafting the personal property exemption statute, the Legislature protected property considered adequate to give a sole debtor a fresh start after economic hardship.<sup>78</sup> The fact that debtors may jointly file for bankruptcy does not change the amount of personal property that each debtor needs for a fresh start. Joint debtors each require their own clothing, cars, and professional books or tools to maintain economic independence. The homestead exemption, although available to any homeowner, is often seen as furthering the goal of preserving the family. The *Palmisano* court's application of Vermont's homestead exemption in the context of a joint debtor case does not necessarily hinder that goal. Limiting joint debtors to a single homestead exemption has a rational appeal because there is an economy of scale that results from sharing a home. The same is not true of personal property.

The policy of preserving the family is furthered by construing the personal property exemption statute to permit each joint debtor to claim the personal property exemptions. If joint debtors are limited to the same personal property exemptions which a single individual enjoys, joint debtors will be penalized for being mar-

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78. *Senate Hearings, supra* note 25.

ried. In this way, the narrow interpretation of the statute encourages dissolution of marriage in order to maximize the effect of the exemption statute.

Finally, some members of the Vermont House Judiciary Committee were aware that this statute could allow each joint debtor to exempt personal property in bankruptcy. The Committee did not draft the statute to preclude this interpretation.<sup>79</sup> By not explicitly preventing each joint debtor from benefiting from the exemptions, the Committee gave tacit approval to this interpretation of the statute.

#### D. Creditors' Arguments for a Narrow Interpretation of the Statute

A creditor's strongest argument is that property held as a tenancy by the entirety should be exempted as if owned by a sole debtor. A creditor may rely on *Palmisano*, in which the debtors held the homestead as tenants by the entirety.<sup>80</sup> In Vermont, "[t]enants by the entirety have but one title and each owns the whole."<sup>81</sup> In addition to the homestead, personal property can be held in a tenancy by the entirety.<sup>82</sup> Creditors can argue that *Palmisano* requires that any property held as a tenancy by the entirety should be limited to a single exemption in a joint bankruptcy, whether it is personal property or a homestead.

Creditors could contend that allowing each joint debtor to claim the exemption leads to unfair results. Creditors would argue that the purpose of the motor vehicle exemption is to allow a debtor to retain possession of an automobile and that the \$2,500.00 motor vehicle exemption allows that, while at the same time remaining fair to creditors. By allowing joint debtors to double the exemption, however, they will be able to retain a motor vehicle worth twice the value than the Legislature deemed necessary.

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79. Rep. Fox and Judge Conrad had the following exchange in response to Rep. Fox's question about joint debtors:

J. Conrad: Under the federal [exemption scheme] you would be able to double up your exemptions, that's correct.

Rep. Fox: And the state would be also?

J. Conrad: That's correct.

*House Hearings*, *supra* note 48, at 23.

80. *Palmisano*, 34 Bankr. at 796.

81. *Kennedy v. Rutter*, 110 Vt. 332, 340, 6 A.2d 17, 21 (1939).

82. *George v. Dutton's Estate*, 94 Vt. 76, 78, 108 A. 515, 516 (1920).

Debtors can refute the above arguments by pointing to similar unwanted results when there is a narrow construction of the statute. Joint debtors may own two cars and need both in order to travel to their respective jobs. If those debtors own both vehicles as tenants by the entirety, they would be limited to one exemption under the creditors' construction of the statute. If the debtors have separate title to both vehicles they would get two exemptions. Applying the rigid logic of the tenants by the entirety argument to the statute will either reward or penalize joint debtors based on how they hold title to their property. The manner in which debtors hold title to their property is irrelevant to the policies supporting an exemption statute. The tenancy by the entirety argument, therefore, should not control the interpretation of the statute.

The exemption statute is not drafted in a manner that anticipates limiting joint debtors to single exemptions or allowing them only double exemptions based on the type of title. Indeed, the contrary is apparent. Courts deciding how to interpret Vermont's personal property exemption statute should consider the effects of their interpretation and the realistic needs of debtors. A court will further the goals of the Legislature by looking to the policies that motivate the enactment of exemption statutes. The personal property exemptions should provide each debtor with the means to pursue employment, whether in single or joint bankruptcy.

#### CONCLUSION

Vermont's personal property exemption statute is a welcome improvement over the superceded statute and provides debtors with fair and equitable protection of property necessary for a fresh start after economic hardship. Debtors relying on the statute should be aware of the potential for loss of property that they fail to designate as exempt and should take steps to avoid that result. Reasonable and fair construction of the statute by the courts will further the benevolent purpose of the law.

*David W. Lynch*

