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COMMENTS

IN RE CHEESEMAN: A JUDICIAL REVISION OF VIRGINIA'S HOMESTEAD EXEMPTION LAWS

I. INTRODUCTION

The Bankruptcy Reform Act of 1978¹ was the first major revision of federal bankruptcy law in over forty years.² An important goal of the Act is to provide the debtor with a "meaningful fresh start."³ To that end, the Bankruptcy Act provides liberalized allowances in amounts and types of property that a debtor may hold exempt from creditors in an insolvency proceeding. Under section 522 subsection (b) of the Act, however, a state is permitted to "opt out" of the federal exemption scheme and prescribe under its own law the exemptions a debtor may claim.⁴ Virginia is among those states which have chosen to "opt out" of the federal scheme.⁵

In a 1981 decision, *In re Cheeseman*,⁶ the Fourth Circuit Court of Appeals held that the terms "householder" or "head of a family" in the Virginia exemption provisions should be interpreted to allow a homestead exemption to each spouse in a joint proceeding, so long as both contribute to the maintenance of the household.⁷ The effect of this holding is to double the amount of the exemption available under Virginia law in cases

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326 (Supp. IV 1980) [hereinafter referred to as the Act].

2. 124 CONG. REC. H11,115 (daily ed. Sept. 28, 1978) (remarks of Rep. Butler).

3. *Id.* The purpose of bankruptcy is to give the debtor "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). Therefore, the debtor must be permitted to retain a sufficient amount of property to prevent his becoming a ward of the state, and to allow him to maintain his existence as an independent economic unit. See Ulrich, *Virginia's Exemption Statutes—The Need for Reform and a Proposed Revision*, 37 WASH. & LEE L. REV. 127, 129-30 (1980). See generally Comment, *Protection of a Debtor's "Fresh Start" Under the New Bankruptcy Code*, 29 CATH. U.L. REV. 843 (1979).

4. Section 522 provides in pertinent part:

(b) . . . [A]n 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 . . . 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 filing

11 U.S.C. § 522(b)(1)-(2)(A) (Supp. IV 1980).

5. See VA. CODE ANN. § 34-3.1 (Cum. Supp. 1981).

6. 656 F.2d 60 (4th Cir. 1981).

7. *Id.* at 62-63.

which meet these criteria. This comment will analyze the *Cheeseman* decision in relation to Virginia precedent and the legislative intent of the Bankruptcy Act of 1978. It will also show how *Cheeseman* emphasizes the need for a revision of Virginia's bankruptcy law. In addition, this comment will briefly examine decisions from states other than Virginia, analyzing their differing approaches to the problem of reconciling disparities between state and federal bankruptcy laws.

II. HISTORICAL BACKGROUND

A. *The Homestead Exemption*

State and federal courts in Virginia have long recognized the necessity of liberally construing bankruptcy laws in favor of the debtor,⁸ not merely to shield the debtor's assets from creditors, but primarily to protect his family,⁹ and to offer the honest debtor a chance to clean his slate.¹⁰ This policy is especially true with regard to the homestead exemption, which was traditionally viewed as a means of preserving the family home.¹¹ In the nineteenth century, when most homestead laws were enacted,¹² "home ownership was the norm and rental of apartments atypical."¹³ Protection of the home was generally thought to lend stability to the family unit, prevent pauperism and stimulate self-interest in preservation of property rights.¹⁴ Today, the nature of the homestead itself has shifted away from its historical definition as simply a dwelling place with surrounding land and appurtenances:¹⁵ the homestead exemption given in

8. See, e.g., *Roberts v. W.P. Ford & Son, Inc.*, 169 F.2d 151, 152-53 (4th Cir. 1948) (without evidence of bad faith, failure of a bankrupt to account for all assets is no ground for refusing discharge); *In re Hale*, 274 F. Supp. 813, 815 (W.D. Va. 1967) (discharge will not be denied without proof of actual intent to defraud creditors); *Wilkinson v. Merrill*, 87 Va. 513, 516, 12 S.E. 1015, 1015-16 (1891) (debtor qualified as "householder" or "head of a family" although his only dependent had been killed).

9. See *Calhoun v. Williams*, 73 Va. (32 Gratt.) 18, 21 (1879) (debtor without dependents not allowed to claim homestead). *But cf.* *Wilkinson v. Merrill*, 87 Va. at 513, 12 S.E. 1015 (partially overruling *Calhoun*). In *Wilkinson*, the court allowed for a homestead exemption to be claimed by a debtor whose only dependent, a 10-year-old grandson, had been murdered. The court may have been swayed by evidence which suggested that the creditor had brought about the grandson's death in order to acquire the property sought to be held as exempt. 87 Va. at 520, 12 S.E. at 1017.

10. 274 F. Supp. at 816.

11. See, e.g., *Murphy v. City of Richmond*, 111 Va. 459, 465, 69 S.E. 442, 444 (1910).

12. Most homestead laws in the South were enacted during the economic upheaval of the Reconstruction era. Note, *State Homestead Exemption Laws*, 46 YALE L.J. 1023, 1030-31 (1937). Virginia's first homestead law was enacted in April of 1867. See 1866-67 Va. Acts 962.

13. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 805 (1974). In 1860, only one of every 15 dwellings was renter-occupied. *Id.* at 805 n.153 (citing C. WRIGHT, *ECONOMIC HISTORY OF THE UNITED STATES* 1023 (1941)).

14. See Note, *supra* note 12, at 1030-31.

15. See *In re Wilkes*, 2 Bankr. Ct. Dec. 957, 958 (W.D. Va. Aug. 5, 1976) ("persons living

the present Code of Virginia¹⁶ allows a debtor to exempt personal property as well as real property. It "is not a 'homestead' in any real sense of the word, but is an *exemption* pure and simple."¹⁷ The broadening in scope of the types of property which may be claimed under the homestead exemption serves to give more protection to the increasing numbers of people who do not own homes.¹⁸ It does not, however, alter the homestead exemption's basic function, which has always been to protect the helpless debtor,¹⁹ and to prevent his family from suffering undue hardship on account of his improvidence.²⁰

B. *The Definition of "Householder"*²¹

Only "householders" may claim the homestead exemption.²² While the current Virginia Code, last amended in 1979, refers only to "householder,"²³ the terms "householder" and "head of a family" have long been considered synonymous.²⁴ Virginia courts have traditionally defined a "householder" as someone who owes a continuing legal and moral support obligation.²⁵ However, from the bare language of the current Code definition of a householder, it appears that the only qualification now necessary

with" householder not limited to dependents living under his roof).

16. VA. CODE ANN. § 34-4 (Cum. Supp. 1981) provides that "[e]very householder or head of a family residing in this State shall be entitled . . . to hold exempt from levy, seizure, garnishment or sale . . . his real and personal property . . . to the value of not exceeding five thousand dollars." In addition, a householder who has not taken the full exemption of \$5,000 in real estate may exempt the balance in personalty. VA. CODE ANN. § 34-13 (Cum. Supp. 1981).

17. 2 Bankr. Ct. Dec. at 958.

18. In 1978, 34.8% of the dwellings in this country were renter-occupied. U.S. BUREAU OF THE CENSUS, 1980 STATISTICAL ABSTRACT OF THE UNITED STATES 793 (101st ed. 1980).

19. *Linkenhoker's Heirs v. Detrick*, 81 Va. 44, 56-57 (1885).

20. *See* 73 Va. (32 Gratt.) at 21. *See generally* Ulrich, *supra* note 3, at 129-31; Vukowich, *supra* note 13, at 782-88.

21. *See* Ulrich, *supra* note 3, at 131-33 for a thorough discussion of this subject.

22. VA. CODE ANN. § 34-4 (Cum. Supp. 1981).

23. The statute provides: "The word 'householder' as used in this title shall include any person, married or unmarried, who maintains a separate residence or living quarters, whether or not others are living with him." VA. CODE ANN. § 34-1 (Cum. Supp. 1981) (emphasis in original). For purposes of statutory construction, the pronoun "him" in Virginia statutes has long been recognized as extending to females as well as males. *Richardson v. Woodward*, 104 F. 873, 876 (4th Cir. 1900).

24. Prior to the 1979 amendment, the former "Definitions" section in the Code read, in pertinent part: "[t]he word 'householder' shall be equivalent to the expression 'householder or head of a family' . . ." VA. CODE ANN. § 34-1 (Repl. Vol. 1976) (revised 1979) (emphasis in original).

25. *See, e.g.,* *Oppenheim v. Myers*, 99 Va. 582, 586, 39 S.E. 218, 219 (1901). The language of the Virginia Code prior to the 1978 and 1979 amendments required that a householder be "one who occupies such a relationship towards persons living with him as to entitle them to a legal or moral right to look to him for support and who, in turn, has the duty of supporting such persons." VA. CODE ANN. § 34-1 (Repl. Vol. 1976) (revised 1978, 1979).

is that the person maintain "a separate residence or living quarters."²⁶ The *Cheeseman* court justifiably described this language as ambiguous.²⁷ One writer has noted that the amended definition might be interpreted to exclude people who are deserving of the exemption, and benefit some who are not.²⁸ It has been suggested that the current definition was included in the 1979 amendment to the Virginia Code as the result of *In re Wilkes*.²⁹ There, the court noted that "[a] literal interpretation of the language [of the Virginia Code prior to the 1979 amendment] would exclude the homestead exemption to a divorced or separated father who otherwise would be entitled" to the exemption, simply because his family did not live *with him*, even though he had continuing legal and moral support obligations.³⁰

C. *The Precedent For Cheeseman*

In February 1980, *In re Thompson*³¹ was decided. It held that sound public policy and the mandate of supremacy of federal bankruptcy laws demanded that Virginia adhere to all provisions of the Bankruptcy Reform Act except for the federal exemption schedule.³² In *Thompson*, both husband and wife had claimed exemptions. The trustee in bankruptcy objected to the wife's claimed exemptions on the grounds that she was not gainfully employed.³³ The court ruled that Congress has "exclusive jurisdiction to determine precisely what exemptions a debtor may claim."³⁴ The court further held that "[t]he Virginia statute is so worded as to acknowledge that the only portion of 11 U.S.C. 522 affected is subsection (d) which enumerates certain property."³⁵ Therefore, each debtor

26. VA. CODE ANN. § 34-1 (Cum. Supp. 1981). See note 23 *supra*.

27. 656 F.2d at 63.

28. See Ulrich, *supra* note 3, at 133. As an example, a recently divorced mother who might be supporting children but is living with her parents would be excluded, while a college student who is being supported by his parents, but is living in an apartment, would apparently qualify. *Id.*

29. 2 Bankr. Ct. Dec. at 957; see Ulrich, *supra* note 3, at 132 n.32.

30. 2 Bankr. Ct. Dec. at 959. See also note 25 *supra*.

31. 2 B.R. 380 (Bankr. E.D. Va. 1980).

32. See 11 U.S.C. § 522(d) (Supp. IV 1980), which enumerates property that may be claimed as exempt under federal law. A detailed analysis of the exemptions allowed under § 522(d) of the Act is outside the scope of this comment. For a good discussion, see Schiffer, *The New Bankruptcy Reform Act: Its Implications for Family Law Practitioners*, 19 J. FAM. LAW 1, 11-19 (1980-1981). As this provision of the Act relates to Virginia law, see generally Ulrich, *supra* note 3, at 127.

33. 2 B.R. at 381.

34. *Id.* See U.S. CONST. art. I § 8 (Congress has power to establish uniform laws on bankruptcy). See also *International Shoe v. Pinkus*, 278 U.S. 261, 263-64 (1929) (a state may not make laws that conflict with national bankruptcy laws).

35. 2 B.R. at 381. See VA. CODE ANN. § 34-3.1 (Cum. Supp. 1981), which provides that "[n]o individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of § 522 of the Bankruptcy Reform Act (Public Law

should be able to claim exemptions in a joint case as prescribed by federal law.³⁶ The court also noted that Congress intended to allow states to "opt out" of *certain, not all* Federal exemptions,³⁷ and that "the intent to provide exemptions to all debtors is evident in subsection (b) of [section] 522"³⁸ which specifies that "an *individual* debtor may exempt" certain property.³⁹

In June 1980, *Thompson* was reversed on appeal.⁴⁰ The district court ruled that since Virginia had "opted out" of the federal exemption scheme, only Virginia's exemption laws should apply.⁴¹ The court reasoned that, since the wife had claimed a homestead exemption,⁴² she had to qualify as a "householder" under Virginia law.⁴³ However, she failed to do so because "[t]he legislature did not . . . intend to grant double exemptions where there was only one residence occupied by two people, that is, in this case, a man and his wife."⁴⁴ In reaching this conclusion, the court relied on the "separate residence" requirement of Section 34-1 of the Code,⁴⁵ noting that statutes should be given a presumption of validity, and when possible construed so as to avoid a constitutional question.⁴⁶ The court also held that "the Virginia statute in question . . . continues to meet its original purported purpose to conserve the family home (shelter) from forced sales."⁴⁷ Thus, the court reasoned, when a man and

95-598), except as may otherwise be expressly permitted under this title."

36. Section 522(m) of the Act provides that "[t]his section shall apply separately with respect to each debtor in a joint case." 11 U.S.C. § 522(m) (Supp. IV 1980).

37. 2 B.R. at 381 (emphasis in original). See 124 CONG. REC. S17,403-34 (daily ed. Oct. 6, 1978).

38. 2 B.R. at 381.

39. *Id.* (emphasis in original); see 11 U.S.C. § 522(b) (Supp. IV 1980) (cited in pertinent part at note 4 *supra*).

40. *In re Thompson*, 4 B.R. 823 (E.D. Va. 1980).

41. *Id.* at 824.

42. It is interesting to note that the lower court's decision in *Thompson* does not mention "homestead exemption." See 2 B.R. at 380-82. Thus the court arrived at its decision more through a determination of which provisions of the Act are applicable to proceedings in Virginia than by an interpretation of "householder" as it applies to the homestead exemption. It did, however, find that the 1979 amendment to Virginia Code § 34-1, which provides that a "householder" is anyone who maintains a "separate residence," is contrary to public policy because it encourages couples to separate in order to qualify for the exemption. 2 B.R. at 382. Upon appeal to the district court, the debtors objected to the trustee's assertion of the homestead issue, since he had failed to raise it in the prior proceeding. However, the district court allowed the issue to enter because the lower court had addressed it in its opinion. 4 B.R. at 824 n.1.

43. See VA. CODE ANN. § 34-1 (Cum. Supp. 1981).

44. 4 B.R. at 825.

45. VA. CODE ANN. § 34-1 (Cum. Supp. 1981).

46. 4 B.R. at 825.

47. *Id. But cf. In re Wilkes*, 2 Bankr. Ct. Dec. at 958 (homestead exemption is really a pure exemption); VA. CODE ANN. § 34-4 (Cum. Supp. 1981) (debtor may exempt real and/or personal property as part of the homestead exemption). Most modern writers agree that, in

his wife are living together, there is only one home to conserve, and therefore only one homestead exemption is intended.⁴⁸

When *In re Thacker*⁴⁹ was later decided by the Bankruptcy Court for the Western District of Virginia, there was no mention of the prior decisions in the *Thompson* case, even though issues presented in *Thacker*⁵⁰ similarly required an interpretation of the "opting out" clause.⁵¹ The court held that the purpose of the "opting out" clause of the Act was merely to allow a state to prescribe its own schedule of exemptions in lieu of those set forth in section 522(d).⁵² Furthermore, the court's opinion suggested that "if § 522 does not apply in Virginia, then *no exemptions*, including the Homestead Exemption, are available to Debtors in this State, since the only authority for such exemptions is found in § 522(b)(2)(A)."⁵³

The *Thacker* decision seems to be in accord with the bankruptcy court's reasoning in the lower *Thompson* case.⁵⁴ Indeed, the wording of Virginia's "opting out" clause⁵⁵ suggests that the Virginia legislature never intended to proscribe any provisions of the Act except for the exemptions specified in section 522, subsection (d).⁵⁶ Thus, section

reality, the amount of the homestead exemption is normally insufficient to allow the debtor and his family to retain their home. See, e.g., Vukowich, *supra* note 13, at 806.

Virginia's exemption scheme provides for a \$5,000 limit on the homestead exemption. VA. CODE ANN. § 34-4 (Cum. Supp. 1981). The adequacy of the \$5,000 limit has been questioned: The purpose of this [homestead] exemption is to safeguard the debtor's home. This purpose, however, is undermined by the inadequacy of the \$5,000 limit. Because of the rapid rise in property values caused by today's inflationary economy a homeowner doubtless will acquire \$5,000 worth of equity in his house in a very short time. Thus, because the homestead exemption currently is limited to \$5,000 and because the debtor's equity frequently will exceed this amount, the debtor's home may be subject to a forced sale. The debtor and his family consequently may lose their home[,] and though they will get \$5,000 that probably will be inadequate to permit the purchase of a new home.

Note, *The Failure of the Virginia Exemption Plan*, 21 WM. & MARY L. REV. 851, 871 (1980).

48. 4 B.R. at 825.

49. 5 B.R. 592 (Bankr. W.D. Va. 1980).

50. *Thacker* was a consolidation of two cases with similar facts and issues. In each case, the trustee had sought to sell real estate owned by the debtor and his wife as tenants by the entireties. He argued that although § 522(b)(2)(B) of the Act allows an individual debtor to exempt any interest in property owned by the entireties, Virginia had "opted out" of the federal exemption scheme entirely. The trustee therefore contended that Virginia effectively denied the use of any of the federal exemption provisions to debtors of the state.

51. In *Thacker*, the court questioned the extent to which Congress had intended to permit a state to preempt provisions of the Act. 5 B.R. at 594-95.

52. 5 B.R. at 594-96.

53. *Id.* at 594 (emphasis added).

54. See text accompanying notes 31-39 *supra*.

55. VA. CODE ANN. § 34-3.1 (Cum. Supp. 1981). See note 35 *supra*.

56. The lower court in *Thompson* also addressed this point. 2 B.R. at 381.

522(m),⁵⁷ the rule for joint cases, should be applicable to debtors in Virginia.⁵⁸

III. ANALYSIS OF THE *Cheeseman* DECISION

A. *The Background and the Fourth Circuit's Ruling*

Oliver and Isabelle Cheeseman lived together as husband and wife in their home which they owned as tenants by the entireties. They were both gainfully employed and both contributed to the maintenance of the household.⁵⁹ In June 1980, they filed a joint petition in bankruptcy pursuant to 11 U.S.C. section 301,⁶⁰ and each claimed the homestead exemption available to every "householder" or "head of a family."⁶¹ The trustee in bankruptcy took exception to Mrs. Cheeseman's claim, arguing that under Virginia law she did not qualify as a householder or head of a family. After a hearing,⁶² the bankruptcy court held that, in light of the district court's decision in *Thompson*, Mrs. Cheeseman could not qualify as a householder and should be denied a joint homestead exemption.⁶³

On appeal, the Fourth Circuit focused on the definition of "householder" in the Virginia Code. The court noted that "no Virginia court has considered whether a husband and wife, living together, may both be deemed householders under this definition."⁶⁴ The district court had avoided this issue by reasoning that since the purpose of a homestead exemption was to conserve the home, the legislature intended to grant only one homestead exemption for each residence.⁶⁵ The Fourth Circuit determined that it must use "established rules of statutory construction,"⁶⁶ starting with the language in the Code definition of "householder."⁶⁷ The court found that the Code language is ambiguous, as it could be interpreted to allow only one householder for each residence, or it could also "be construed to permit *any individual who contributes to*

57. 11 U.S.C. § 522(m) (Supp. IV 1980); see *supra* note 36 and accompanying text.

58. The *Cheeseman* court to some extent relied on reasoning similar to that expressed in *Thacker*. 656 F.2d at 64. The *Cheeseman* decision, however, did not mention *Thacker*.

59. 656 F.2d at 61. It is reported that Mr. Cheeseman earned \$22,773.30, and Mrs. Cheeseman \$6,311.79 in 1979, *id.*, but no figures were furnished in the opinion concerning the proportion of funds each contributed to the maintenance of the household.

60. 11 U.S.C. § 301 (Supp. IV 1980) says that a voluntary case is commenced by the debtor's filing of a petition in bankruptcy and that such filing constitutes an order for relief under the Act.

61. VA. CODE ANN. § 34-4 (Cum. Supp. 1981).

62. *Cheeseman v. Nachman*, No. 80-2292 (Bankr. E.D. Va. Oct. 3, 1980).

63. 656 F.2d at 62. For the opinion of the lower *Thompson* court, see text accompanying notes 40-48 *supra*.

64. 656 F.2d at 62-63.

65. 4 B.R. at 825. See text accompanying notes 47-48 *supra*. But see note 47 *supra* (exemption amounts are probably insufficient to allow debtors to protect their homes).

66. 656 F.2d at 63 (citing *Richardson v. Woodward*, 104 F. at 875).

67. The term "householder" is defined at VA. CODE ANN. § 34-1 (Cum. Supp. 1981).

the maintenance of a residence, without regard to whether others in the same residence contribute to its maintenance, to be a householder. . . . Under this latter construction, a husband and wife could both be householders."⁶⁸

This result appears to be an unlikely redefinition of the word "householder,"⁶⁹ and would have been unnecessary had the court chosen, as did the lower court in *Thompson*,⁷⁰ to rule that only section 522(d) of the Bankruptcy Act was affected by the "opting out" clause.⁷¹ However, had

68. 656 F.2d at 63 (emphasis added). This dictum seems to recognize the potential for homestead exemption claims by almost anyone who can show that he contributed in any way to the maintenance of a residence. Fortunately, the opinion qualifies this view by holding that the exemptions should be available to each *spouse* living together, provided that he or she contributes to the maintenance of the residence. *Id.*

69. *Cf.* 104 F. at 879 (wife may claim the homestead exemption where she is the debtor, owns the real estate and runs the family business and "the husband *cannot* and *does not* claim the homestead exemption"). *Id.* (emphasis added). The *Cheeseman* court cited this case as authority for construing Virginia Code § 34-1 "according to the established rules of statutory construction," see note 67 *supra* and accompanying text, while apparently ignoring the language in the latter part of the opinion.

See generally Vukowich, *supra* note 13, at 841-45; see also Ulrich, *supra* note 3, at 131-33. Professor Ulrich argues that Virginia's exemption statutes are in need of revision, and proposes that "householder" be defined as "an individual who is the primary source of support for some person including himself." *Id.* at 153. He notes, however, that:

This [proposed] definition opens the very real possibility that at least two people in a family could each claim a homestead exemption. Two parents working to support themselves and their dependents is a clear example. This possibility exists under the present definition of householder in § 34-1 *only if the parents maintained separate residences.*

Id. at 153 n.149 (emphasis added). Professor Ulrich apparently did not contemplate the eventuality of the *Cheeseman* analysis—that a court could construe the phrase "maintains a separate residence" to include both spouses as long as they both contribute to the maintenance of a single home.

70. See 2 B.R. at 381.

71. See VA. CODE ANN. § 34-3.1 (Cum. Supp. 1981). The Bankruptcy Court for the Western District of Virginia ruled that § 34-3.1 applied to only § 522(d) of the Act when it decided *In re Snellings*, 10 B.R. 949 (Bankr. W.D. Va. 1981), just prior to the *Cheeseman* decision. In *Snellings*, the debtors were joint owners of their residence, and had both filed homestead exemptions against creditors who sought to have the court enforce a judgment lien on the real estate involved. The defendants owed \$10,000 without interest on a demand note, in which they had waived the homestead exemption right pursuant to § 34-22 of the Virginia Code. The debtors sought to have the creditors' complaint dismissed, because they had filed separate homestead exemptions of \$5,000 each for a total of \$10,000, and because the waiver could be avoided under federal law. See 11 U.S.C. § 522(f) (Supp. IV 1980) (regardless of waiver, debtor may avoid a judicial lien which impairs any exemptions to which he is entitled under § 522(b)). The court reasoned that statutes had to be construed with regard to prevailing facts, and decided that the words "householder shall include" in the 1979 amendment to § 34-1 of the Virginia Code should be read as an enlargement of the meaning, rather than a limitation. Since the homestead laws are matters of public policy, the court held that the statute should be interpreted to allow each debtor to claim the homestead exemption in jointly held property. 10 B.R. at 952-54. The court concluded that "[t]his Virginia Code Section [§ 34-3.1, the 'opt out' clause] only deals with § 522(d)," and

the circuit court adopted this reasoning alone, it would have voided by implication the Virginia statute defining a "householder." Virginia courts had never construed the definition so as to include both spouses, but all provisions of the federal law are meant to apply equally to joint debtors.⁷² Thus, a construction of the Virginia law which allowed only one spouse to be a "householder" would fly in the face of the federal legislation.

It is well settled that a state's bankruptcy laws, to the extent that they conflict with those of Congress, are suspended.⁷³ It is equally well established that a statute should be construed, if possible, so as to uphold its validity.⁷⁴ The *Cheeseman* court therefore chose to construe the statutory definition of "householder" in a manner that would validate the state law and effectuate "Virginia's policy that the homestead provisions be liberally construed."⁷⁵ In addition, the court noted that a construction which allowed only one spouse to be a householder as long as the couple lived together would be contrary to public policy, since it would encourage couples to separate in order to claim two homestead exemptions.⁷⁶

B. *Conflicting State and Federal Laws in Other States*

A good deal of judicial effort has been put forth towards interpretation of the words "householder" or "head of a family."⁷⁷ However, there are very few reported cases in which the court of a state which has "opted out" of the federal scheme⁷⁸ has attempted to resolve a conflict between its own laws and the provisions of the Bankruptcy Act.

Florida courts, like those in Virginia, traditionally have relied on the notions of support and moral obligation in determining who qualifies as "head of a family."⁷⁹ Moreover, a recent Florida bankruptcy decision, *In*

thus "does not affect the Virginia debtor's right to use 11 U.S.C. § 522(a), (b), (c) and (e)-(m)." 10 B.R. at 954.

72. 11 U.S.C. § 522(m) (Supp. IV 1980).

73. *Stellwagen v. Clum*, 245 U.S. 605, 613 (1917).

74. 4 B.R. at 825. While the *Cheeseman* court did not enunciate this policy, its influence is evident from the court's use of statutory construction rather than invalidation to resolve the potential conflict. *See also* 104 F. at 874 (where there is no construction of a state statute by state courts, or where there is a conflict with federal law, the bankruptcy court will construe the statute so as to carry out the intent of the act of Congress). *But see* 2 B.R. at 382 (even though enacted in good faith, a statute should be declared void if it violates the State Constitution).

75. 656 F.2d at 63.

76. *Id.* This concern was also expressed in the lower *Thompson* case. *See* 2 B.R. at 382. *See also* Ulrich, *supra* note 3, at 133 n.34.

77. For a survey of some cases in which the term "householder" and "head of a family" have been construed, *see* 3 COLLIER ON BANKRUPTCY ¶ 522.05, at 522-19 n.13 (15th ed. 1981).

78. Other states besides Virginia which have chosen to opt out are: Arizona, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Missouri (legislation pending), Nebraska, Ohio, South Dakota, Tennessee and Wyoming. *Id.* ¶ 522.02, at 522-11 n.4a.

79. *See In re Rivera*, 5 B.R. 313, 315 (Bankr. M.D. Fla. 1980).

re Barnes,⁸⁰ indicates that the state will recognize only one "head of a family"⁸¹ for the purpose of claiming a homestead exemption. Florida apparently still adheres to the "presumption that the *husband* is head of the family,"⁸² even when the wife's income is greater and the home is owned solely in her name.⁸³ Also, the husband cannot choose to permit the wife to stand as head of the family.⁸⁴ It appears that the *Barnes* court chose not to recognize a conflict between the Florida statute and federal law. Rather than deciding, as did the Fourth Circuit in *Cheeseman*, that the statute should be given an interpretation that is consistent with the provisions of the federal law, the *Barnes* court retained a construction based strictly on state precedent. The effect of this decision is to frustrate the Act by denying Florida debtors the use of the joint exemption provisions to which the Congress intended they should be entitled.⁸⁵ Further, a reading of Florida's "opt out" statute indicates that the state legislature only intended to prohibit debtors from using the federal exemption schedule.⁸⁶ In the past, Florida courts have shown willingness to stretch the interpretation of "head of a family."⁸⁷ In *Barnes*, however, the court

80. 4 B.R. 600 (Bankr. M.D. Fla. 1980) (wife not allowed to claim homestead exemption in a joint proceeding because she did not qualify as a "head of a family").

81. Florida's homestead exemption may be claimed only by "a head of a family." FLA. STAT. ANN. § 222.01 (West Supp. 1981).

82. 4 B.R. at 602 (emphasis added).

83. *Id.* at 601-02.

84. The court, citing *Abernathy v. Gruppo*, 119 So.2d 398 (Fla. App. 1960), noted that: [A]n able bodied husband cannot abdicate his presumptive position as the head of a family and as long as the family relationship of a husband and wife remains intact, the husband is deemed to be head of the family unless he is unable to discharge his duties due to permanent illness, incarceration or mental incompetence.

4 B.R. at 602. Moreover, "[t]o qualify to be head of a family in this state, there must be at least two persons living together in relation of one family and one of them must be the head of that particular family." *Id.* (emphasis in original).

85. See text accompanying notes 35-39 *supra*. Some writers have expressed concern that the "opting out" clause of the Act would serve as a means by which states could enact laws which would nullify the federal legislation. See, e.g., Sommer, *The New Law of Bankruptcy: A Fresh Start for Legal Services Lawyers*, 13 CLEARINGHOUSE REV. 1, 4 (1979). In Florida it would appear that a similar effect has occurred due to judicial construction of an existing state statute.

86. Florida's opting out clause provides, in pertinent part, that "[r]esidents of this state shall not be entitled to the federal exemptions provided in § 522(d) of the Bankruptcy Code of 1978. . . . Nothing herein shall affect the exemptions given to residents of this state by the . . . Florida Statutes." FLA. STAT. ANN. § 222.20 (West Supp. 1981).

87. See, e.g., *Davis v. Miami Beach Bank & Trust Co.*, 99 Fla. 1282, 128 So. 817 (1930) (widow supporting incapacitated adult son qualified as "head of a family"). But see *In re Rivera*, 5 B.R. at 316 (single man can not claim head of family exemption based on cohabitation with an unmarried woman). In *Rivera*, although the debtor had fathered a child by the woman with whom he was living, there had been no legal determination of fatherhood. Thus, the court held that there was no permanent and continuing support obligation; therefore, he could not qualify as "head of a family." In so ruling, the court stated that "actual support, temporary or even a sustained support, is not by itself determinative of this question." *Id.* at 315.

rendered a statutory interpretation which not only frustrates the legislative intent of the Act, but also contravenes Florida's own policy of construing exemption claims liberally in favor of the debtor.⁸⁸

The *Cheeseman* case demonstrates how courts may engage in judicial legislation in order to resolve a conflict between state law and the Bankruptcy Act. In contrast, *Barnes* illustrates the danger that a court may continue to give deference to antiquated state laws⁸⁹ and thereby frustrate the goals of the Act, and defeat the fresh start doctrine.

The Ohio legislature has wisely amended its homestead law so as to grant the exemption to "[e]very person who is domiciled in this state."⁹⁰ Further, in two judicial decisions which disallowed the fixing of liens that would have been permitted under the state statutes, Ohio courts correctly decided that there is no authority in the Bankruptcy Act for a state to prescribe anything other than exemption entitlements.⁹¹ In both cases, the courts held that the Act of Congress prevailed over a conflicting Ohio statute which would have prohibited the debtors from claiming a lien exemption that was available under federal law.⁹² The Bankruptcy Court for the Northern District of Ohio recited that "[i]f a state opts out of the federal exemption, it does not affect the debtor's power under [11 U.S.C. section 522] subsection (f)."⁹³ One can reasonably infer, therefore, that the Ohio courts, if faced with a case similar to *Cheeseman* or *Barnes*, would invalidate a state statute which was in conflict with the joint exemptions provision of the Act.⁹⁴

Thus, at present there are three ways in which courts have resolved the problem of a conflict between state and federal laws under the Act. The Florida court upheld a strict construction of state law which is clearly contrary to the joint exemption provision of the Act. The Fourth Circuit chose to compromise, validating the Virginia statute by giving it an interpretation in conformity with the federal law. Ohio's position, on the other

88. See, e.g., *Vandiver v. Vincent*, 139 So. 2d 704, 707 (Fla. App. 1962).

89. Note that the *Barnes* court ignored the rule that a state statute, to the extent that it is in conflict with federal law, is suspended. See *International Shoe Co. v. Pinkus*, 278 U.S. 261, 263-64 (1929); note 73 *supra* and accompanying text. *In re Barnes* could and should be overruled on this basis.

90. OHIO REV. CODE ANN. § 2329.66(A) (Baldwin 1979) (emphasis added). The former version of the Ohio Code specified that "[e]very person who is the chief support of a family, or who is . . . paying alimony, maintenance or other allowance" was entitled to claim the exemption. OHIO REV. CODE ANN. § 2329.66 (Baldwin 1975).

91. *In re Fisher*, 6 B.R. 206, 210 (Bankr. N.D. Ohio 1980); *In re Cox*, 4 B.R. 240, 242 (Bankr. S.D. Ohio 1980). OHIO REV. CODE ANN. § 2329.662 (Baldwin 1979) states, in pertinent part: "[p]ursuant to . . . 11 U.S.C.A. 522(b)(1), this state specifically does not authorize debtors . . . to exempt property specified in . . . 11 U.S.C.A. 522(d)."

92. 6 B.R. at 210; 4 B.R. at 243.

93. 6 B.R. at 210 (citing 3 COLLIER'S ON BANKRUPTCY, ¶ 522.29 (15th ed. 1979)).

94. See 11 U.S.C. § 522(m) (Supp. IV 1980).

hand, seems to be better reasoned. The Ohio bankruptcy courts have made it clear that state statutes which conflict with the provisions of the Act will be invalidated. Further, the Ohio legislature has revised the state homestead law so that it conforms with the joint exemption provisions of the Act.⁹⁵ This position obviates the need for the type of judicial legislation that was found necessary in *Cheeseman*. Also, it precludes state courts from giving credence to antiquated state exemption laws which deny debtors the full measure of relief intended by the Act. Moreover, it demonstrates that the state is exercising an appropriate and timely review of its exemption laws.⁹⁶ The Virginia and Florida legislatures would be wise to follow the example of Ohio and make necessary revisions in the exemption laws of their respective states.

IV. THE EFFECTS OF THE *Cheeseman* DECISION

A. *Cheeseman Shows the Need for Revision of Virginia's Exemption Laws*

The Virginia homestead exemption law has long been considered to be antiquated and insufficient to ensure a fresh start under current economic conditions.⁹⁷ The *Cheeseman* decision will go a long way toward liberalizing the Virginia law, since it will enable Virginia debtors to obtain a greater amount of protection than was formerly available. However, the need for judicial legislation of this type is indicative of a need for legislative action. For example, under the Bankruptcy Act a couple in a joint bankruptcy proceeding would be able to claim \$7,500 each, or \$15,000 total as a homestead exemption.⁹⁸ Following the decision in *Cheeseman*, the same couple in Virginia is entitled to only \$5,000 each,⁹⁹ or \$10,000 total, provided both contribute to the maintenance of the household.¹⁰⁰ Thus, even though the Virginia statute has been revised twice in recent years,¹⁰¹ there is a considerable disparity between the amounts granted under Virginia law and those prescribed in the federal exemption scheme.¹⁰²

In addition to the homestead exemption, parts of the Virginia Code allow a debtor to exempt a loom, a spinning wheel, a horse and three hogs;¹⁰³ or if he is a farmer, an extra horse or mule, a rake and a pitch-

95. See note 90 *supra* and accompanying text.

96. See text accompanying note 109 *infra*.

97. See Note, *supra* note 47, at 868-69. See generally Ulrich, *supra* note 3, at 140-41.

98. 11 U.S.C. § 522(d)(1),(m) (Supp. IV 1980).

99. VA. CODE ANN. § 34-4 (Cum. Supp. 1981).

100. 656 F.2d at 63.

101. The exemption amount was raised from \$2,000 to \$3,500 in 1975, VA. CODE ANN. § 34-4 (Cum. Supp. 1975), and to \$5,000 in 1977. VA. CODE ANN. § 34-4 (Cum. Supp. 1981).

102. For a comparison of the federal provisions with those of Virginia, Maryland and the District of Columbia, see Comment, *supra* note 3, at 853-59.

103. VA. CODE ANN. § 34-26 (Cum. Supp. 1981).

fork.¹⁰⁴ It is significant to note, however, that there is no provision for exemption of an automobile in the Virginia Code.¹⁰⁵ Thus, it is apparent that Virginia's exemption laws are in need of a general revision.

B. *Virginia's Homestead Law Fails to Achieve the Goals of the Bankruptcy Act*

The Bankruptcy Act as passed in 1978 was an amended version of the original House Bill, which had called for a considerably more generous homestead exemption.¹⁰⁶ Apparently, the amended version represents a compromise between the House Bill and the Senate amendment, which resulted in the amount of the homestead exemption being reduced and allowed states to circumvent the federal laws by affirmative legislation.¹⁰⁷ The Senate Report indicates a desire to allow states some flexibility in adjusting local laws to the standard of living in their particular area.¹⁰⁸ It has been suggested that Congress, by allowing a state to opt out only by affirmative legislation, "has ensured that states exercising the option [to deny the use of the federal exemptions] will reexamine their own exemption statutes and make a conscious choice between the two provisions."¹⁰⁹ If so, Virginia has failed to achieve the goal of Congress by neglecting to update its exemption laws fully when it chose to opt out of the federal scheme.

Since states have the option of proscribing the use of the federal regu-

104. *Id.* at § 34-27. A full analysis of the inadequacies of the present exemption scheme is outside the scope of this comment. For a good discussion, see Note, *supra* note 47, at 868-76. It is important to note that these "Poor Debtor's Exemptions" rely on the same "householder" definition in § 34-1 which the fourth circuit ruled could be joint in a federal bankruptcy case.

105. The federal exemption scheme allows a \$1,200 motor vehicle allowance in addition to the homestead exemption. See 11 U.S.C. § 522(d)(2) (Supp. IV 1980).

106. The homestead amount in the original House bill was \$10,000. See H.R. REP. No. 95-595, 95th Cong., 2d Sess. 126, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6087. The intent of the original bill was apparently to let the states set levels of exemptions commensurate with the area's standard of living, then allow the debtor to select the more favorable of state or federal exemption schedules. *Id.*

107. 124 CONG. REC. H11,095 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).

108. S. REP. No. 95-989, 95th Cong., 2d Sess. 6, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5792. The Senate Report stresses that it favors the fresh start policy, but objects to "instant affluence," as might be possible under the original House version. See also Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 449-53, 485-86 (1960) (differing conditions and relevant interests make it desirable to allow states to prescribe their own exemption laws). Although it has been argued that allowing states to preempt the federal legislation frustrates the Act's aim of uniformity, see, e.g., Rendleman, *Liquidation Bankruptcy Under the '78 Code*, 21 WM. & MARY L. REV. 575, 651-52 (1980), the Constitutional requirement of uniformity is geographical, not personal, and so it is within the scope of states' powers to determine the rights of debtors within their borders. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902).

109. Comment, *supra* note 3, at 865.

lations, they should use that power as a means of enhancing the opportunity for an honest debtor to obtain a fresh start, and thus implement, through state regulation, the Congressional intent underlying the Bankruptcy Act. It is in a state's best interest to offer exemptions that are adequate to prevent the debtor's "leaving the courtroom in a barrel,"¹¹⁰ becoming a public charge,¹¹¹ or being forced back immediately after discharge into the credit market and the circumstances which precipitated his insolvency.¹¹²

V. CONCLUSION

The *Cheeseman* court has concocted a somewhat resourceful interpretation of "householder," enabling the court to validate Virginia's statute while still complying with the federal law concerning joint debtors. The Fourth Circuit has also followed Virginia's public policy of protecting the debtor's family and enabling him to achieve a meaningful fresh start after discharge. Other courts faced with antiquated state exemption laws have occasionally adopted similar means of breathing new life into anachronistic legislation.¹¹³ Yet courts should not have to make artful interpretations of outdated statutory language in order to achieve just results; statutory revision simply is not within the province of the judiciary. But neither should debtors be condemned to suffer undue hardship under an archaic system of state exemption laws, which a court like that in the Florida *Barnes* case may refuse to invalidate. The answer to this dilemma lies with the legislature.

The ruling in the *Cheeseman* decision should substantially improve the chances that spouses as joint debtors in Virginia will be able to retain enough of their property to enable them to achieve a fresh start. Allowing joint debtors to claim dual exemptions, as was intended by Congress under the Bankruptcy Act, is a meaningful step in the direction of bringing Virginia's exemption laws up to date. The next step is for the Virginia legislature to take its cue from *Cheeseman* and to undertake a meaningful, realistic revision of the Virginia exemption laws.¹¹⁴

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110. See Rendleman, *supra* note 108, at 649.

111. Ulrich, *supra* note 3, at 129.

112. See Lacy, *South Carolina's Statutory Exemptions and Consumer Bankruptcy*, 30 S.C.L. REV. 643, 688 (1979).

113. See, e.g., *Phillips v. C. Palomo & Sons*, 270 F.2d 791 (5th Cir. 1959) (truck-trailer held exempt in lieu of "two horses" and "wagon"); *Patten v. Sturgeon*, 214 F. 65 (8th Cir. 1914) (automobile exempt in lieu of "carriage").

114. Legislation was introduced in the 1982 Virginia General Assembly which would have abrogated *Cheeseman* by limiting the homestead exemption to the "householder providing the primary maintenance" for a residence. The bill was passed by the Senate but was killed in the House Committee for Courts of Justice. S.B. 317 (amended Feb. 18, 1982) (emphasis added).