

A Primer on Florida Homestead Law

by
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Introduction

- What is Homestead?

We will be discussing to constitutional real property homestead as defined in Article X, §4 of the Florida Constitution

Three Aspects of Homestead Laws

1. Creditor Exemption - Homestead property is protected from the owners creditors other than those exceptions specifically named in the constitution.
2. Inurement of exemption upon death of owner.
3. Restriction on Transfer of Property - Constitutionally protected homestead cannot be devised by the owner under certain circumstances.

Homestead Laws

- Basic Framework found in:
 - Article X, Section 4 of the Florida Constitution
 - Chapters 732 and 733 of the Florida Statutes

Case Law

A significant portion of our law on homestead has come from case law



Article X, §4 (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:

Article X, §4 (a)(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;



- Article X, §4 (b):
- These exemptions shall inure to the surviving spouse or heirs of the owner.

Article X, §4 (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.

Restrictions on Devise

- IF MINOR CHILD, NO DEVISE!

- IF SPOUSE BUT NO MINOR CHILD, 100% TO SPOUSE IN QUANTITY AND QUALITY

WHAT IS THE PENALTY?

- Property passes by OPERATION OF LAW!
- Answer NOT FOUND in Florida Constitution – Look to Florida Statutes

F.S. 732.401(1) – Prior to October 1, 2010

- (1) If not devised as permitted by law and the Florida 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.

F.S. 732.401(2)

If forced descent of homestead property and resulting life estate.

Need to look at subsection (2) to evaluate whether spouse should take an election.



F.S. 732.401(2)

- F.S. 732.401(2) provides for an election in lieu of a life estate.
- Surviving spouse can elect to take an undivided one-half interest in the homestead as a tenant in common, with the decedent's descendants receiving the other undivided one-half interest.

Who Can Make Election

- Surviving Spouse
- Guardian or Attorney-In-Fact but only after the court approves the election.
 - Court must make a finding that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.

Deadlines to Make Election

- Six month deadline – Cannot be extended – It is IRREVOCABLE
- Surviving spouse must be alive at time of election.
- A petition by an attorney-in-fact or guardian tolls the time to make the election.

How to Make Election

- F.S. 732.401(2)(e) – provides a form of a “Notice of Election”
- Filed in the official record books of the county or counties where the homestead property is located.

F.S. 732.4015

- F.S. 732.4015(1) – Parrots Article X, Section 4(c) devise restrictions.
- F.S. 732.4015(2)(a) - Clarifies that “owner” includes the grantor of a trust described in F.S. 733.707(3) – Revocable Trusts.
- F.S. 732.4015(2)(b) – Defines “devise” for purposes of devise restrictions as, “. . . 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.”

F.S. 732.401(4) – Disclaimers of Homestead

- If a surviving spouse disclaims a life estate created pursuant to F.S. 732.401(1), the interests of the decedent's descendants may not be divested.
- The remainder interests accelerated into full fee ownership.

Disclaimer of Validly Devised Interest

- F.S. 732.4015(4) clarifies that if an interest in homestead has been validly devised to the surviving spouse and the surviving spouse disclaims, the disclaimed interest passes pursuant to Chapter 739.
- Can use a disclaimer to fund the credit shelter trust.

F.S. 732.401(5) – TBE and JTWROS

- (5) This section shall not apply to property that the decedent owned in tenancy by the entirety or joint tenancy with rights of survivorship.
- Joint ownership with survivorship trumps homestead.
- Clarified in 2010 to include JTWROS.

Protected Homestead

- **F.S. § 731.201(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."
- Means protected from claims of creditors.

- If “protected homestead”, the property is not an asset of the probate estate and is not subject to control by the personal representative. See F.S. 733.607 and F.S. 733.608.
- Protected homestead may be devise restricted homestead but that does not have to be the case.

F.S. 733.608(2) – (12) Taking Possession of Homestead Property

- If property reasonably appears to be protected homestead and is not occupied by a person who has an interest in the property
- Personal representative is authorized, but not required, to take possession for limited purpose of preserving, insuring, and protecting it for the owners pending a determination of homestead status.

- BEWARE – Taking possession does not equal authority to sell.
- Harrell v. Snyder, 913 So.2d 749, 753 (Fla. 5th DCA 2005).

Homestead and Elective Share:

- Big Changes in calculation of elective share for decedents dying on or after July 1, 2017.



- If the decedent died prior to July 1, 2017:
 - F.S. 732.2045(i) – Elective estate **excludes** the value of protected homestead.
 - F.S. 732.2075 – Satisfaction of elective estate does not include interest spouse received per F.S. 732.401

- If decedent died on or after July 1, 2017:
- F.S. 732.2035 – The elective estate INCLUDES the decedent’s interest in property which constitutes the protected homestead of the decedent.

A 3D rendering of the year '2017' in a vibrant green color with a slight shadow, set against a light brown wood-grain background. The numbers are thick and have a slight metallic sheen.

- F.S. 732.2055 – Valuation of Elective Estate:
 - Protected homestead valued one of two ways in order to keep a complicated issue as simple as possible.
 - Value depends on whether the spouse receives a fee simple interest or life estate/TIC interest.



simplicity is key

- Value of homestead for purposes of determining the elective estate:
 - If spouse receives a fee simple interest = fair market value on date of decedent's death.
 - If spouse receives a life estate or elects to take a $\frac{1}{2}$ TIC interest then one-half of fair market value of the protected homestead on date of decedent's death.

- If spouse waived homestead rights and receives something other than fee simple, life estate or ½ interest as tenant in common (i.e. – an interest in a trust that holds the homestead property), then value is determined as if the property was not protected homestead.
- In all cases, the fair market value is to be reduced by all outstanding mortgages, liens, and security interests on the property for which the decedent is liable, BUT ONLY if the amount is not otherwise deducted as a claim or payable from the elective estate. No double dipping.

- F.S. 732.2095 – Valuation of Property Used to Satisfy Elective Share
 - Date of death value is used just as in determining the value of the elective estate.
 - Value is determined in the same fashion as for determining the value for elective estate.

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If residence is owned TBE or JTWRORS:

- F.S. 732.2035(4) – Elective estate includes value of $\frac{1}{2}$ of residence.
- F.S. 732.2075 – Satisfaction of elective estate includes $\frac{1}{2}$ of value of house.

F.S. 732.4017 – Irrevocable Homestead Trusts

- Added to the probate code in October of 2010.
- Provides guidance on “alienation” of homestead to avoid devise restrictions.
- Subsection (4) - “It is the intent of the Legislature that this section clarify existing law.”



F.S. 732.4017 - Useful planning tool

- Divorced parents with minor children
- People with children contemplating 2nd marriage



- Although it has been on the books for almost 7 years, it took 4 years before an appellate court first looked at the statute.
- We will discuss the *Stone* case in depth – 4th DCA “blessed” the statute (including the retroactive application)



Waiver of Homestead



Waived

F.S. 732.702 – Waiver of Spousal Rights

The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, . . . 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 . . .



F.S. 732.702

- A waiver of “all rights” in a marital agreement is deemed to waive homestead rights in a surviving spouse.
- F.S. 732.702(2) - If executed after marriage there must be “fair disclosure” of assets - this requirement seems to be overlooked in the recent cases.
- F.S. 732.702(3) – No consideration necessary other than the execution of the waiver itself is necessary.

Frisca v. Frisca, 39 FLW D1810, 2nd DCA August 27, 2014

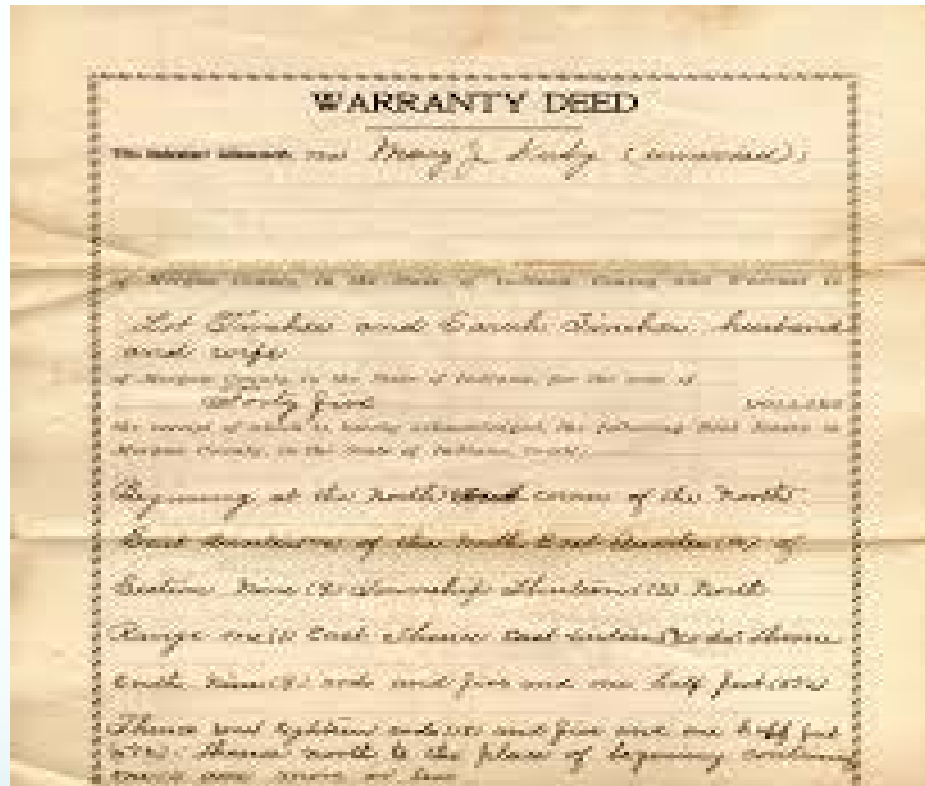
- Case involving a Marital Settlement Agreement



Lyons v. Lyons, 155 So.3d 1179 (Fla. 4th DCA 2014)



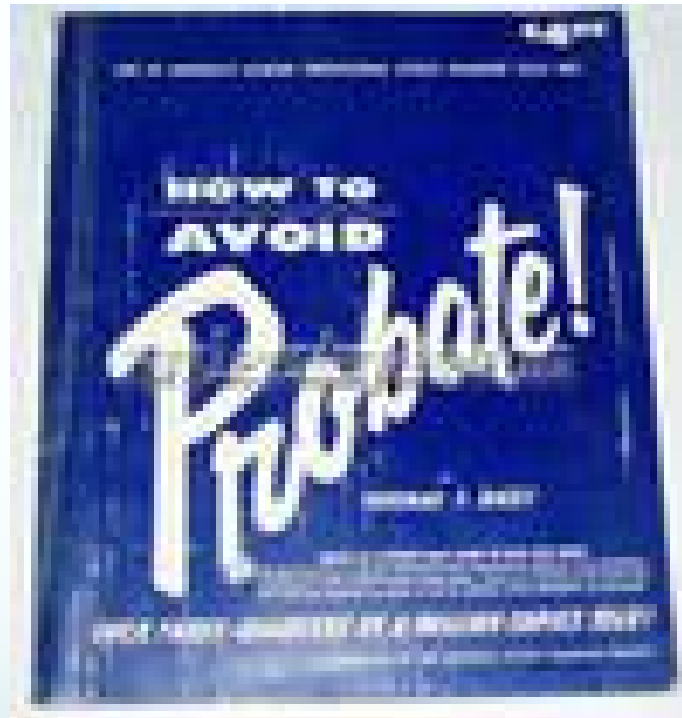
Habeeb v. Linder 36 FLW D300 (February 9, 2011)



Stone v. Stone, 157 So.3d 295 (Fla. 4th DCA 2015)



Homestead in Revocable Trusts



F.S. 732.4015 – Devise Restrictions

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Elmowitz v. Estate of Zimmerman, 647
So.2d 1064 (Fla. 3d DCA 1994)



Homestead Exemption Inures

- *Engelke v. Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006)
- *Callava v. Feinberg*, 864 So.2d 429 (Fla. 3d DCA 2004)

Aronson v. Aronson, 81 So.3d 515 (Fla. 3d DCA 2012)

This case provides some guidance regarding homestead property held in revocable trusts and how title to that property passes upon the death of the owner.



In Probate Context - No Issue

- F.S. §733.607(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*, ...
- F.S. §733.608(1)(a) - All real and personal property of the decedent, *except the protected homestead*, ... shall be assets in the hands of the personal representative . . .

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*Estate planning tip - Go first
class or your heirs will!*

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