

A PRIMER ON FLORIDA HOMESTEAD LAW

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I. INTRODUCTION

- Florida's first Constitution was adopted in 1868 and contained homestead provisions. The relevant provisions, which have been revised over the years, are now found in Article X, §4 of the Florida Constitution. Those provisions have three basic components in Florida:

1. Exemption from forced sale.
2. Inurement of the exemption upon death of owner.
3. Restrictions on devise of homestead.

- While different concepts, they serve the same purpose of protecting the family home. see *McKean v. Warburton*, 919 So.2d 341 (Fla. 2005), which provides,

The public policy furthered by a homestead exemption is to 'promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of the financial misfortune and the demands of creditors who have given credit under such law.'

- The general framework regarding the three concepts described above is found in Article X, §4 of the Florida Constitution and over the years those basic concepts have been somewhat developed through legislation contained in Chapter 732 and Chapter 733 of the Florida Statutes.
- While the Constitution and the Florida Statutes provide a general framework for homestead issues, there are many issues that are left unresolved and the courts have had to fill in the gaps.

- The lack of direction in the Florida Constitution and Florida Statutes has led to many headaches for attorneys and fiduciaries when faced with a homestead in an estate or trust administration.
- The goal of this outline is to provide you with the general background of the homestead provisions and then review the most important cases regarding homestead property in order to provide you with the guidance and the confidence to handle the legal chameleon that is homestead.

II. CONSTITUTION AND STATUTES

- The general framework regarding homestead property for purposes of probate and trust administration is contained in Article X, §4 of the Florida Constitution and in Chapter 732 and Chapter 733 of the Florida Statutes.
- In order to gain an understanding of homestead law, you must first obtain an understanding of the homestead “basics”.

A. Article X, §4 of the Florida Constitution:

SECTION 4. Homestead; exemptions.

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

. . .

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there

be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

- Article X, §4(a) allows an exemption from forced sale for a real property homestead owned by a natural person. Subsection 4(b) provides that the exemption shall inure to the decedent's heirs and Subsection (c) imposes restrictions on the devise of that property.

B. F.S. § 731.201(32). General definitions

(32) "Protected homestead" means the property described in [s. 4\(a\)\(1\), Art. X of the State Constitution](#) on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under [s. 4\(b\), Art. X of the State Constitution](#). For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship is not protected homestead.

C. F.S. § 732.401. Descent of homestead

(1) If not devised as authorized by law and the Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

(a) The right of election may be exercised:

1. By the surviving spouse; or

2. With the approval of a court having jurisdiction of the real property, by an attorney in

fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.

(b) The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).

(c) A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election.

(d) Once made, the election is irrevocable.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:

[Statutory Notice Omitted]

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

(5) This section does not apply to property that the decedent owned in tenancy by the entireties or in joint tenancy with rights of survivorship.

D. F.S. 732.4015. Devise of Homestead

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

(2) For the purposes of subsection (1), the term:

(a) "Owner" includes the grantor of a trust described in [s. 733.707\(3\)](#) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.

(b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

(3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

E. F.S. 732.4017. Inter Vivos Transfer of Homestead Property

(1) If the owner of homestead property transfers an interest in that property, including a transfer in trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of [s. 731.201\(10\)](#) or [s. 732.4015](#), and the interest transferred does not descend as provided in [s. 732.401](#) if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.

(2) As used in this section, the term "transfer in trust" refers to a trust under which the transferor of the homestead property, alone or in conjunction with another

person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor's lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate or exercised to discharge the transferor's legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.

(3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:

(a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or

(c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.

(4) It is the intent of the Legislature that this section clarify existing law.

F. F.S. 733.607. Possession of Estate

(1) Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead . . .

G. F.S. 733.608. General Power of the Personal Representative

(1) All real and personal property of the decedent, except the protected homestead, within this state and the rents, income, issues, and profits from it shall be assets in the hands of the personal representative:

(a) For the payment of devises, family allowance, elective share, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate.

(b) To enforce contribution and equalize advancement.

(c) For distribution.

(2) If property that reasonably appears to the personal representative to be protected homestead is not occupied by a person who appears to have an interest in the property, the personal representative is authorized, but not required, to take possession of that property for the limited purpose of preserving, insuring, and protecting it for the person having an interest in the property, pending a determination of its homestead status. If the personal representative takes possession of that property, any rents and revenues may be collected by the personal representative for the account of the heir or devisee, but the personal representative shall have no duty to rent or otherwise make the property productive.

(3) If the personal representative expends funds or incurs obligations to preserve, maintain, insure, or protect the property referenced in subsection (2), the personal representative shall be entitled to a lien on that property and its revenues to secure repayment of those expenditures and obligations incurred. These expenditures and obligations incurred, including, but not limited to, fees and costs, shall constitute a debt owed to the personal representative that is charged against and which may be secured by a lien on the protected homestead, as provided in this section. The debt shall include any amounts paid for these purposes after the decedent's death and prior to the personal representative's appointment to the extent later ratified by the personal representative in the court proceeding provided for in this section.

(a) On the petition of the personal representative or any interested person, the court having jurisdiction of the administration of the decedent's estate shall adjudicate the amount of the debt after formal notice to the persons appearing to have an interest in the property.

(b) The persons having an interest in the protected homestead shall have no personal liability for the repayment of the above noted debt. The personal representative may enforce payment of the debt through any of the following methods:

1. By foreclosure of the lien as provided in this section;

2. By offset of the debt against any other property in the personal representative's possession that otherwise would be distributable to any person having an interest in the protected homestead, but only to the extent of the fraction of the total debt owed to the personal representative the numerator of which is the value of that person's interest in the protected homestead and the denominator of which is the total value of the protected homestead; or

3. By offset of the debt against the revenues from the protected homestead received by the personal representative.

(4) The personal representative's lien shall attach to the property and take priority as of the date and time a notice of that lien is recorded in the official records of the county where that property is located, and the lien may secure expenditures and obligations incurred, including, but not limited to, fees and costs made before or after recording the notice. The notice of lien may be recorded before adjudicating the amount of the debt. The notice of lien shall also be filed in the probate proceeding, but failure to do so does not affect the validity of the lien. A copy of the notice of lien shall be served in the manner provided for service of formal notice upon each person appearing to have an interest in the property. The notice of lien must state:

(a) The name and address of the personal representative and the personal representative's attorney;

(b) The legal description of the property;

(c) The name of the decedent and also, to the extent known to the personal representative, the name and address of each person appearing to have an interest in the property; and

(d) That the personal representative has expended or is obligated to expend funds to preserve, maintain, insure, and protect the property and that the lien stands as

security for recovery of those expenditures and obligations incurred, including, but not limited to, fees and costs.

Substantial compliance with the foregoing provisions renders the notice in comportment with this section.

(5) The lien shall terminate upon the earliest of:

(a) Recording a satisfaction or release signed by the personal representative in the official records of the county where the property is located;

(b) The discharge of the personal representative when the estate administration is complete;

(c) One year from the recording of the lien in the official records unless a proceeding to determine the debt or enforce the lien has been filed; or

(d) The entry of an order releasing the lien.

(6) Within 14 days after receipt of the written request of any interested person, the personal representative shall deliver to the requesting person at a place designated in the written request an estoppel letter setting forth the unpaid balance of the debt secured by the lien referred to in this section. After complete satisfaction of the debt secured by the lien, the personal representative shall record within 30 days after complete payment, a satisfaction of the lien in the official records of the county where the property is located. If a judicial proceeding is necessary to compel compliance with the provisions of this subsection, the prevailing party shall be entitled to an award of attorney's fees and costs.

(7) The lien created by this section may be foreclosed in the manner of foreclosing a mortgage under the provisions of chapter 702.

(8) In any action for enforcement of the debt described in this section, the court shall award taxable costs as in chancery actions, including reasonable attorney's fees.

(9) A personal representative entitled to recover a debt for expenditures and obligations incurred, including, but not limited to, fees and costs, under this section may be relieved of the duty to enforce collection by an order of the court finding:

(a) That the estimated court costs and attorney's fees in collecting the debt will approximate or exceed the amount of the recovery; or

(b) That it is impracticable to enforce collection in view of the improbability of collection.

(10) A personal representative shall not be liable for failure to attempt to enforce collection of the debt if the personal representative reasonably believes it would have been economically impracticable.

(11) The personal representative shall not be liable for failure to take possession of the protected homestead or to expend funds on its behalf. In the event that the property is determined by the court not to be protected homestead, subsections (2)-(10) shall not apply and any liens previously filed shall be deemed released upon recording of the order in the official records of the county where the property is located.

(12) Upon the petition of an interested party to accommodate a sale or the encumbrance of the protected homestead, the court may transfer the lien provided for in this section from the property to the proceeds of the sale or encumbrance by requiring the deposit of the proceeds into a restricted account subject to the lien. The court shall have continuing jurisdiction over the funds deposited. The transferred lien shall attach only to the amount asserted by the personal representative, and any proceeds in excess of that amount shall not be subject to the lien or otherwise restricted under this section. Alternatively, the personal representative and the apparent owners of the protected homestead may agree to retain in escrow the amount demanded as reimbursement by the personal representative, to be held there under the continuing jurisdiction of the court pending a final determination of the amount properly reimbursable to the personal representative under this section.

(13) This act shall apply to estates of decedents dying after the date on which this act becomes a law.

H. F.S. 732.2045. [Elective Share] Exclusions and overlapping Application

(1) Exclusions - Section 732.2035 [Property entering into elective estate] does not apply to:

. . .

(i) Property which constitutes the protected homestead of the decedent whether held by the decedent or by a trust at the decedent's death.

I. F.S. 732.702. Waiver of Spousal Rights

(1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

III. CASE LAW

- While homestead property has always been a potential trap for the unwary attorney or fiduciary, there is some very helpful guidance in case law that can keep you out of trouble in the majority of the situations. The goal is to learn from other people's mistakes rather than learn the hard way.
- *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So.2d 315 (Fla. 3d DCA 1985).
 - An attorney drafted a Last Will and Testament that devised a life estate in the decedent's residence to his mother and the remainder to his two sons, one of which one was a minor. *Id.* The devise failed due to the existence of the minor child (see Article X, §4(c) of the Florida Constitution that prevents the devise of the homestead if there is a minor child) and the mother sued the drafting attorney for negligence as it was clear from the provisions of the will that the testator's intent was frustrated by the provisions of the will.
 - The 3rd DCA held that it was not the negligence of the attorney that caused the devise to fail but the Florida Constitution,

Accordingly, there was no means by which a will could have been drafted so that Johnson's testamentary intent, that a life estate in the homestead pass to his mother on his death, could have been accomplished . . . Johnson's testamentary intent was not frustrated by Weinstein's professional negligence, but rather by Florida's constitution and statutes.

Id. at 319.

- Lesson – If you fail to properly address homestead property, blame it on the Constitution.¹

A. Exemption From Forced Sale

- *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001).
 - Mr. Hill, a resident of Tennessee, purchased a home in Destin for \$650,000 cash three days before a judgment for \$15,000,000 was entered against him. The US

¹ The dissent was not as understanding as the majority, "I think it utterly indefensible to say that an attorney's failure to advise a testator that his desired devise is a nullity is any less negligent than an attorney's faulty draftsmanship or improper execution of a will." *Id.* at 319.

Court of Appeals for the 11th Circuit certified the question to the Florida Supreme Court “Does Article X, Section 4 of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying, or defrauding creditors in violation of Fla. Stat. § 726.105 or Fla. Stat. § § 222.29 and 222.30?”

- The court held that Article X section 4(a) provided three exceptions to the prohibition against forced sale.² Fraudulent transfer was not one of them. The Supreme Court held “...we answer the certified question in the affirmative, holding that a homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors is not excepted from the protection of Article X, section 4.”
- Lesson – When we say it’s protected, we really mean it.
- *Gold v. Schwartz*, 774 So.2d 879 (Fla. 4th DCA 2001).
 - This case involves a mobile home homestead. In this case, the decedent died intestate and his “residence was a permanently affixed mobile home rather than a traditional house” which was affixed to the lot he owned. His sole heir at law was his mother, and he was not survived by a spouse or minor child. The estate was insolvent.
 - The permanently attached (and therefore a part of the real property) mobile home and its underlying real property were determined to be exempt from claims of the estate creditors.
- Lesson – A man’s mobile home really is his castle, especially if permanently affixed to the property.
- *Menard v. Univ. Radiation Oncology Assoc.*, 976 So. 2d 69 (Fla. 4th DCA 2008).
 - Debtor owned and lived in 1/3 of a triplex where he owned the entire building and rented the other two units. Court held that only the part occupied by debtor was exempt under Article X sec. 4(a).
 - The balance of the property was not exempt and the trial court was directed to determine if the property could be logically partitioned (it suggested consideration of submitting the building to condominium) and if it could not be divided, then the entire parcel can be sold with 1/3 of the proceeds segregated as exempt.

² The exceptions found in Article X section 4(a) of the Florida Constitution are (1) payment of taxes and assessments, (2) obligations contracted for the purchase, improvement or repair of the homestead, and (3) obligations contracted for house, field or other labor performed on the realty.

- *Davis v. Davis*, 864 So.2d 458 (Fla. 1st DCA 2004).
 - Decedent owned a tract of land of less than 160 acres outside a municipality. His home was on a small part of the tract and the balance was developed and operated by him as a commercial mobile home park. Although he was survived by a spouse, he purported to devise this tract to third persons.
 - The spouse filed a petition to determine homestead status of the entire tract, including the home and the mobile home park. The personal representative admitted the homestead status of the home, but opposed that status for the mobile home park. The trial court agreed with the personal representative and found homestead status only for the home. The 1st DCA reversed and determined the mobile home park was also homestead, determined its devise was limited and that title passed pursuant to F.S. §732.401(1).

Article X section 4(a), in relevant part, describes homestead as “the following property owned by a natural person: (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, . . . ; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family . . .”. The phrase “upon which the exemption shall be limited to the residence of the owner or the owner's family” modifies that part of the sentence relating to homesteads “located within a municipality” and is set off from the rest of the sentence by a semicolon. It does not modify that part of the sentence before the semicolon relating to homesteads “located outside a municipality”.

- Lesson – If you want to run a business at home live outside of a municipality.
- *Phillips v. Hirshorn*, 958 So. 2d 227 (3d DCA 2007).
 - In 1979, the Florida Supreme Court decided that a cooperative apartment may not be considered homestead property for the purpose of the constitutional limitation on devise, as not being an interest in real estate. *In re Estate of Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978).
 - In 2002, the 5th DCA was presented a similar question, but one involving applicability to cooperative ownership of the exemption from creditor's claims under Article X, sec 4(a). *Southern Walls, Inc. v. Stilwell Corporation*, 810 So.2d 566 (Fla. 5th DCA 2002), *rev.den* 829 So.2d 919.
 - In *Southern Walls, Inc.*, the 5th DCA found that ownership of a cooperative unit was the functional equivalent of ownership of a condominium unit and the law applicable to a condos should also apply to a cooperative unit, thereby

exempting the cooperative interest, which otherwise met the requirements of protected homestead, from creditor's claims. The court also noted that after *Wartels* was decided, the legislature adopted the Florida Cooperative Act, Ch. 719. The stated statutory purpose of that Act is "to give statutory recognition to the cooperative form of ownership of real property." (Emphasis added.) If cooperative ownership is ownership of an interest in real property, not intangible personal property (a membership certificate in a non-profit corporation and a proprietary lease), then, the *Southern Walls* decision is probably correct and *Wartels* has been overturned by statute.

- This is the background against which *Phillips* was decided by the 3rd DCA.
 - The *Phillips* court determined that it should not overrule an opinion of the Florida Supreme Court, and found that Article X, sec. 4 had no application to cooperative ownership. It certified conflict with the 5th DCA opinion in *So. Walls*.
 - The Florida Supreme Court accepted jurisdiction, the parties briefed and argued the issues and the court then discharged jurisdiction and dismissed the appeal without ruling on the merits. SC07-1079 order dated April 17, 2008 *per curiam*.
- Lesson – Unless you live in Daytona Beach co-ops are not homestead.
- *Geraci v. Sunstar EMS*, 93 So.3d 384 (Fla. 2d DCA 2012).
- Ms. Geraci died owning, and permanently residing in an "On Top of the World" condominium for seniors. The condominium was built on a 100 year land lease which, at the time of her death, had an unexpired term of approximately 75 years. Her estate was insolvent and creditors filing claims included the Agency for Health Care Administration (Medicaid recovery) and Pinellas County Emergency Medical Services Authority.
 - The personal representative petitioned the court to determine the condominium was exempt from creditor's claims under Article X, § 4(a) of the Florida Constitution. The trial court held that the condominium did not qualify for that exempt status since the owner did not own an interest in land, a leasehold not being an interest in the land for purposes of Article X, § 4. The matter was appealed and the 2nd DCA reversed.
 - The 2nd DCA stated the issue as "whether a condominium that is subject to a long-term leasehold may qualify as a homestead [under Article X, § 4(a)(1) and (b), Fla.Const.] to be protected from forced sale to pay the creditors of the deceased owner." In a unanimous opinion the court reversed the trial court and answered the issue in the affirmative.

- Lesson – Seniors in Florida can have their cake and eat it too – an active senior lifestyle and a homestead exemption.
- *Callava v. Feinberg*, 864 So.2d 429 (Fla. 3rd DCA 2004).
 - As part of divorce proceedings, Pilar Callava, sold her home and invested a portion of the proceeds into a new homestead but titled it in the name of a trustee of her revocable trust. Callava’s divorce attorney sought to foreclose on an equitable lien on the property claiming Callava was not entitled to the exemption from forced sale under Article X, § 4(a) of the Florida Constitution, as property was not in Callava’s name.
 - The 3rd DCA held that even if the homestead was owned by a debtor in her revocable trust, that she was entitled to the homestead protection, “. . . even if Callava owns only a beneficial interest in the property, she is entitled to claim a homestead exemption to the forced sale of the property.” *Id.* at 431.
- *Engelke v. Estate of Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006).
 - More recently, this issue was addressed by the 4th DCA. In *Engelke*, The court found that while the [decedent’s] residence was held in a revocable trust, it was owned by a “natural person” for purposes of the constitutional homestead exemption.
 - Because [the decedent] retained a right of revocation, he was free to revoke the trust at any point in time. Accordingly, he maintained an ownership interest in his residence, even though a revocable trust held title to the property.
- Lesson – Trust me - property owned in a revocable trust is entitled to the homestead exemption during the lifetime of the grantor.
- *Law v. Law*, 738 So.2d 522 (Fla. 4th DCA 1999).
 - Husband and wife owned a house as tenants by the entireties. Husband and wife separated and husband moved to his mother’s home, where he established his residence. Upon his mother’s death, husband inherited his mother’s home. Husband filed a declaratory action seeking a declaration that the home he inherited was his homestead and exempt from liens.
 - Court held that if husband and wife are married, but “legitimately live apart in separate residences,” the Court will extend a homestead exemption to each of them. The Court defined legitimately living apart to mean living apart without an intent to defraud.

- Lesson – More is better - why limit yourself to one homestead when you can have two?

B. Inurement of Exemption From Forced Sale

- *Estate of Hammel v. Parker*, 821 So.2d 1276 (Fla. 2d DCA 2002).
 - The decedent's children, who were his residuary devisees, sold the decedent's homestead (presumably in the estate proceeding) without obtaining a determination of its homestead status.
 - A creditor of the estate attempted to enforce the claim against the proceeds. After the fact, the children filed a petition to determine the homestead status of the property and the trial court ruled it was the decedent's homestead but also ruled that since the property had been converted to dollars before the determination, the sale constituted a waiver of that exemption from creditor's claims.
 - On appeal that order was reversed with the 2nd DCA ruling that the judicial determination is not a factor in whether the homestead status exists. The exemption from creditors' claims inured to the heirs at the moment of death and a belated determination of the property's status was merely a ratification of that fact, "Generally, property rights passing by virtue of the death of a person vest at the time of death . . . The same has been held true for homestead." *Id.* at 1279.
 - Homestead status is not one that attaches because of a court determination. It is one that exists because of the facts. Accordingly, the voluntary sale of the property prior to the homestead determination did not constitute a waiver of the homestead protection.
- Lesson – Homestead is homestead; an order determining homestead status only confirms that fact.
- *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005).
 - Mr. McKean died with no surviving spouse or minor child thereby making the homestead freely devisable. Mr. McKean's Will devised the homestead through the residuary clause to four half-brothers thereby qualifying the property as protected homestead.
 - The Will also contained a preresiduary pecuniary devise to Warburton, his nephew. Absent the value of the homestead, there were no other asset to satisfy creditors' claims and the cash bequest to Warburton. The homestead was sold

during the administration of the estate and Warburton claimed a priority to the proceeds under the abatement statute, F.S. 733.905(1), superior to the residuary devisees. The 4th DCA agreed with Warburton and it ordered the proceeds of the sale of the homestead delivered to Warburton and found that the residuary abated.

- The Florida Supreme Court reversed the 4th DCA and awarded the protected homestead to the residuary devisees over the claim of entitlement of the preresiduary devisee. The significant holding in this opinion is a re-affirmation that protected homestead is not a probate asset and that protected homestead can pass through the residuary to qualified heirs.
 - The opinion correctly states that “the protected homestead is not a part of the decedent’s estate for purposes of distribution”. The prohibition against including the protected homestead in the probate proceeding is not constitutional, rather it is statutory pursuant to F.S. 733.607 and 733.608. If the legislature desired, it could amend the statutes to provide that protected homestead is a probate asset and can be used to satisfy preresiduary devisees. What could not be done is to allow the creditors any claim against the protected homestead, even if it were a probate asset, because Article X § 4(b) of the Florida Constitution prohibits that.
- Lesson – You can’t abate an asset that doesn’t exist.
- *Harrell v. Snyder*, 913 So.2d 749, 753 (Fla. 5th DCA 2005).
- The Personal Representative invoked F.S. 733.608(2) – (12) in order to take possession of protected homestead. The property was devised through the residuary clause in the decedent’s will to the decedent’s adult children.
 - In this case, a Personal Representative sold property that was clearly protected homestead from an estate. The decedent’s adult daughter challenged the sale by the personal representative seeking a determination that the deed was invalid and that the Personal Representative had no right to sell the property,

This subsection [F.S. 733.608(2)], relied upon by the trial court, gives the personal representative the authority to take possession of protected homestead property where necessary to protect it for the heirs. It does not, however, authorize the personal representative to sell the property. This amendment does not impair vested rights but is entirely remedial in nature, designed to safeguard the value of homestead property.

Id. at 752.

- Lesson - Possession may be 9/10 of the law, but it doesn't equal the right to sell protected homestead.

- *Elmowitz v. Estate of Zimmerman*, 647 So.2d 1064 (Fla. 3d DCA 1994).
 - In this case, the Decedent's homestead passed to his revocable trust upon his death pursuant to a pour over Will. The 3rd DCA held that the decedent's exemption from creditors did not inure to the beneficiaries of revocable trust. In this case, the 3rd DCA held that the devise of homestead to the decedent's revocable trust caused the homestead creditor exemption to be lost. This is the only case with this type of holding.

 - The *Elmowitz* court noted in a footnote that the property was not specifically devised to the beneficiary of the trust but rather, the beneficiary was entitled only to an amount equivalent in value to 50% of the trust assets and was not entitled to an undivided or equitable interest in the protected homestead property. There is an implication in the footnote that if the property was specifically devised under the revocable trust that the exemption may have inured to the beneficiary, "It is noted that the Zimmerman's property was not specifically devised to Plotkin, thus she could not claim protection under Article X, Section 4(b) of Florida's Constitution . . . and was only entitled to an equivalent in value from the assets of the trust."

 - The court in *Elmowitz* cited *In re Estate of Morrow*, 611 So.2d 80 (Fla. 2d DCA 1992), as support for its holding. However, *Morrow* did not reach the question of whether protected homestead property transferred to a trust loses its protected status because there was no beneficiary who was a member of the protected class to provide the personal representative with justification for filing the petition.

 - *Elmowitz* has been cited by Florida Supreme Court as authority in *Warburton* but for a different proposition.

- *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So.2d 774 (Fla. 1st DCA 1992).
 - The 1st DCA addressed the issue of whether the exemption inures when the protected homestead is devised in a will to a testamentary trust. The court looked to the **substance rather than the form** of the devise in holding that the property retained its exempt character. In Mrs. Downing's will she devised her homestead to her former husband, as trustee of a testamentary spendthrift trust for her daughter (the opinion implies that the daughter was not a minor).

- The 1st DCA held that the exemption did inure finding that “the trustee, Mr. Downing, although possessed of legal title in the subject property, exercised nothing more than a supervisory interest in the homestead. Were the facts otherwise, this result may have been different.” Id. at 776. Although the opinion does not discuss any of the specific terms of the trust, one must wonder if the trustee had the power to sell the property.
- *Engelke v. Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006).
- In *Engelke*, the decedent’s ½ interest in his residence was transferred to his revocable trust prior to his death. He retained the right to live on the property and the right to revoke the trust at any time. On his death, his wife continued to have the right to live on the property during her lifetime and, upon her death or removal from the home, the decedent’s children would receive the home through the residuary provisions of the trust.³
 - The court held that the decedent’s interest in the property was protected during his lifetime under Art. X, §4(a) and the exemption inured to his heirs under §4(b) upon his death,

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

- Lesson – Why risk it? Keep your homestead out of a revocable trust.

C. Devise Restrictions

- *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997).
- In *Snyder*, the estate was insolvent, except for the homestead which was devised to a granddaughter where the granddaughter’s mother (decedent’s daughter) was still living.
 - The Florida Supreme Court significantly broadened the definition of "heirs" in its application to the homestead exemption from creditor’s claims by its decision in this case to include "any family member within the class of person categorized in [the Florida] intestacy statute."

³ The surviving spouse signed a prenuptial agreement waiving homestead rights or this would have been an invalid devise by the decedent.

- The court ignored the statutory definition, applied the rule that the homestead exemption is to be liberally construed for the protection of the family, found that the granddaughter was an “heir” and held the homestead devised to the granddaughter to be exempt.
- The dissent pointed out the potential for a ridiculous result when the homestead was devised to the decedent’s stepson (the son of his predeceased wife). The last class mentioned in the Florida intestacy statute, F.S. §732.103, is:

(5) If there is no kindred of either part, the whole of the property shall go to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate.

- *Moss v. Estate of Moss*, 777 So.2d 1110 (Fla. 4th DCA 2001).
 - This is the first case that “stretches” the supreme court holding in *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997) to its extreme. The decedent’s homestead was devised 1/4 each to the decedent’s two nieces and 1/4 each to the predeceased husband’s brother and niece. The trial judge cited to the *Snyder* opinion but approved of Justice Grime’s dissent which argues it is only the person who would take as an intestate heir to whom the decedent’s exemption inures.
 - The last category in the intestacy statute is “to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate”. In this case, the predeceased husband’s brother and niece were persons who were designated in the intestacy statute.
 - The 4th DCA rejected the dissent in *Snyder* and held with the majority opinion and found that the predeceased husband’s brother and niece were protected heirs. (The predeceased husband’s brother, a resident of North Carolina, died several months after this decedent, but was still entitled to come ahead of the decedent’s creditors).
- Lesson – You can disinherit those rotten kids (as long as they are all adults) and still rest assured your homestead will be protected.
- *In re Estate of Finch*, 401 So.2d 1308 (Fla. 1981).
 - A decedent attempted to devise a life estate in his homestead to his wife and the remainder to one of his two adult daughters.
 - The Florida Supreme Court held that if a decedent is survived by a spouse, a devise of less than a fee simple interest to the spouse will fail, “(W)here a testator

dies leaving a surviving spouse and adult children, the property may not be devised by leaving less than a fee simple interest to the surviving spouse.”

- *Arnoson, et al v. Aronson*, 81 So.3d 515 (Fla. 3d DCA 2012).
 - In *Aronson*, the owner of a homestead conveyed the property to his revocable trust during his lifetime. A spouse and two adult sons from a prior marriage survived him. Upon his death, the surviving spouse was to receive an interest in all assets as a lifetime beneficiary of a marital trust. Not only did the spouse have the right to income, there was a possibility of principal invasions and a 5 x 5 power⁴ under which she had the right annually to withdraw the greatest of 5% of the assets of the trust or \$5,000.
 - The only significant asset of the trust was the homestead property and the sons, as trustees, were seeking to liquidate the homestead property to cover expenses in the estate and trust administration. As the property was improperly devised, the property passed according to F.S. 732.401(1) with a life estate vesting in the spouse and a remainder interest vesting in the two adult sons.
 - Of special note is that the 3rd DCA held, “At the moment of Hillard’s death, his homestead property passed outside of probate . . . in a twinkle of an eye, as it were to his wife for life, and thereafter to his surviving sons, James and Jonathan per stirpes.” *Id.* at 519.
 - All of the authority cited by the 3rd DCA in support of this proposition was based on homestead property held in an estate context. I assume that this is because once the trust devise of the homestead property was declared invalid, the property became subject to the intestacy provisions so application of the homestead cases in the estate context was appropriate.
- Lesson – The kids are one thing – the spouse trumps all.

D. Waiver of Homestead Rights

- *Knadle v. Estate of Knadle*, 686 So. 2d 631 (Fla. 1st DCA 1997).
 - In *Knadle*, the decedent directed in his will that his homestead be sold with the proceeds being distributed to his two adult children. The court found that the direction for sale constituted a waiver of homestead protection from creditors and the creditors had the first claim on the proceeds of the sale as an estate asset.

⁴ A “5 x 5 power” is a power of withdrawal in a trust document that allows access to the greater of: a) \$5,000 per year, or b) 5% of the [fair market value](#) of the trust per year. This type of power will not cause tax issues for the holder of the power. See IRC Sec. 2014.

- Lesson – Cash is not always king.
- *City National Bank of Florida v. Tescher*, 578 So.2d 701 (Fla. 1991).
 - The decedent was survived by her spouse and two adult children. The decedent and her surviving spouse had entered into a prenuptial agreement in which the surviving spouse had waived all rights in the estate of the decedent, including homestead.
 - The Supreme Court of Florida held, “. . . when a decedent is survived by no minor children and the surviving spouse has waived homestead rights, there is no constitutional restriction on devising property.” *Id.* at 703. The Court reached that result because it found that the waiver of homestead rights in the prenuptial agreement “is the legal equivalent of predeceasing the spouse.” *Id.*
- Lesson – It doesn’t hurt to ask – make sure there is no waiver.
- *Lyons v. Lyons*, 155 So.3d 1179 (Fla. 4th DCA 2014).
 - Richard and Norma Lyons owned a residence in Fort Lauderdale as husband and wife (TBE). In 1993, Richard and Norma quit claimed the residence to Norma. On the same day, Norma (without Richard’s joinder) quit claimed the residence to a qualified personal residence trust (QPRT) in which Norma was the grantor and under which she retained an interest for 15 years or until the settlor’s death, whichever occurred first.
 - In 2002, Richard executed a Last Will and Testament in which he acknowledged the QPRT and then in 2007 Richard passed away survived by Norma and five children.
 - In 2010, after the expiration of the 15 year retained term in the QPRT, Norma executed a quit claim deed attempting to convey the residence to herself and her daughter, Valerie, even though the property had previously been conveyed to Norma’s QPRT and had been administered by the trustees of the QPRT since 1993.
 - Upon learning of this attempted transfer by Norma, the trustees of the QPRT filed a complaint seeking to set aside the 2010 deed on the grounds that Norma did not own the residence at the time the 2010 deed was executed as title was held by the trustees of the QPRT.
 - The trial court entered summary judgment in favor of Norma and Valerie finding that the 2010 deed from Norma to Norma and Valerie was valid because Norma, not the trustees of the QPRT, owned the residence in 2010.

- Specifically, the trial court held that the 1993 deed from Norma to the trustees of the QPRT was invalid as Richard did not join in the deed. See Article X, Section 4(c) which provides, “The owner of the homestead real estate, *joined by the spouse if married*, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse.” (emphasis provided).
 - The 4th DCA reversed the summary judgment holding that Norma Lyons did not have standing to assert the homestead rights of Richard after his death in order to defeat a deed that Norma Lyons had executed prior to Richard’s death. It was Richard’s rights that were being effected by the deed, not Norma’s.
 - In reaching this result the 4th DCA correctly pointed out that the homestead provisions were designed to protect minor children and non-owner surviving spouses from having the homestead property alienated away from them without the consent of the non-owner spouse, “The entire provision hinges on the conduct of the owner spouse, and the resultant protections to the non-owner surviving spouse.”
 - The 4th DCA pointed out that, “. . . it would be absurd for the party who created the alleged infirmities in the quit claim deed to be able to attack the viability of the same quit claim deed. In other words, Norma should not be able to attack the quit claim deed as void ab initio, where she drafted, relied on, and was the sole signatory to it.”
 - Instead of Norma using the homestead protections as a shield, she was attempting to use them as a sword to undo a situation that she herself had created prior to Richard’s death.
- Lesson – Hindsight is always twenty-twenty. (Billy Wilder quote)
 - *Habeeb v. Linder*, 36 FLW D300 (February 9, 2011).
 - A warranty deed was executed by husband and wife transferring property from TBE into wife’s name alone was sufficient to form the basis for the husband’s waiver of his homestead rights. Ramco Form 01 used – transferred “all the tenements, hereditaments and appurtenances thereto”.
 - The Court relied on language in the deed and held, “In this case the term ‘hereditaments’ in the 1979 warranty deed encompasses the homestead rights of each grantor as the survivor.” “Hereditaments” defined as anything capable of being inherited.
 - On May 17, in a sua sponte Order, the 3rd District Court of Appeals withdrew the Habeeb decision via this order:

Upon the Court's own motion, and upon consideration of a settlement of this appeal before the issuance of a final opinion, the non-final opinion issued February 9, 2011, 36 Fla. L. Weekly D300, is hereby withdrawn.

- The *Habeeb* case cannot be cited as precedence but leaves one with uncertainty as to the status of many situations where homestead property transferred from both spouses to one spouse or to one of the spouse's revocable trust.
- *Stone v. Stone*, 157 so.3d 295 (Fla. 4th DCA 2015).
- Habib lives!
 - This is the first case in which an appellate court analyzes F.S. 732.4017.
 - Jerome Stone and his wife, Alma, owned a residence as tenants by the entireties (TBE). On March 27, 2000, Jerome and Alma executed a warranty deed conveying the property to themselves as tenants in common (TIC).
 - On the same day Jerome executed the Jerome M. Stone Qualified Personal Residence Trust (QPRT) and then Jerome (joined by Alma) executed a warranty deed conveying his ½ TIC interest in the residence to Jerome and Alma as co-trustees of the QPRT. Alma also created a QPRT and executed a warranty deed (joined by Jerome) conveying her ½ TIC interest in the residence to Jerome and Alma as co-trustees of her QPRT.
 - The retained term of Jerome's QPRT was the earlier of five years or Jerome's death, and if Jerome died prior to the end of the five year term, the property would revert to Jerome's estate.
 - Jerome died prior to the conclusion of the five year term survived by Alma and his two adult children, Ross and Nancy. Jerome's Will was a pour over will which devised all property into Jerome's Revocable Trust which provided that the assets were held in continuing trust for the remainder of Alma's lifetime. Upon Alma's death, the trust was to be terminated in favor of Nancy (excluding Ross as a beneficiary).
 - Nancy and Ross became involved in a dispute in Jerome's estate as to whether the residence was Jerome's homestead, and therefore devise restricted (which would result in Ross receiving ½ of the remainder interest), or whether the property was not Jerome's homestead upon his death and the devise under Jerome's revocable trust was valid (which would result in Nancy receiving the entire remainder interest upon Alma's death).

- The 4th DCA correctly pointed out that although F.S. 732.4017 applied to the initial transfer of the residence into the QPRT, that statute does not address the result if the grantor of a QPRT fails to survive the retained term of years and the terms of the QPRT provide for a reversion to the grantors' estate,

If Jerome had survived the stated term of the QPRT, the transfer would have been completed and the property would have passed to Nancy through the trust pursuant to its terms. However, since Jerome died before the term of the QPRT, it is as if the QPRT never existed, at least for this purpose.

- The technical issue that has created significant dispute among estate planning attorneys in Florida is whether the reversion from the QPRT into the grantor's estate upon the grantor's death will then be treated as owned by the grantor at the moment of his death (which would then be subject to the homestead devise restrictions) or is it something that happens subsequent to the moment of death, and therefore, does not subject the interest in the residence to the homestead devise restrictions.
 - DRAFTING LESSON – If you are funding QPRTs with homestead property in Florida, you may not want to provide for a reversion of the property to the grantor's estate upon the death of the grantor. If the property is devised through the QPRT (as opposed to reverting to the grantor's estate), then pursuant to F.S. 732.4017, the homestead devise restrictions will not apply.
- The 4th DCA held that upon the reversion from the QPRT to Jerome's estate on his death, the property was then subject to the homestead devise restrictions,

We hold that when a homeowner transfers property to a QPRT pursuant to section 732.4017 and the property later reverts back to the homeowner's estate because the homeowner fails to survive the term of the QPRT, a subsequent disposition of the property pursuant to the homeowner's will is a devise.

- But even though the residence was subject to devise restrictions upon Jerome's death (and would have failed as an improper devise), the 4th DCA upheld the devise in Jerome's Revocable Trust based on a waiver of Alma of her homestead rights pursuant to F.S. 732.702. Specifically, the 4th DCA found that Alma, ". . . waived her homestead rights by executing the march 27, 2000 warranty deed splitting the

property into two one-half tenancy in common interests and then transferring her interest into her QPRT.”

- This is the same rationale used by the *Habib* court to find a “waiver” when property was deeded from both spouses into the name of one spouse. In *Stone*, the deed contained language providing that Alma, “. . . ‘grants bargains, sells, aliens, remises, releases, conveys, and confirms’ the property ‘together with all the tenements, *hereditaments*, and appurtenances thereto belonging or in anywise appertaining.’”
- There is no discussion of any type of “fair disclosure” by Jerome of his estate to Alma at the time the deed was signed.

- Lesson – Latin is not a lost language.

IV. **CONCLUSION**

If all else fails, there is still one guaranteed way to avoid those homestead headaches. Simply use the Kelley Homestead Paradigm attached to this outline and all of your homestead problems will disappear.

