IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-554

(Lower Tribunal Case No. 3D09-3427)

PEDRO J. GARCIA, AS PROPERTY APPRAISER OF MIAMI-DADE COUNTY,

Petitioner,

vs.

DAVID ANDONIE AND ANA L. ANDONIE; AND LISA ECHEVERRI, AS EXECUTIVE DIRECTOR OF THE STATE OF FLORIDA DEPARTMENT OF REVENUE

Respondents.

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ON PETITION FOR DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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**PETITIONER'S INITIAL BRIEF ON THE MERITS**

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R. A. CUEVAS, JR.
MIAMI-DADE COUNTY ATTORNEY
Stephen P. Clark Center, Suite 2810
111 N.W. 1st Street
Miami, Florida 33128
Telephone: (305) 375-5151
Facsimile: (305) 375-5611

By: Melinda S. Thornton
Assistant County Attorney
Florida Bar No. 261262

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OFFICE OF COUNTY ATTORNEY, MIAMI-DADE COUNTY
TELEPHONE (305) 375-5151

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OFFICE OF COUNTY ATTORNEY, MIAMI-DADE COUNTY
TELEPHONE (305) 375-5151

## INTRODUCTION

This Court is being asked to determine, as a matter of law – and in the specific context of the homestead exemption from ad valorem taxation – whether minor children can be considered "permanent residents" of Florida, if their parents are not. This Initial Brief on the Merits is filed by Petitioner Pedro J. Garcia, the current Miami-Dade County Property Appraiser ("Property Appraiser")[1], whose office denied the 2006 tax year application for homestead exemption.

Petitioner will be referred to as "Property Appraiser." Respondents David and Ana Andonie will be referred to as "Andonies" or "Taxpayers." Lisa Echeverri, in her official capacity as the Executive Director of the Florida Department of Revenue, will be referred to as "DOR."

References to "homestead exemption" are to the homestead exemption from ad valorem taxation, unless otherwise indicated. The real property which is the subject of this dispute may be referred to as "subject property."

The Appendix to this Initial Brief has been filed separately. It will be referred to as (App. Ex.__: pg__), and includes, in addition to the conformed copy of the Third District's decision, only those portions of the record relevant to the factual background of the case.

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[1] This case has been restyled to reflect the name of the current Property Appraiser.

## STATEMENT OF THE CASE AND OF THE FACTS

### Nature of Case, Course of Proceedings, and Factual Background

Property Appraiser challenges the lower court's ruling that Taxpayers David and Ana Andonie were entitled to a homestead exemption from ad valorem taxation for the 2006 tax year. The material facts are undisputed and based on: a) documentation presented by Taxpayers to Property Appraiser, which is attached to the affidavit of Property Appraiser supervisor Angela Neumann (App. B:1-10), and b) David Andonie's affidavit, both submitted during the summary judgment proceedings before the trial court. (App. C:1-2).

The Andonies purchased the subject property, a condominium in Key Biscayne, Florida, in 2003. (App. B:9). The Property Appraiser assessed the subject property at a value of $1,090,410 for the 2006 tax year. (App. D:1).

The Andonies first applied for a homestead exemption for the 2006 tax year. (App. B:9-10). On the application was the handwritten statement: "[m]y children are US Citizens, aged 7, 12 and 14 living at this address and are legally and naturally dependent on me, thereby qualifying the property for the homestead exemption." (App. B:9). In support of their application, Taxpayers submitted the birth certificates of their three children, born in Miami in 1992, 1993 and 1999. (App. B:6-8).

Property Appraiser denied the Andonies' application for homestead exemption on the ground that "they did not satisfy the requirements of Florida Statute Section 196.031." (App. B:4). Specifically, the Andonies had not established that they were permanent residents of Florida, as required by law.

As of the January 1, 2006, taxing date, David and Ana Andonie were citizens of Honduras, and were in the United States pursuant to an E-2 Investor Visa, a temporary visa issued by the United States government. (App. B:5). David Andonie's affidavit confirmed that "…my wife and I do not claim the right to homestead exemption based on our permanent residence at this location, but upon the fact that our three minor children, who are naturally and legally dependent upon my wife and me, live here on the subject property." (App. C:1).[2]

Andonies filed a petition with the Miami-Dade County Value Adjustment Board ("V.A.B.") contesting the denial of the homestead exemption. The V.A.B.

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[2] The Property Appraiser's Initial Brief before the Third District contains additional factual background regarding the immigration status of the Taxpayers. However, the parties acknowledge, as does the Third District, that "[i]t is undisputed that David and Ana Andonie are legally incapable of qualifying as 'permanent residents' of Miami-Dade County." *Saiz de la Mora v. Andonie*, 51 So. 3d 517, 519 (Fla. 3d DCA 2010) (citing as authority *Juarrero v. McNayr*, 157 So. 2d 79, 81 (Fla. 1963); *DeQuervain v. Desguin*, 927 So. 2d 232, 235 (Fla. 2d DCA 2006); *Alcime v. Bystrom*, 451 So. 2d 1037 (Fla. 3d DCA 1984)); therefore, the additional facts are not set forth herein.

Special Magistrate granted the homestead exemption, finding, "owner father not permanent resident, but children are legal residents." (App. D:1).

**Disposition in the Courts Below**

Pursuant to Sections 194.036 and 194.171, Florida Statutes, Property Appraiser filed an action in the circuit court to contest the V.A.B.'s granting of the homestead exemption for the 2006 tax year. As provided in Section 194.036(3), Florida Statutes, the lower court proceedings were litigated *de novo*. The defendants included the Taxpayers, as well as DOR, a nominal party joined pursuant to Section 194.181(5), Florida Statutes.

Property Appraiser filed his Motion for Summary Judgment, and, in conjunction therewith, filed the affidavit of Angela Neumann, with the attached documentation from the Taxpayers. (App. B:1-10). The Property Appraiser's position was that the Andonies were not permanent residents of the United States; therefore, they were unable to show, as a matter of law, the requisite permanent residence, either for themselves or their minor children.

In opposition, Taxpayers filed the affidavit of David Andonie (App. C:1-2). He stated therein that he was basing his claim of entitlement to exemption on his ownership of the subject property and the "status of my children, as U.S. Citizens legally and naturally dependent on my wife and myself." (App. C:2).

After argument was heard on the merits, Andonies' counsel made an *ore tenus* cross motion for summary judgment, over the objection of Property Appraiser's counsel. At the conclusion of the hearing, the lower court entered a handwritten Order granting relief to the Andonies. (App. E:1). The court deemed the matter to be

> a case of first impression addressing the issue of entitlement *vel non* to homestead exemption from ad valorem property tax where owners of property are foreign nationals not permanent residents of Florida or of the U.S. and minor U.S. born children naturally dependent on owner live on the property.

Property Appraiser appealed the lower court's ruling to the Third District. During the appellate proceedings, the Third District granted DOR's request to realign its position with that of Property Appraiser.

The Third District affirmed, holding that even though the Respondents, as the property owners, could not establish that they were permanent residents, they could establish that their property was the permanent residence of their minor children. The court therefore ruled that the Andonies could obtain the homestead exemption. *Saiz de la Mora v. Andonie*, 51 So. 3d 517, 524-525 (Fla. 3d DCA 2010).

The Third District's opinion noted the court's assumption that DOR, which filed its own brief and whose counsel did not appear at oral argument, found

Property Appraiser's "arguments to be unmeritorious." *Andonie* at 522, n.7. However, an examination of DOR's brief reveals an adoption of all the substantive arguments made by Property Appraiser.[3] Further, as stated by undersigned counsel for Property Appraiser at the commencement of oral argument, DOR chose not to appear and to instead cede its time to Property Appraiser. [4]

Property Appraiser and DOR each timely filed a Motion for Certification of a question of great public importance, and of direct conflict with decisions of other district courts of appeal. The Third District denied the Motion for Certification.

Property Appraiser timely filed a combined Notice of Appeal and Notice to Invoke Discretionary Jurisdiction of the Supreme Court, pursuant to Rule 9.030, subsections (a)(1)(A)(ii) and (a)(2)(A)(ii), (iii), and (iv), Fla. R. App. P. This Court accepted jurisdiction of this case on June 30, 2011. Specifically, the Court

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[3] The only point of disagreement between DOR and Property Appraiser was DOR's request for remand so that a finding could be made by the trial court as to whether the Andonies' minor children were "permanent residents" for purposes of Chapter 196, Florida Statutes. Counsel for both Property Appraiser and, at oral argument, Taxpayers, agreed that the relevant undisputed facts pertaining to the Andonies and their children as contained in the record were sufficient to enable the Third District to apply them to the legal issue of permanent residency. Therefore, remand was unnecessary. *See Bacardi v. De Lindzon*, 728 So. 2d 309, 312 (Fla. 3d DCA 1999), *decision approved*, 845 So. 2d 33 (Fla. 2007).

[4] By operation of Rule 9.020(g)(4), Fla. R. App. P., DOR is considered a Respondent in the proceedings before this Court, as it did not separately seek review of the Third District's opinion.

has indicated that it wishes to review Property Appraiser's position that the Third District's decision: a) invalidates a portion of the ad valorem taxation homestead exemption and b) expressly and directly conflicts with decisions of this Court and other district courts of appeal.

## SUMMARY OF ARGUMENT

This case concerns only the taxation of residential real estate. It is important that this context not be forgotten, as this case does not concern the authority of foreign nationals to own property in Florida, or to receive benefits for which they may qualify, or to care for their children as they see fit. While Respondents' property tax bill may be impacted slightly by this Court's decision, nothing about this case will affect them personally, or their relationship with their children.

Florida's homestead exemption from ad valorem taxation exists for the benefit of its permanent residents. "Permanent residence" is a defined concept for homestead exemption purposes, and should not be confused with mere physical presence or citizenship. Taxpayers, as recipients of temporary visas issued under federal law, admittedly did not qualify on the January 1, 2006, taxing date, as "permanent residents," pursuant to statute as well as this Court's decision in *Juarrero v. McNayr*, 157 So. 2d 79, 81 (Fla. 1963).

The question of first impression before this Court is whether their minor children qualified as "permanent residents," so as to entitle Taxpayers to the homestead exemption. While the homestead exemption statutes set forth criteria to assist property appraisers in determining the permanent residence of applicants/owners, there are no provisions that specifically address how appraisers are to ascertain the permanent residence of their legal or natural dependents.

The Third District held that a mere statement by Taxpayers indicating their intent that the subject property be their children's "permanent residence" was sufficient to qualify it for exemption. This ruling expressly rejects the settled reliance on common law governing this issue by both the Department of Revenue (which promulgates regulations in its role as the agency which supervises the administration of the statewide ad valorem taxation system), and the Attorney General (whose office interprets for the state's property appraisers and tax collectors issues pertaining to ad valorem taxation).

With respect to homestead exemption, the DOR and the Attorney General have historically applied the common law rule set forth in *Beekman v. Beekman*, 53 Fla. 858, 43 So. 923, 924 (Fla. 1907) and *Chisholm v. Chisholm,* 98 Fla. 1196, 125 So. 694, 702 (Fla. 1929). Simply put, the common law presumes that the domicile of a minor is that of his parents.

The Third District agreed that the concepts of "domicile" and "permanent "residence," as defined in the homestead exemption law, overlap. The Third District also acknowledged that the *Beekman* rule is "broadly accurate." Yet, without discussion, the court expressly invalidated Fla. Admin. Code R. 12D-7.014(2), which applies the *Beekman* rule to homestead exemptions, stating that it contravenes the requirements of Article VII, Section 6(a), Florida Constitution, which establishes the right to homestead exemption.

There is nothing in the record to rebut the presumption that the Andonie children's "permanent residence" is Honduras, the domicile of their parents. That the children are United States citizens is not relevant to the determination of their domicile for homestead exemption purposes, because neither citizenship nor physical presence are the tests. Their citizenship will enable them to establish permanent residency in the United States when they reach their majority. But so long as they are minors, living with their parents in an intact family, the usual rules of domicile apply to them, including the rule embodied in Section 196.012(18), which provides "[a] person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred."

Given that no other standard for determining the "permanent residence" of a minor exists in the homestead exemption laws, there was no basis for the Third District's invalidation of the DOR's regulation based on *Beekman*. Further, the court's holding that a property appraiser may not condition the receipt of homestead exemption on the legal status of homeowners whose minor children reside on the property throws into doubt how property appraisers are to reconcile its decision with the *Juarrero* decision, the *Beekman* rule and the provisions of Section 196.012(18).

It is difficult to discern whether the district court intends that its decision be limited to the underlying facts of the case: a) homeowners who are not permanent residents, but are otherwise legally in the United States and b) minor children who are United States citizens. Therefore, this Court's interpretation of ad valorem tax law under this factual scenario is necessary so that consistent applications of the law result.

The Third District also disregarded the constitutional requirement that the homestead exemption be implemented by legislation. In opining that Article VII, Section 6(a) is self-executing, the decision invites challenges to the statutory and regulatory framework under which entitlement to homestead exemptions is determined. Further, the court's rejection of the "actual residency" criterion of

Section 196.031, Florida Statutes – which occurred despite there being no issue or argument in this case regarding this portion of the statute – is premised on a nonexistent conflict between constitutional and statutory provisions that for years have been implemented harmoniously.

Florida's sixty-seven property appraisers are charged with ensuring that the preferential tax treatment afforded to permanent residents by the homestead exemption is extended in a uniform manner, and in strict compliance with its provisions. The Third District's opinion has created confusion in how entitlement to homestead exemptions is to be determined.

Property Appraiser requests that this Court quash the Third District's decision and reinstate his denial of the homestead exemption. Property Appraiser further requests that this Court hold, as a matter of law, that a minor child's permanent residence, for homestead exemption purposes, is the same as his parents' in the absence of evidence to the contrary.

## STANDARD OF REVIEW

The Third District's decision interpreted both constitutional and statutory provisions regarding entitlement to homestead exemption from ad valorem taxation. Therefore, this Court's review will be *de novo*. *Gomez v. Vill. of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010) ("Because this case involves statutory

interpretation, this Court's review is *de novo*."); *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004) ("Although we take into consideration the district court's analysis on the issue, constitutional interpretation, like statutory interpretation, is performed *de novo*." ) Further, citing *Powell*, this Court has confirmed that "[a] court's task in constitutional interpretation follows principles similar to the principles of statutory interpretation." *Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1090 (Fla. 2008).

## ARGUMENT

**TAXPAYERS' PROPERTY WAS NOT ENTITLED TO HOMESTEAD EXEMPTION FROM AD VALOREM TAXATION BECAUSE, ON THE JANUARY 1, 2006, TAXING DATE, NEITHER THE OWNERS NOR THEIR MINOR CHILDREN WERE "PERMANENT RESIDENTS" OF FLORIDA.**

### I. HOMESTEAD EXEMPTION LAWS PROVIDING RELIEF FROM AD VALOREM TAXATION MUST BE STRICTLY CONSTRUED.

With respect to qualifying homeowners, Florida law exempts a certain portion of the property's value in order to reduce the taxes owed. Taxpayers sought this reduction for the 2006 tax year, and it is *only* in this context that Property Appraiser is concerned with the permanent residence status of the Andonies and their minor children.

A homeowner does not have an absolute right to receive an ad valorem tax exemption with respect to his residence. *Zingale v. Powell*, 885 So. 2d at 281 (Fla.

2004), ("[A]rticle VII, section 6 … requires that taxpayers establish the right thereto by following the procedures required by law."); *Horne v. Markham*, 288 So. 2d 196, 199 (Fla. 1973) ("[Article VII, Section 6] clearly provides that taxpayers who otherwise qualify shall be granted an exemption only 'upon establishment of the right thereto in the matter prescribed by law.' ")

Article VII, Section 6 (a), Florida Constitution, establishes the homestead exemption from ad valorem taxation, and provides

> Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon … upon establishment of the right thereto in the manner prescribed by law.[5]

Section 196.031, Florida Statutes, implements the Constitution in the following manner

> Every person who, on January 1, has the legal title or beneficial title in equity to real property in the state and who resides thereon and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, …as defined in s. 6, Art. VII of the State Constitution.

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[5] On the January 1, 2006, taxing date in this case, the provisions of Article VII, Section 6(a) exempted up to $25,000 in residential value. Once the homestead exemption is established, Article VII, Section 4(c), Florida Constitution limits the percentage by which annual assessments of residential property can rise in subsequent years.

In determining that neither the Andonie parents nor the Andonie children were entitled to receive a homestead exemption on their residence for the 2006 tax year, Property Appraiser considered the statutes and regulations relevant to the circumstances presented. In addition to Section 196.031, Florida Statutes, the pertinent portions of the following provisions, which were in effect on the January 1, 2006, taxing date, governed the Property Appraiser's determination, with emphasis added:

1. § 196.012, Fla. Stat. – Definitions:

> (17) "Permanent resident" means a person who has established a permanent residence as defined in subsection (18).
>
> (18) "Permanent residence" means that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the *intention* of returning. A person may have only one permanent residence at a time; and, *once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred*.

2. § 196.015, Fla. Stat.[6] – Permanent residency; factual determination by property appraiser:

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[6] There are several factors listed in Section 196.015, some of which have been amended in recent years. However subsection (4), the provision relevant to the Taxpayers because of their temporary visa status, remains the same. The applicability of the *Juarrero* decision to Taxpayers' situation precluded consideration of the other factors.

Intention to establish a permanent residence in this state is a factual determination to be made, in the first instance, by the property appraiser. Although any one factor is not conclusive of the establishment or nonestablishment of permanent residence, the following are relevant factors that may be considered by the property appraiser in making his or her determination as to the intent of a person claiming a homestead exemption to establish a permanent residence in this state:

. . . .

(4) *The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.*

. . . .

3. Fla. Admin. Code R. 12D-7.007 – Homestead Exemptions – Residence Requirement

(1) For one to make a certain parcel of land his permanent home, he must reside thereon with a present *intention* of living there indefinitely and with no present *intention* of moving therefrom.

. . . .

(3) *A person in this country under a temporary visa cannot meet the requirement of permanent residence or home* and, therefore, cannot claim homestead exemption.

. . . .

4. Fla. Admin. Code R. 12D-7.014 – Civil Rights

(2) An *unmarried minor whose disabilities of non-age have not been removed may not maintain a permanent home away from his parents* such as to entitle him or her to homestead exemption. (<u>Beckman v. Beckman [sic], 43 So. 923 (Fla. 1907)</u>).

These provisions must be analyzed *in pari materia* in order to ensure that legislative intent is effectuated, as directed in *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another."). *See also Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 312 (Fla. 2006), applying *Forsythe* in an ad valorem tax context.

Statutes providing exemption from taxation, including the homestead exemption, must be strictly construed. *See Capital City Country Club, Inc, v. Tucker,* 613 So. 2d 448, 452 (Fla. 1993) ("[I]t is well settled that all property is subject to taxation unless expressly exempt, and exemptions are strictly construed against the party."); *Willens v. Garcia*, 53 So. 3d 1113, 1117 (Fla. 3d DCA 2011) ("[I]t is settled law that exemptions providing relief from taxation must be strictly construed.") (citation omitted); *Karayiannakis v. Nikolits*, 23 So. 3d 844, 846 (Fla. 4th DCA 2009) ("Our holding [that rental property is not entitled to homestead exemption] is supported by public policy, which favors construing tax exceptions and exemptions against the taxpayer.") (citation omitted); *Haddock v. Carmody*, 1 So. 3d 1133, 1137 (Fla. 1st DCA 2009) ("Because the statute at issue involves a property owner's eligibility for homestead tax exemption, we note at the outset that

statutes involving tax exemptions are strictly construed against the taxpayer.") (citation omitted); *DeQuervain v. Desguin*, 927 So. 2d 232 (Fla. 2d DCA 2006) ("[B]ecause the homestead exemption provides relief from an ad valorem tax, we must construe the statute strictly against [the homeowners].")

Strict construction of the homestead exemption laws mandates that the Andonies needed to show more than mere ownership and actual presence to qualify for the exemption. They were required to prove that either they, or their minor children, were "permanent residents," on the taxing date – or, in other words, that they were domiciled in Florida.

The Taxpayers, themselves, admittedly could not make the required showing of permanent residence based on their Honduran domicile. Remaining, then, is the question of first impression regarding whether their minor children could be considered "permanent residents." The Third District incorrectly ruled that the requisite showing had been made. In so holding, the court ignored law applicable to determination of a minor's "permanent residence," and failed to strictly construe the homestead exemption laws.

## II. AS A MATTER OF LAW, MINOR CHILDREN'S "PERMANENT RESIDENCE" IS PRESUMED TO BE THAT OF THEIR PARENTS; THEREFORE, WHERE PARENTS ARE NOT "PERMANENT RESIDENTS" OF FLORIDA, NEITHER ARE THEIR CHILDREN.

### A. "Permanent Residence," For Ad Valorem Tax Purposes, Has The Same Meaning As "Domicile," And Common Law Rules Governing The Domicile Of A Minor Apply.

Section 196.012(18), Florida Statutes, defines "permanent residence" in a manner consistent with the common law concept of "domicile, " including the requirement that the owner intend to make the location his permanent home and the presumption that once a permanent residence is established, it continues until there is proof of a change. The Third District acknowledged that "[a]lthough the concepts of 'residence' and 'domicile' are not interchangeable, they do overlap in some cases. That is so in this case." *Andonie* at 522, n. 4.

"[D]omicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d 29 (1989). *See also Snyder v. McLeon*, 971 So. 2d 166, 169 (Fla. 5th DCA 2007) ("A legal residence or 'domicile' is the place where a person has fixed an abode with the present intention of making it his or her permanent home.") The intent requirement is incorporated into the homestead exemption definition of

"permanent residence." Section 196.012(18), Florida Statutes (" 'Permanent residence' means that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning.")

The notion of "permanent residence" is not to be confused with mere physical residence. As stated by this Court in *Minick v. Minick*, 111 Fla. 469, 149 So. 483, 489 (Fla. 1933)

> 'While the terms 'domicile' and 'residence' are frequently used synonymously, they are not, when accurately used, convertible terms. The former is of more extensive signification and includes, beyond mere physical presence at the particular locality, positive or presumptive proof of an intention to constitute it a permanent abiding place. 'Residence' is of a more temporary character than 'domicile.'

*(citation omitted). See also Weiler v. Weiler*, 861 So. 2d 472, 476-477 (Fla. 5th DCA 2003) ("There is a difference between the terms 'domicile' (sometimes referred to as legal, permanent or primary residence) and 'residence.' ")

*Snyder v. McLeon*, 971 So. 2d at 169, notes, "A person may have several temporary local residences but can have only one legal residence….Once established, a domicile continues until it is superseded by a new one." This element of domicile is also in the statutory definition of "permanent residence." Section 196.012(18), Florida Statutes. ("A person may have only one permanent residence at a time; and, once permanent residence is established in a foreign state

or country, it is presumed to continue until the person shows that change has occurred.")

Additionally, "domicile", or "permanent residence" should not be confused with citizenship. *See, e.g.*, *Hammerstein v. Lyne*, 200 F. 165, 168 (D.C. Mo. 1912), which cited United States Supreme Court precedent in distinguishing American citizenship from state residency

> 'The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.' Slaughterhouse Cases, 16 Wall. 36, 73, 74, 21 L.Ed. 394.

*See also Jones v. Law Firm of Hill and Ponton*, 141 F. Supp. 2d 1349, 1355 (M.D. Fla. 2001) (recognizing United States citizenship as a separate and unrelated element in a diversity case) and *Maldonado v. Allstate Ins. Co.*, 789 So. 2d 464, 467-8 (Fla. 2d DCA 2001) ("the relationship between one's national citizenship and one's residency is tenuous at best.") [7]

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[7] In *Maldonado*, the court held that the statute governing personal injury protection (PIP) benefits to "residents" of the state applied to nonimmigrant aliens. In so holding, the court read the residency requirement narrowly and not as "a

While the requirement of "permanent residence" in the homestead exemption laws is based on traditional notions of "domicile," there are no additional provisions that address how the permanent residence of a minor is to be determined. In circumstances where there is no statutory guidance regarding an issue of domicile, the United States Supreme Court in *Mississippi Band of Choctaw Indians*, 490 U.S. at 48-49, 109 S. Ct. at 1608, has noted, "we find it helpful to borrow established common-law principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme."

Similarly, this Court has relied on common law principles in interpreting statutes, stating

> Statutes in derogation of the common law are to be construed strictly….They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced.

*Carlile v. Game and Fresh Water Fish Commission*, 354 So. 2d 362, 364 (Fla. 1977) (citation omitted). *See also Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) ("Unless a statute unequivocally states that it changes the

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requirement that includes elements of either domicile or citizenship." 789 So. 2d at 470. The PIP statute and the ad valorem exemption statute (which, in defining "residence," does include the intent element of domicile) have different contexts.

common law, or is so repugnant to the common law the two cannot coexist, the statute will not be held to have changed the common law.")

In *Mississippi Band of Choctaw Indians*, 490 U.S. at 48, 109 S. Ct. at 1608, the Court recognized the common law rule of domicile pertaining to minors, stating, "Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." (citation omitted). The Court also noted, in terms relevant to the Andonie children, that "[u]nder these principles, it is entirely logical that '[o]n occasion, a child's domicile of origin will be in a place where the child has never been.'" *Id*. at 48, 1608.

The presumption regarding a minor's domicile can be rebutted in appropriate cases, such as in divorce proceedings resulting in a court-ordered determination of residency, or in cases where guardians are appointed. This is not the Andonies' situation, however. The record is clear that the Andonies are an intact family, all physically residing in the same house. There are no facts which rebut the presumption that the minor children shared their parents' "permanent residence" of Honduras.

### B. The Third District Opinion Expressly And Directly Conflicts With This Court's *Beekman* Decision By Rejecting The Applicability To The Homestead Exemption Of The Common Law Rule Holding That A Minor's "Permanent Residence" Is That Of His Parents.

The Third District described as "broadly accurate" the common law rule that a minor's domicile follows that of the parent, recognized by this Court in *Beekman v. Beekman*, 53 Fla. 858, 43 So. 923, 924 (Fla. 1907) ("Under the laws of Florida the domicile of the father is the domicile of his minor children, and such…disability continues here with all minors, be they male or female, until they arrive at the age of 21 years.") [8] (citations omitted) and *Chisholm v. Chisholm,* 98 Fla. 1196, 125 So. 694, 702 (Fla. 1929) ("…usually the residence of the father establishes the residence of his minor child.") *Andonie* at 521. Yet, the court refused to apply this traditional principle of domicile to the homestead exemption requirement of "permanent residence," stating instead that "…this general common law proposition [is] contravened by the constitutional provision we are called upon to apply in this case," *Andonie* at 521.

As part of its ruling, the court specifically invalidated a DOR regulation and an opinion of the Attorney General, both applying *Beekman* and *Chisholm* as the

[8] Currently, a "minor" includes any person who has not attained the age of 18 years. Section 1.01(13), Florida Statutes (2011).

standard for determining the "permanent residence" of a minor for homestead exemption purposes. The court also rejected case law relying on the *Beekman* rule in interpreting eligibility rules for in-state university tuition rates. *Florida Dep't of Educ. v. Harris*, 338 So. 2d 215, 219 (Fla. 1st DCA 1976) ("To establish a domicile, a person must have a legal capacity to do so…, and an unemancipated minor cannot, of his own volition, select or change his domicile.") (citations omitted).

The Third District, in rejecting the applicability of the *Beekman* line of cases, has created a conflict in the law. *See, e.g., Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 2011 WL 2566399, at *1 (Fla. June 30, 2011), where this Court identified a conflict issue based on the alleged misapplication by the district court of the proper test for determining the retroactivity of a statute. *See also Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981), and its recognition of a sufficient basis for conflict review when the district court discusses the legal principles applied, even if no conflict is explicitly identified.

It is difficult to discern the rationale for the Third District's statement that the *Beekman* rule contravenes Article VII, Section 6(a), when the provision merely references "permanent residence" of the owner, or "another legally or naturally dependent upon the owner…." Neither the Constitution nor the implementing

statutes provide an alternative standard for determining the "permanent residence" of a minor.

Further, the court's attempt to distinguish *Beekman, Chisholm* and *Harris*, based on their contexts is not compelling. The general common law rule recognized by Florida courts in the *Beekman* line of cases has been applied in many contexts where courts were asked to interpret statutory domicile requirements as they applied to minors. The United States Supreme Court in *Mississippi Band of Choctaw Indians*, applied it regarding adoption under the Indian Child Welfare Act. *See also Lepe-Guitron v. Immigration and Naturalization Serv.*, 16 F. 3d 1021, 1025 (9th Cir. 1994) (interpreting a minor's domicile under federal immigration law by reference to the common law rule enunciated in *Mississippi Band of Choctaw Indians*); *Rosado-Marrero v. Hosp. San Pablo, Inc.*, 927 F. Supp. 576, 588 (D. P.R. 1996) (applying the common law rule to determine whether the requirements of the federal diversity jurisdiction statute had been met in a minor's personal injury action)*; In re Watson*, 99 F. Supp. 49, 53 (D. Ark. 1951) (applying the common law rule to determine jurisdiction of a bankruptcy court). The role of the common law rule is to aid the particular court, in the absence of specific standards or criteria, in determining the domicile of the minor child or children involved in the case. Because there are no

specific standards or criteria in Florida's homestead exemption laws, this rule, embodied in the *Beekman* line of cases, should have been the basis of the Third District's analysis.

Most significantly, the Third District rejected recognition by the Department of Revenue and Florida's Attorney General of the *Beekman* rule as controlling the determination of the "permanent residence" of a minor. The Third District's opinion erroneously invalidated these administrative and executive interpretations of applicable law.

DOR has enacted Fla. Admin. Code R. 12D-7.014 (2), providing that an unmarried minor "may not maintain a permanent home away from his parents such as to entitle him or her to homestead exemption," and cites *Beekman* as its authority. The enactment of this regulation was pursuant to the Florida Legislature's mandate that the Department of Revenue "prescribe rules and regulations for the assessing and collecting of taxes, and such rules and regulations shall be followed by the property appraisers, tax collectors, clerks of the circuit court, and value adjustment boards." Section 195.027(1), Florida Statutes, in pertinent part. This administrative construction of the homestead exemption statutes by the agency charged with their administration is entitled to great weight, and should not be overturned unless clearly erroneous. *Dep't. of Ins. v. Southeast*

*Volusia Hosp. Dist.*, 438 So. 2d 815, 820 (Fla. 1983), *appeal dismissed*, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984). *See also Volusia Jai-Alai, Inc. v. McKay*, 90 So. 2d 334, 340 (Fla. 1956), which cautions against disregarding administrative interpretations of legislative enactments.

The Third District found that "[Rule 12D-7.014 (2)] is as much in conflict with the express language of article VII, section 6 (a), as is the common law principal previously discussed…." *Andonie* at 522. There is no support in the Third District's opinion for this invalidation of the DOR's regulation – which was not challenged by either party[9] – as neither the Constitution nor the ad valorem homestead provides a different standard for determining the "permanent residence" of a minor.

Likewise, Florida's Attorney General has on numerous occasions recognized the *Beekman* rule in the context of homestead exemptions. These opinions are entitled to great weight, as noted in *Lowry v. Parole and Probation Com'n*,

[9] The Third District noted that that the "conflict" between the Rule 12D-7.014 (2) and the Constitution was so obvious "that the Department of Revenue itself makes no defense of the rule." *Andonie* at 522. The court's observation stemmed from the DOR's nonappearance at the oral argument. *Andonie* at 522, n. 7. However, the validity of this rule was not an issue raised by the parties in their briefs. Therefore, DOR would have had no way of knowing prior to the oral argument – and its decision to cede its time to co-Appellant Property Appraiser – that the court would question the regulation's validity.

473 So. 2d 1248, 1249 (Fla. 1985), citing *Beverly v. Div. of Beverage of Dep't of Bus. Regulation*, 282 So. 2d 657, 660 (Fla. 1st DCA 1973) ("While the official opinions of the Attorney General of the State of Florida are not legally binding upon the courts of this State, they are entitled to great weight in construing the law of this State.")

The Third District specifically took issue with Op. Att'y Gen. Fla. 82-27 (1982), which discusses a dependent's permanent residence for ad valorem tax purposes. The court stated, "Because the opinion is based upon the same faulty application of *Beekman* and *Chisholm*, as previously discussed, we do not find the opinion persuasive." *Andonie* at 523.

While the thrust of Op. Att'y Gen. Fla. 82-27 deals with a distinguishable factual issue – the entitlement of an out of state property owner to a Florida homestead exemption on residential property purchased as a residence for his *adult* child who was attending college in Florida – the Attorney General cautioned that the exemption would *not* be available were the child still a minor.

> However, where the dependent child is a minor, it appears to be a general rule of law in the State of Florida that, in the absence of a divorce of the parents, or a guardianship, the permanent residence of a dependent minor is the same as his father. Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694, 702 (1929); Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (1907); AGO 069–37; AGO 063–47; 20 Fla.Jur.2d Domicile and Residence, §§ 21–22. Therefore, if the parent's permanent residence was in another state, the permanent residence of

> his or her dependent minor child would also be considered to be that other state, notwithstanding the fact that the minor child may actually live on the Florida property for substantial portions of the year. Furthermore, notwithstanding the fact that the age of majority in Florida is 18 (§§ 1.01[14] and 743.07, F.S.), the question of whether the disability of nonage has been removed so that a person may formulate the intent necessary to effect a change in permanent residence must be answered by the law of the state of domicile. Clingan v. Duffey, 381 So.2d 303, 304 (2 D.C.A. Fla., 1980); 10 Fla.Jur.2d Conflict of Laws, § 6 (1979); 16 Am.Jur.2d Conflict of Laws, § 12 (1979). Thus, if an 18 year old student who resides with his parents in a state where the age of majority is higher than 18, enters Florida to attend college, he cannot legally form the necessary intent to change his permanent residence to Florida until he has attained the age of majority under the law of his original domiciliary state. Where the student has attained the appropriate age of majority, he does then have the capacity to change his permanent residence to Florida.

*Id.* at *2-3. The opinion further stated that if a parent did establish a permanent residence in Florida, but then returned to a former state of residence leaving a minor child to live on the property while attending school,

> those facts would appear to constitute an abandonment of the permanent residence by the parent and *likewise by the minor child since the new permanent residence of the parent would become that of the minor child in spite of the child continuing to live on the Florida property*. If the homestead is abandoned, the exemption for ad valorem taxation may no longer be claimed.

*Id.* at *4. (emphasis added).

The Attorney General has through the years recognized the applicability of *Beekman* and *Chisholm* in numerous other opinions. While it should be noted that

these opinions all deal with different factual scenarios, and different versions of Florida statutes in effect at the time of their writing, the reliance on *Beekman* and *Chisholm*, where appropriate, has never wavered. Moreover, the reliance on *Beekman* and *Chisholm* spans the years before *and* after the 1968 amendments to Article VII, Section 6 (a), Florida Constitution. *See* Op. Att'y Gen. Fla. 92-0046 (1992) ("Under Florida law the minor child's permanent residence is the same as the person who is the legal guardian of the minor child," citing *Chisholm*); Op. Att'y Gen. Fla. 91-0035 (1991) ("The minor child's permanent residence is the same as the persons who are the parents or legal guardians of the minor child," citing *Chisholm*); Op. Att'y Gen. Fla. 69-37 (1937) ("…if the student is a minor, then the general rule in this state that the domicile of a minor child, during minority, follows that of its parents should be considered," citing *Chisholm*); Op. Att'y Gen. Fla. 63-47 (1963) ("…in the light of the foregoing authorities…the unmarried minor [is] unable to establish a domicile separate and apart from that of his father, or mother in case of the death or other legal disability of the father or surviving parent," citing *Beekman* and *Chisholm*).[10]

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[10] Op. Att'y Gen. Fla. 63-10 (1963), while citing *Chisholm*, reaches a different result where homestead was granted in the case of minor citizen children of Cuban refugees. However, the opinion is based on two significant facts particular to the situation reviewed, and distinguishable from the circumstances before this Court. The opinion was premised on the assumption that title to the subject property

The *Beekman* rule is the only standard that has been used by the DOR and the Attorney General when the permanent residence of a minor is at issue. The Third District was wrong to summarily disregard the role that these authorities play in the determination of entitlement to the homestead exemption.

### C. Parental Intent That Florida Property Be Considered The Permanent Residence Of Their Minor Children, Without More, Is Insufficient To Change The Legal Domicile Of The Children.

Instead of affirming the *Beekman* rule for determining the "permanent residence" of a minor, the Third District relied instead on the statements contained in the affidavit of David Andonie describing the subject property as the "permanent residence" of his minor children. (App. C:1-2.) The court concluded that "these Honduran parents have adequately declared that whatever may become of their ability to remain in the United States in the future, they fully plan and intend for their U.S.-born children to 'permanently resid[e]' in the United States." *Andonie* at 520.

Mere expressions of intent, however, do not establish domicile. A person can have only one domicile, and, once established, the domicile continues until a new one supersedes it. *Snyder v. McLeod*, 971 So. 2d at 169; *Keveloh v. Carter*,

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would be conveyed to the minor children. More importantly, the Cuban refugee parents, under federal law then in effect, were deemed to have no domicile.

699 So. 2d 285, 288 (Fla. 5th DCA 1997). If the Taxpayers intended Florida to be the "permanent residence" of their minor children, they needed to have met the burden of proving that, as of the January 1, 2006, taxing date, "positive overt acts" had been taken to establish Florida as the children's new domicile, since Honduras was presumed to be their original domicile by operation of law. *See Snyder* at 169-170 (burden of proof is on party asserting the acquisition of a new domicile to show "positive overt acts," along with the "good-faith intention" to establish it.)

The Andonies, in accepting an E-2 business investor visa, understood that their actual residence in the United States was deemed temporary. The Third District pondered whether the Andonies' assertions that they intended Florida to be the "permanent residence" of their minor children, even while acknowledging the temporary nature of their own stay, "are congruous with the laws of nature." *Andonie* at 521.

Property Appraiser submits that such assertions are incongruous not only with the "laws of nature," but also with the laws of Florida, absent a showing that, by the taxing date, legal arrangements to relinquish the care and control of their children to a guardian had been made in the event of their departure. This State does not allow children to be without the supervision of an adult with legal authority to act for them. *See, e.g.,* Section 39.401(1) (b) (3), Florida Statutes,

which provides that a child can be considered a dependent of the state if he or she "has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care." *See also* Chapter 751, Florida Statutes, which sets forth procedures authorizing extended family members to take temporary custody of minor children.

Therefore, it is appropriate for a property appraiser to reject mere statements of intent regarding a child's "permanent residence" in the absence of evidence that the change from the original domicile has been formally effectuated. As noted in *Beekman*, at 862, "…the mere intention to acquire a new domicile, unaccompanied by an actual removal, avails nothing…."

Further, the rejection of mere "intent" as the basis of entitlement to exemption is consistent with general ad valorem taxation exemption law. By way of analogy, *Smith v. Am. Lung Ass'n of Gulf-Coast Florida, Inc.*, 870 So. 2d 241, 242 (Fla. 2d DCA 2004), holds, with respect to charitable use of property, "As the supreme court has made clear, it is the actual use of the property as of the assessment date, rather than its intended future use, that controls the determination of whether the property qualifies for exemption from ad valorem taxes. *Cedars of Lebanon*, 355 So. 2d at 1204." Similarly, various exemption statutes require that "affirmative steps" – usually architectural plans, permits, site preparation, and

other measures taken to evidence the commitment of the taxpayer to the exempt use – be proven with respect to an intended use before an exemption can be granted. *See, e.g.*, Section 196.196(3), Florida Statutes (affirmative steps evidencing religious use); Section 196.196 (5), Florida Statutes (affirmative steps evidencing affordable housing use); Section 196.198, Florida Statutes (affirmative steps evidencing educational use).

Florida law regarding ad valorem tax exemptions is consistent in its approach to exempt use. The statutes must be strictly construed. The actual or intended use must be proven by specific acts. The Third District was wrong when it stated that "The Property Appraiser may not condition this benefit on the legal status of the Andonies in the United States." *Andonie* at 522. If the legal status of the Taxpayers prevented them from being considered permanent residents, then they needed to prove that their children's permanent residence – presumed to be the same as theirs – had, in fact, been changed to Florida. The Property Appraiser's duty was to ascertain that the "permanent residence" of the owner or the owner's dependents was proven, not merely intended.

## III. ARTICLE VII, SECTION 6 (a), FLORIDA CONSTITUTION, WHICH ESTABLISHES THE RIGHT OF FLORIDA'S PERMANENT RESIDENTS TO THE HOMESTEAD EXEMPTION FROM AD VALOREM TAXATION, IS NOT SELF-EXECUTING AND REQUIRES IMPLEMENTING LEGISLATION.

The Third District's opinion *sua sponte* addresses certain issues that were not identified or discussed by either the Taxpayers or Property Appraiser.[11] First, on the theory that Article VII, Section (6) (a) is self-executing, the Third District relied on the Constitution, rather than the implementing statutes. *Andonie* at 522, n. 5. Second, the Third District invalidated language in Section 196.031(1) (a), Florida Statutes, requiring that the homestead exemption applicant "reside on" the subject property, stating that it was an "unenforceable appendage" to the statute. *Andonie* at 524. The discussion below with respect to these issues is the first time they have been addressed on the merits by either party.

### A. The Third District, In Opining That The Homestead Exemption Provision Is Self-Executing, Expressly and Directly Conflicts With The *Haddock* Decision, Which Recognizes The Constitution's Requirement That Entitlement To The Exemption Be "In The Manner Prescribed By Law."

Article VII, Section 6 (a), Florida Constitution, explicitly mandates that the homestead exemption from ad valorem taxation shall only be "…upon

[11] Additionally, as discussed in the previous section, neither party had challenged the DOR regulation that the Third District invalidated.

establishment of right thereto in the manner prescribed by law." The Third District, in nullifying a portion of the homestead exemption statute because of differences in the wording between the statute and the Constitution, also characterized Article VII, Section 6 (a) as "indubitably a self-executing provision…." *Andonie* at 522, n. 5.

This characterization is critical, as it signifies, if correct, that the constitutional provision "…may be determined, enjoyed or protected without the aid of legislative enactment." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). The Third District recognized, however, by its "*but see*" citation, that there was conflict on this issue with *Haddock v. Carmody*, 1 So. 3d 1133, 1135-36 (Fla. 1st DCA 2009). *Haddock* held that Article VII, Section 6 (a) is not self-executing, and noted that the appellants in that case

> properly point out that the Florida Supreme Court has held that a taxpayer's right to claim the homestead exemption is not self-executing since Article VII, section 6 (a), conditions exemption upon establishment of the right in accordance with the manner prescribed by law. *Horne v. Markham,* 288 So.2d 196, 199 (Fla. 1973).

*See also Zingale v. Powell*, 85 So. 2d 277, 284 (Fla. 2004), which recognized that Article VII, Section 6 (a) conditions the right to homestead exemption on compliance with criteria established by the Legislature. Because Article VII, Section 6 (a) requires legislative enactments in furtherance of its purposes, the

provision is not self-executing. *See, e.g., Barley v. S. Fla. Water Mgmt. Dist.*, 823 So. 2d 73, 80 (Fla. 2002); *St. John Med. Plans, Inc. v. Gutman*, 721 So. 2d 717, 719-720 (Fla. 1998).[12]

There are numerous statutes in Chapter 196, Florida Statutes, and numerous regulations in Chapter 12D of the Florida Administrative Code, implementing the homestead exemption provisions of the Constitution, which require, but do not define, terms relating to ownership and residence criteria. The specifics of the requirements for application, the definitions of terms such as "permanent residence," the scope of the exemption, how the exemption is granted or lost, must all be codified so that the state's property appraisers can make consistent determinations regarding eligibility. The drafters of the Constitution understood that, and therefore included the requirement of implementing legislation.

The Third District is mistaken in describing Article VII, Section 6 (a) as self-executing. Such a characterization could make the job of property appraisers

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[12] *Compare* Article VII, Section 6 (a), Florida Constitution, *with* subsection 6 (e), which establishes an ad valorem tax discount for certain disabled veterans over the age of 65. Subsection (e) contains specific residence criteria, none of which are dependent upon "permanent residence." It also specifies how the discount is to be calculated, how application is to be made, what paperwork is necessary to support the application, and what the property appraiser must do if the request is denied. It allows the Legislature to enact a law waiving the annual application requirement in subsequent years. This subsection is specifically deemed to be "self-executing, and does not require implementing legislation."

increasingly difficult if allowed to stand, as it could encourage challenges to many of the laws and regulations that have traditionally provided necessary guidance during the assessment process.

### B. Section 196.031, Florida Statutes, Consistently Implements The Constitution, And The Third District Erroneously And Unnecessarily Rejected Portions Of The Statute As Unenforceable.

There are three components of entitlement to homestead exemption set forth in Section 196.031, Florida Statutes: a) ownership (legal or beneficial title), b) actual residence on the property and c) good faith permanent residence by the owner or his dependent(s). This case involves only the third component – "permanent residence."

The Third District, however, analyzed as well the second component – actual residence – though this criterion was not at issue in this case. To put the court's analysis in context, the relevant portion of Section 196.031 provides in subsection (1) (a), with emphasis added

> Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and *who resides thereon* and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person [is entitled to the homestead exemption]

The court compared the statutory language, which is based on a pre-1968 version of the Constitution, to the current language of Article VII, Section (6)(a),

which reflects the 1968 amendment. The current language reads in pertinent part, with emphasis added

> Every person who has the legal or equitable title to real estate and *maintains thereon* the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon … upon establishment of the right thereto in the manner prescribed by law.

The court decided that the phrase "who resides thereon" was "a vestige of the past, probably inadvertently carried forward into the modern statutory scheme relating to section 196.031, and, thus, legally ineffective." *Andonie* at 523. The court stated further that because Section 196.031 contained this "unenforceable" language, "we decline to be guided by the statute." *Andonie* at 524.

The Third District's decision effectively invalidates a portion of the homestead exemption statute, and it has done so erroneously in contravention of established principles of statutory construction. Where constitutional provisions are not self-executing, such as the homestead exemption provision, " 'all existing statutes which are consistent with the amended Constitution will remain in effect until repealed….' " *Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 281-282 (Fla. 1997), citing *In re Advisory Opinion to the Governo*r, 132 So. 2d 163, 169 (Fla. 1961) ("Implied repeal of statutes by later constitutional provisions is not favored…. if by any fair course of reasoning

the statute can be harmonized or reconciled with the new constitutional provision, then it is the duty of the courts to do so.") (citations omitted).

This Court's opinion in *The Florida Bar v. Sibley*, 995 So. 2d 346, 349-350 (Fla. 2008), provides a worthwhile analogy. In *Sibley*, this Court reviewed alleged discrepancies between the Florida Constitution's form of oath for judicial officers, and the slightly different statutory version. The Court approved reliance on the statutory form. *Sibley* reaffirmed that "[t]o the extent possible, courts have a duty to construe a statute in such a way as to avoid conflict with the Constitution…Additionally,…courts should be guided by the statute's substance and manner of operation, rather than by its form." *Id*. at 350. (citations omitted).

The test as to whether the "resides on" language in Section 196.031 is valid, therefore, is whether it significantly conflicts with the current provisions of Article VII, Section 6 (a). The Third District should have, but did not, apply this standard.

It is not appropriate to disregard statutory language "…unless it can be said of the statute that it positively and certainly is opposed to the Constitution." *Greater Loretta Imp. Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 670 (Fla. 1970). *See also Mendenhall v. State*, 48 So. 3d 740, 749 (Fla. 2010) (" '…words in a statute should not be construed as mere surplusage.' ") (citation omitted); *Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 215 (Fla. 2009) (" '[W]ords in a statute are

not to be construed as superfluous if a reasonable construction exists that gives effect to all words.' ") (citation omitted).

In this case, the comparison between the Constitution's current requirement that an owner "maintain thereon" his permanent residence and the statute's requirement that the owner "reside thereon and make the same his permanent residence," reveals that the two phrases are not in conflict, either contextually or in the way the provisions have been interpreted. After all, the very definition of "homestead" assumes occupancy – "The house, outbuildings, and adjoining land owned *and occupied* by a person or family as a residence." Black's Law Dictionary (9th ed. 2009), homestead. (emphasis added).

Additionally, the administrative construction of the homestead exemption laws has ensured logical application and consistency. Fla. Admin. Code R. 12D-7.007 (1) and (4), when read together, require actual residence, but recognize that there may be situations where the owner is not physically present.[13] This certainly can be the situation in cases of divorce, military service, extended hospitalization,

[13] As noted previously, 12D-7.007(1) requires actual residence with a "present intention" of remaining indefinitely and no "present intention" of moving. Subsection (4) applies to owners who are not actually residing on the property, but whose dependents are living there. It is this subsection (4) which ensures that homestead exemption is not abandoned if an owner must be absent due to extenuating circumstances. The Andonies all live on the property; subsection (4) does not apply to them.

etc. *See, e.g.*, Op. Att'y Gen. Fla. 2002-19 (2002), in which the Attorney General discussed homestead exemption and its availability under certain circumstances for members of the military. The Attorney General reached his conclusion – that physical presence is not always necessary – based on both Section 196.031 and Article VII, Section 6 (a), without noting any conflict between the two.

Interestingly, the Third District, while diminishing the significance of Op. Att'y Gen. Fla. 82-27 (1982), cites to it as evidence that the "enforcing authorities" do not recognize the "resides thereon" requirement. *Andonie* at 524. However, the opinion does confirm that if a minor resides on the property and the owner does not, there will not be entitlement to the exemption, based on the *Beekman* rule. Therefore, the Third District's position that there is no longer consideration, including by the Attorney General, of the "who resides on" portion of the homestead exemption statute is not accurate. *See Andonie* at 524. *See also Higgs v. Warrick*, 994 So. 2d 492, 493 (Fla. 3d DCA 2008); *Nolte v. White*, 784 So. 2d 493 (Fla. 4th DCA 2001); *Robbins v. Welbaum*, 664 So. 2d 1, 2 (Fla. 3d DCA 1995), which exemplify the need to look to the "resides thereon" criterion when dealing with the thorny ownership and actual residence issues created by various trust mechanisms.

The Third District decision is premised on the assumption that the "resides on" language is nothing more than an oversight, albeit one that renders the statute irrelevant to the analysis of the case at hand. This assumption is not borne out by the history of Section 196.031, which has been amended twenty-seven times since the 1968 revision of Article VII, Section 6 (a).[14] This Court must presume that the Legislature had knowledge of the laws when each revision to Section 196.031 was enacted. *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 9 (Fla. 2004). The *Knowles* decision further explains that "'the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so.'" *Id.* at 9 (citation omitted).

This Court's opinion in *Bronson v. State*, 83 So. 2d 849, 850 (Fla. 1956) is instructive in this regard. In *Bronson*, the Court rejected an argument in a case involving the Game and Fresh Water Commission that statutory language first

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[14] The amendments to Section 196.031, and its predecessors, are found in ss. 1, 2, ch. 17060, 1935; CGL 1936 Supp. 897(2); s. 1, ch. 67-339; ss. 1, 2, ch. 69-55; ss. 1, 3, ch. 71-309; s. 1, ch. 72-372; s. 1, ch. 72-373; s. 9, ch. 74-227; s. 1, ch. 74-264; s. 1, ch. 77-102; s. 3, ch. 79-332; s. 4, ch. 80-261; s. 10, ch. 80-274; s. 3, ch. 81-219; s. 9, ch. 81-308; s. 11, ch. 82-208; ss. 24, 80, ch. 82-226; s. 1, ch. 84-327; s. 1, ch. 85-232; s. 5, ch. 92-32; s. 1, ch. 93-65; s. 10, ch. 93-132; ss. 33, 34, ch. 94-353; s. 1473, ch. 95-147; s. 2, ch. 2001-204; s. 908, ch. 2002-387; s. 2, ch. 2006-311; s. 6, ch. 2007-339; s. 8, ch. 2008-173; s. 1, ch. 2010-176.

enacted before a constitutional amendment, and remaining afterwards, was ineffective. The Court reasoned

> This contention is based on the provision in the amendment that the legislature might enact laws 'in aid of, but not inconsistent with, the provisions' of the amendment, and the declaration that all inconsistent laws were ineffective. We find no merit in this position. The statute was, in our opinion, consistent with the amendment and an aid to the Commission and its agents in the performance of the duties imposed on them. Repeatedly since the adoption of the amendment the legislature has reenacted the statute, so plainly it was considered by that body that it aided the Commission and harmonized with the amendment. We agree.

*Id.* at 850.

There was no need for the Third District to opine on the "resides on" language in the case, much less invalidate that portion of the homestead exemption statute. It is clear that subsequent legislatures, Florida's courts, the Attorney General, and the DOR have all relied upon the current statutory language without challenge, reconfirming that Article VII, Section 6 (a) and Section 196.031 (1) (a) harmoniously implement Florida's homestead exemption from ad valorem taxation.

## CONCLUSION

Based on the arguments above, Petitioner, Miami-Dade County Property Appraiser Pedro J. Garcia, requests that this Court quash the decision of the Third District Court of Appeal and uphold the Property Appraiser's denial of Respondents Andonies' homestead exemption application, based upon the Andonies' inability, as a matter of law, to show that either they or their minor children were "permanent residents" as required by Florida law. Property Appraiser further requests that this Court hold, as a matter of law, that a minor child's permanent residence, for homestead exemption purposes, is that of his or her parents in the absence of evidence to the contrary.

Respectfully submitted,

R. A. CUEVAS, JR.
Miami-Dade County Attorney
111 N.W. First Street, Suite 2800
Miami, Florida 33128
Telephone: 305-375-5151
Facsimile: 305-375-5611

By:________________________
Melinda S. Thornton
Assistant County Attorney
Fla. Bar No. 261262

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of *Petitioner's Initial Brief on the Merits* was served by Federal Express on August 23, 2011 to the **Florida Supreme Court**, and has been sent by U.S. Mail to the following: **DANIEL A. WEISS, ESQ.**, Tannebaum Weiss, PL, Counsel for Respondents David and Ana Andonie, Museum Tower, 150 West Flagler Street, PH 2850, Miami, FL 33130; **KENNETH P. KAZOURI, ESQ.** and **JEFFREY S. ELKINS, ESQ.**, DeBeaubien Knight Simmins, et al., 332 N. Magnolia Avenue, Orlando, FL 32801-1609; **THOMAS M. FINDLEY, ESQ**. and **ROBERT J. TELFER, III, ESQ.**, Messer Caparello & Self, P. O. Box 15579, Tallahassee, FL 32317-5579; **LOREN E. LEVY, ESQ.** and **ANA CRISTINA TORRES, ESQ.,** The Levy Law Firm, 1828 Riggins Lane, Tallahassee, FL 32308-4885; and **JOSEPH C. MELLICHAMP, III, ESQ.**, Office of the Attorney General, 400 S. Monroe St., PL-01, Tallahassee, FL 32399-6536.

By:_________________________
Melinda S. Thornton
Assistant County Attorney

## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been generated in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

By:________________________
Melinda S. Thornton
Assistant County Attorney