

**HOMESTEAD HEADACHES:  
ATTEMPTING TO TAME THE LEGAL CHAMELEON**

**Estate Planning Council of Greater Miami  
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**Jeremy P. Leathe, Esq.**  
Dunwody White & Landon, P.A.  
550 Biltmore Way, Ste. 810  
Coral Gables, FL 33134  
(305) 529-1500  
[JLeathe@DWL-law.com](mailto:JLeathe@DWL-law.com)

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**I. INTRODUCTION**

**A. Homestead property is often the most valuable single asset in a decedent's estate, and subject to the greatest protections**

1. “[H]omestead property is the most significant part of a testator’s estate.” *Snyder v. Davis*, 699 So. 2d 999, 1005 (Fla. 1997).

**B. But with great protections come great exceptions**

1. Described as “our legal chameleon.” *Snyder v. Davis*, 699 So. 2d 999, 1001 (Fla. 1997).
2. Homestead law is often far from clear, and constantly changing

**C. So many topics, so little time**

1. This presentation will attempt to cover:
  - a. Basic homestead principles (briefly)
  - b. Difficult areas in homestead law – the ones that can give you a headache
    - i. Residency requirement
    - ii. Definition of heirs
    - iii. Possession of homestead property by the personal representative
    - iv. Acreage limitations
    - v. Residences that may not be covered by homestead protections – cooperative apartments
    - vi. Real property held as tenants by the entirety or joint tenants with rights of survivorship
    - vii. Equitable liens on homestead property
    - viii. Creditor’s claims against homestead property used to pay debts
    - ix. Homestead property held under a trust

2. Topics not covered by this presentation:
  - a. Restrictions on devise and descent (Kelley's Homestead Paradigm)
  - b. Elective share
  - c. Portability of the exemption from ad valorem taxation
  - d. Effect of bankruptcy on homestead protection

## **II. BASIC HOMESTEAD PRINCIPLES**

### **A. General Purpose**

1. *Public Health Trust v. Lopez*, 531 So.2d 946, 948 (Fla.1988).
  - a. "As a matter of public policy, the purpose of the 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 financial misfortune and the demands of creditors who have given credit under such law."
2. *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997).
  - a. Homestead provisions are to be liberally construed and interpreted broadly in favor of maintaining the homestead property.

### **B. Definition of Homestead**

1. Property is owned by a natural person;
2. Owner intends to make the property the owner's, or the owner's family's, permanent residence; and
3. Property meets size limitations.



**C. Three Types of Homestead Protection<sup>1</sup>**

1. Devise and Descent – i.e., restrictions on devise and descent
  - a. Article X, § 4(c), Fla. Const.
2. Creditor Protection – i.e., exemption from forced sale
  - a. For the owner – Article X, § 4(a), Fla. Const.
  - b. For the surviving spouse or heir – Article X, § 4(b), Fla. Const.
3. Tax Exemption
  - a. Ad valorem taxation – Article VII, § 6, Fla. Const.
  - b. “Save Our Homes” assessment limitation – Article VII, § 4, Fla. Const.

**D. Application of Case law**

1. *Jones v. Jones*, 412 So. 2d 387 (Fla. 2d DCA 1982).
  - a. The applicable law is the law in effect on the date of the owner’s death.
2. *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997).
  - a. Homestead case law from other jurisdictions is likely inapplicable. “In Florida...our case law surrounding the homestead provision has its own contours and legal principles. As a result, it is not susceptible to comparisons with similar provisions in other jurisdictions.”
3. *Phillips v. Hirshon*, 958 So. 2d 425, 427 n. 3 (Fla. 3d DCA 2007)
  - a. The definition of homestead for devise and descent and creditor protection is NOT the same as for tax exemption. “It is well appreciated in the case law concerning homestead that the definition of homestead property for Article VII, section 6 purposes is not the same as Article X, section 4 of the Florida Constitution.”

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<sup>1</sup> See *Snyder v. Davis*, 699 So. 2d 999, 1001-02 (Fla. 1997), which lists these three general categories of homestead protection. There are really four (and possibly five) types of homestead protection, depending on whether the subcategories are viewed as separate protections.

### III. CONSTITUTIONAL AND STATUTORY SOURCES OF HOMESTEAD PROTECTIONS (WITH EMPHASIS ADDED) – AT YOUR FINGERTIPS

#### A. Florida Constitution<sup>2</sup>

##### 1. Article X, § 4, Fla. Const. – 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....

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<sup>2</sup> Article X of the Florida Constitution, which contains at § 4 the two main homestead protections of devise and descent and creditor protection, is entitled “Miscellaneous”. Why such important constitutional protections are included with a series of allegedly “miscellaneous” provisions is mind-boggling.

2. Article VII, § 6, Fla. Const. – Homestead exemptions

(a) 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, except assessments for special benefits, up to the assessed valuation of twenty-five thousand dollars and, for all levies other than school district levies, on the assessed valuation greater than fifty thousand dollars and up to seventy-five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years...

(b) Not more than one exemption shall be allowed any individual or family unit with respect to any residential unit....

3. Article VII, § 4, Fla. Const. – Taxation; assessments

(d) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided in this subsection.

(1) Assessments subject to this subsection shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

a. Three percent (3%) of the assessment or the prior year.

b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics....

## B. Florida Statutes

### 1. § 196.031, Fla. Stat. (2013) – Exemption of homesteads

(1)(a) A person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon<sup>3</sup> 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, up to the assessed valuation of \$25,000 on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. Such title may be held by the entireties, jointly, or in common with others, and the exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear....

### 2. § 196.012, Fla. Stat. (2013) – Definitions

(17) “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.<sup>4</sup>

### 3. § 196.041, Fla. Stat. (2013) – Extent of homestead exemptions

(2) A person who otherwise qualifies by the required residence for the homestead tax exemption provided in s. 196.031 shall be entitled to such exemption where the person’s possessory right in such real property is based upon an instrument granting to him or her a beneficial interest for life, such interest being hereby declared to be “equitable title to real estate,” as that term is employed in s. 6, Art. VII of the State Constitution; and such person shall be entitled to the homestead tax exemption irrespective of whether such interest was created prior or subsequent to the effective date of this act.

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<sup>3</sup> The Supreme Court of Florida has declared this clause unconstitutional. *See Garcia v. Andonie*, 101 So. 3d 339, 345 (Fla. 2012).

<sup>4</sup> Section 196.015, Fla. Stat. (2013) lists 10 factors that the property appraiser may consider when making a factual determination as to the intent of a person claiming a homestead exemption to establish a “permanent residence”.

4. § 222.05, Fla. Stat. (2012) – Setting apart leasehold

Any person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his or her own which he or she may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his or her homestead, shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid.

**C. Florida Probate Code**

1. § 731.201, Fla. Stat. (2013) – Protected Homestead

(33) “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 insures the owner’s surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purpose of the code, real property owned in tenancy by the entireties or in joint tenancy with right of survivorship is not protected homestead.<sup>5</sup>

2. § 732.401, Fla. Stat. (2012) – 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.

.....

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

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<sup>5</sup> Also known as “exempt homestead” (vs. “nonexempt”, i.e., subject to the claims of creditors).

3. § 732.4015, Fla. Stat. (2012) – 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.

4. § 732.4017, Fla. Stat. (2012) – 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....

## HOMESTEAD HEADACHES: THE TOP NINE

### **I. RESIDENCY REQUIREMENT – *When a “Resident” is Not a Resident***

#### **A. Authority – Brief Review**

1. Florida Constitution

a. Art. X, § 4(a)(1), Fla. Const.

Creditor protection: “[T]he exemption shall be limited to the residence of the owner or the owner’s family....”

b. Art. VII, § 6(b), Fla. Const.

Tax exemption: “Not more than one exemption shall be allowed any individual or family unit with respect to any residential unit.”

2. Statutes

a. § 196.012, Fla. Stat. (2012)

“Permanent residence” means...true, fixed, and permanent home...to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time.

#### **B. A Non-Citizen with A Temporary Visa Can Be a “Resident” Owning a Protected Homestead Residence**

1. *Grisolia v. Pfeffer*, 77 So. 3d 732 (Fla. 3d DCA 2011)

a. Type: Creditor protection.

b. Facts: Registered alien living in Florida under temporary visa. Owners could not apply for homestead exemption. Owner had applied for permanent residency before his death. Son, who also lived in the residence, was a U.S. Citizen.

c.  Holding: Residence was protected homestead, because home was for his family (son, who could permanently live there), and because owner had requisite intent to make home his permanent residence.

2. *Garcia v. Andonie*, 101 So. 3d 339 (Fla. 2012)
  - a. Type: Tax exemption
  - b. Facts: Owners of Key Biscayne residence were citizens of Honduras who were residing lawfully in the U.S. under a temporary visa. Their three minor children, however, were U.S. citizens and resided permanently in the residence.
  - c. Holding: The owners were entitled to the tax exemption.
3. *Juarrero v. McNayr*, 157 So. 2d 79 (Fla. 1963)
  - a. Type: Tax Exemption.
  - b. Facts: Owners, Cuban refugees fleeing political persecution, purchased residence in Coral Gables. Owners held “temporary visas”, although they could stay in U.S. indefinitely.
  - c. Holding: Owners could not have a permanent residence in Florida because they only had a temporary visa and could not, therefore, assert in good faith that they intend to reside for a fixed period of time in this country. Stated, however, that “Citizenship is not a prerequisite for claiming homestead exemption.”

**C. An Owner Does Not Need to Reside in Residence for it to be Deemed a Protected Homestead Residence**

1. *Bayview Loan Servicing, LLC v. Giblin*, 9 So. 3d 1276 (Fla. 4<sup>th</sup> DCA 2009).
  - a. Type: Creditor protection.
  - b. Facts: Spouses were separated. Husband purchased residence titled solely in his name. Wife and daughter resided in that residence. Husband never resided in that residence. Husband died, devising residence to his heirs.
  - c. Holding: Residence was protected homestead exempt from the claim of creditors.
  - d. Exemption from forced sale shall be limited to the residence of (1) the owner, or (2) the owner’s family. Art. X, § 4(a), Fla. Const.
  - e. Unanswered questions:
    - i. What is the definition of “family”? Nieces and nephews? Cousins?



- ii. Can one person own multiple protected homestead properties, one for himself, and others for his family?

**D. Legitimately Separated Spouses Can Each Own a Separate Protected Homestead Residence**

1. *Law v. Law*, 738 So. 2d 522 (Fla. 4<sup>th</sup> DCA 1999)
  - a. Type: Creditor protection.
  - b. Facts: Husband owned residence with wife as tenants by the entirety. Husband and wife claimed homestead exemption on this property. Husband and wife subsequently separated. Husband moved into his mother's residence, which he later inherited. There is no indication that husband and wife filed a petition for dissolution of marriage. Upon his mother's death, husband petitioned to determine his mother's residence as protected homestead.
  - c. Holding: Residence in which husband was living is protected homestead, because husband "legitimately live[d] apart" in a separate residence from wife, although court states, "We agree...that [the husband] cannot have two homesteads, and that a husband and wife in an intact marriage cannot have two homesteads." *Law*, 738 So. 2d at 525.
2. *Wells v. Haldeos*, 48 So. 3d 85 (Fla. 2d DCA 2010)
  - a. Husband and wife were estranged and lived in separate residences. Second DCA that each spouse was entitled to tax exemption for each residence, because each spouse had a separate "family unit".
3. *But cf. Brklacic v. Parrish*, --- So. 3d ---, 2014 WL 4328068 (Fla. 4<sup>th</sup> DCA 2014)
  - a. Type: Tax exemption.
  - b. Facts: Husband alleged that he has a "separate family unit" from his wife, and therefore he was entitled to his own homestead tax exemption. Despite a good marriage, the husband maintained his pre-marital home in Broward County, and the wife maintained her pre-marital residence in Palm Beach County. Both claimed a homestead tax exemption. The spouses claimed they never lived together on a daily basis, but stayed together on weekends and holidays.
  - c. Holding: Although Art. VII, § 6(b), Fla. Const. prohibits a "family unit" from having more than one homestead tax exemption,

because the spouses were not estranged, they did not have separate family units. Homestead tax exemption denied.

**E. Absence from Residence Because of Health Issues – Still the Owner’s Homestead Residence**

1. *Estate of Melisi*, 440 So. 2d 584 (Fla. 4th DCA 1983)

Although a case involving whether a divorced husband could still be deemed “head of household” for his former wife and child, important because the Fourth DCA recognized that, “The homestead character of the property is not abandoned when the owner involuntarily changes his residence, as in a case where an infirmity requires residence in a nursing home or hospital facility.” *Id.* at 585.

2. *Crain v. Putnam*, 687 So. 2d 1325 (Fla. 4th DCA 1997)

- a. Type: Tax Exemption.
- b. Facts: Owner, who suffered extensive brain damage as a result of an illness, was involuntarily put in a nursing home. Her son sought exemption from all property taxes pursuant to § 196.101, Fla. Stat., which provides for such tax exemption on a homestead residence owned by a person who is totally and permanently disabled. The county property assessor challenged the exemption. The owner’s furniture, clothing, and most of her other possessions remained at the residence, and she continued to receive her mail there.
- c. Holding: The owner was entitled to the homestead.

## II. EXEMPTION INURING TO BENEFIT OF HEIRS – When an heir is not an “heir”

### A. Florida Constitution

1. Art. X, § 4(b), Fla. Const.

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

### B. Statutory Definition of Heir

1. § 731.201(20), Fla. Stat. (2013)

The Florida Probate Code defines “heirs” as those persons, including the surviving spouse, who are entitled under the statutes on interstate succession to the property of a decedent.

2. § 731.201(9), Fla. Stat. (2013)

The Florida Probate Code provides a separate definition for “descendant”, meaning “a person in any generational level down the applicable individual’s descending line and includes children, grandchildren, and more remote descendants. The term ‘descendant’ is synonymous with the term ‘lineal descendant’ and ‘issue’ but excludes collateral heirs.”

### C. Definition of Heir for Homestead Law

1. *Snyder v. Davis*, 699 So. 2d 999, 1005 (Fla. 1997)

a. The Supreme Court of Florida held that an “heir” under Article X, § 4(b) includes anyone listed in the “class of heirs” created by the statutes on intestate succession, and not just heirs actually entitled to an intestate share. In other words, an “heir” is anyone who may inherit under the intestate succession statutes, not just someone who actually inherits from the owner of the homestead property.

b. “[W]e reject the narrow entitlement definition of the term ‘heirs’ that includes only those people who would inherit under the intestacy statute at the death of the decedent. Instead, we hold that the homestead provision allows a testator with no surviving spouse or minor children to choose to devise, in a will, the homestead property, with its accompanying protection from creditors, to any family member within the class of persons categorized in our intestacy statute.”

2. *Moss v. Estate of Moss*, 777 So. 2d 1110 (Fla. 4th DCA 2001)
  - a. When homestead property was devised to husband's brother and niece, the creditor protection inured to these "heirs".
3. *Traeger v. Credit First Nat'l Ass'n*, 864 So. 2d 1188 (Fla. 5th DCA 2004)
  - a. Decedent's deceased husband's adult son is an "heir" to whom homestead creditor protection inured.

**III. POSSESSION OF HOMESTEAD PROPERTY BY PERSONAL REPRESENTATIVE – *When property “passing by operation of law” does not pass by operation of law***

**A. General principle**

1. *In re Estate of Hamel*, 821 So. 2d 1276 (Fla. 2d DCA 2002)

Protected homestead passes by operation of law and vests on death, even in the absence of a court order.

**B. Probate Code and Rules**

1. § 733.608(2), Fla. Stat. (2012)

“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.”

Property cannot be occupied by a person who appears to have an interest in the property

The personal representative can only take possession for the limited purpose of preserving, insuring, and protecting the property

The personal representative cannot sell the property

**C. Repayment of Expenses**

1. § 733.608(3), Fla. Stat. (2012)

- a. “If the personal representative expends funds or incurs obligations to preserve, maintain, insure, or protect the property referenced in subsection 92), the personal representative shall be entitled to a lien on that property and its revenues to secure repayment of those expenditures and obligations incurred.”

- b. The subsection continues with procedure for quantifying and enforcing the lien

**D. The personal representative may decline option to take possession**

1. § 733.608(2), Fla. Stat. (2012)

- a. “[T]he personal representative...is authorized, but not required, to take possession....”

**IV. ACREAGE LIMITATIONS – When “property exempt from forced sale” is not exempt from forced sale**

**A. Constitutional acreage limitations**

1. 160 acres – outside a municipality
2. 0.5 acres – inside a municipality
  - a. But note: homestead protections for property after incorporation that is in excess of 0.5 acres and that was owned by the debtor before incorporation may be grandfathered in – the acreage limitation “shall not be reduced without the owner’s consent by reason of subsequent inclusion in a municipality”. Art. X, § 4(a)(1), Fla. Const.

**B. Reducing acreage amount**

1. Selection of amount within acreage limitation
  - a. § 222.02, Fla. Stat. (2012) – Designation of homestead after levy

Whenever a land is made upon the lands, tenements, mobile home, or modular home of such person whose homestead has not been set apart and selected, such person, or the person’s agent or attorney, may in writing notify the office making such levy, by notice under oath made before any officer of this state duly authorized to administer oaths, at any time before the day appointed for the sale hereof, of what such person regards as his or her homestead, with a description thereof; and the remainder only shall be subject to sale under such levy.

2. Sale and apportionment of proceeds
  - a. *In re Englander*, 95 F.3d 1208 (11th Cir. 1996)
    - i. Property in municipality was 1.05 acres, and could not be subdivided due to local zoning and business regulations. Court upheld the bankruptcy court’s ruling that the equitable solution was to sell the property and apportionment of the proceeds.
  - b. *In re Kellogg*, 197 F.3d 1116 (11th Cir. 1999)
    - i. Property in municipality was 1.3 acres, and could not be subdivided. Eleventh Circuit upheld bankruptcy court’s ruling that property is to be sold and proceeds apportioned.

- c. *In re Quraeshi*, 289 B.R. 240 (S.D. Fla. 2002)
  - i. Property in municipality was 2.69 acres, could not be subdivided, and had mortgage. Court held that mortgage must be satisfied first from entire proceeds of sale before the apportionment of the proceeds of sale.

**C. Mixed use residential/commercial**

- 1. Within a Municipality
  - a. *Weiss v. Stone*, 220 So. 2d 403 (Fla. 3d DCA 1969)
    - i. Property consisted of three contiguous lots of land and a one-story five unit apartment building, in which the debtor occupied one of the five units. The Third DCA held that only the unit occupied by the debtor was subject to homestead protection.
  - b. *Menard v. University Radiation Oncology Associates, LLP*, 976 So. 2d 69 (Fla. 4<sup>th</sup> DCA 2008)
    - i. Portion of property that was leased to another was not subject to homestead protection.
- 2. Outside a Municipality
  - a. *Davis v. Davis*, 864 So. 2d 458 (Fla. 1st DCA 2004)
    - i. Land was not in a municipality and was less than 160 acres, but included a residence and a separate mobile home park. First DCA held that the entire property (including the commercial mobile home park) was the owner's protected homestead. The First DCA held that the limitation in Art. X, § 4(a)(1) ("upon which the exemption shall be limited to the residence of the owner or the owner's family" only applied to real property within a municipality.
  - b. *But see In re Radtke*, 344 B.R. 690 (Bankr. S.D. Fla. 2006) (commercial portion or real property would not be considered exempt homestead property).

**V. COOPERATIVE APARTMENTS – *When your residence is not your “residence”***

**A. Types of Ownership Interests Subject to Homestead Protections**

1. *Cutler v. Cutler*, 994 So.2d 341, 344 (Fla. 3d DCA 2008)
  - a. Article X, § 4(a), Fla. Const. does not distinguish between the different kinds of ownership interests that are entitled to the homestead exemption against forced sale.
  - b. There is no definition of “owned”
  - c. But note: must be owned by a “natural person”. Therefore, homestead protection does not apply to a residence owned by, e.g., a corporation or LLC, even if used as the primary residence of the sole interest holder of the business entity
2. *Geraci v. Sunstar EMS*, 93 So. 3d 384 (Fla. 2d DCA 2012)
  - a. The Florida Supreme Court adopted the general rule that a fee simple estate is not necessary to this exemption. Any “beneficial interest in land” may entitle its owner to the exemption. Specific Types
3. A slight detour – real property interests that are considered homestead property
  - a. Leasehold
    - i. § 222.05, Fla. Stat.
    - ii. But this is a statutory protection, not a constitutional protection. Accordingly, there is no restriction on devise and descent, only creditor protection for the leaseholder.
  - b. Houseboat
    - i. *Miami Country Day School v. Bakst*, 641 So. 2d 467 (Fla. 3d DCA 1994)
      - (a) *See also In re Mead*, 255 B.R. 80 (Bankr. S.D. Fla. 2000) (34-foot cabin cruiser was exempt homestead property)
      - (b) *But see In re Christie*, 2003 WL 16856 (Bankr. M.D. Fla. 2003) (38-foot powerboat was not exempt homestead property).



- c. Mobile Homes
  - i. *Gold v. Schwartz*, 774 So. 2d 879 (Fla. 4<sup>th</sup> DCA 2001)
- d. Recreational Vehicles
  - i. *In re Mangano*, 158 B.R. 532 (Bankr. S.D. Fla. 1993)
- e. Proceeds from Sale of Homestead Property
  - i. *Orange*, 137 So. 2d 201
- f. Condominiums
  - i. *Traeger v. Credit First Nat'l Ass'n*, 864 So. 2d 1188, 1189 n.1 (Fla. 5th DCA 2004)
    - (a) "A condominium may qualify as a homestead."
  - ii. *Braswell v. Braswell*, 890 So. 2d 379 (Fla. 3d DCA 2004)
  - iii. *Geraci v. Sunstar EMS*, 93 So. 3d 384 (Fla. 2d DCA 2012)
    - (a) Limited to exemption from forced sale. Does not apply to restrictions on descent and devise.

## **B. Cooperative Apartments**

### 1. Definition

- a. *In re Estate of Wartels*, 357 So. 2d 708. 709 (Fla. 1978).
  - i. "Unlike a condominium purchaser, a cooperative apartment unit purchaser does not receive title to the cooperative apartment unit, nor does he become entitled to ownership of any portion of the building or the land upon which the cooperative apartment unit is situated. Rather, a cooperative apartment unit purchaser only receives shares in the corporation which holds title to the land on which the cooperative apartment building is constructed. In conjunction with the purchase of the shares in the cooperative corporation, the stockholder receives a lease for his individual cooperative apartment unit. In short, the purchaser of a cooperative apartment unit does not hold any type of proprietary interest in either the apartment itself or the apartment building containing the apartment unit, or the land upon which the building is situated." Deemed an interest in personal property, not real property.

2. Application of homestead law to cooperative apartment
  - a. Devise and descent
    - i. *In re Estate of Wartels*, 357 So. 2d 708, 711 (Fla. 1978)
      - (a) No – “[A] cooperative apartment may not be considered homestead property for the purpose of subjecting it to Florida Statutes regulating the descent of homestead property.”
    - ii. *Phillips v. Hirshon*, 958 So. 2d 425 (Fla. 3d DCA 2007)
      - (a) Refused to apply devise and descent protection to cooperative apartment despite passage of the Florida Cooperative Act, which placed cooperative apartments on equal footing with all other interest in realty.
  - b. Creditor Protection
    - i. *Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566 (Fla. 5<sup>th</sup> DCA 2002)
      - (a) Maybe?
  - c. Tax Exemption
    - i. *Ammerman v. Markham*, 222 So. 2d 423 (Fla. 1969)
      - (a) Yes!
    - ii. § 196.031, Fla. Stat.

**VI. PROPERTY HELD AS TENANTS BY THE ENTIRETIES OR AS JOINT TENANTS WITH RIGHT OR SURVIVORSHIP – *When your residence is not subject to homestead protections***

**A. Florida Statutes**

1. § 732.401(5), Fla. Stat. (2012)
  - a. Homestead restriction on descent “does not apply to property that the decedent owned in tenancy by the entireties or in joint tenancy with right of survivorship.”

**B. Cases**

1. *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA)
  - a. Owner, who was single, conveyed title to residence to himself and three others as joint tenants with right of survivorship. Owner subsequently married. Two of the joint tenants died, then the owner died, survived by his spouse and his niece (the remaining joint owner). The Second DCA held that the property was not homestead property, and title therefore vested in the sole remaining joint tenant, the niece, to the exclusion of the surviving spouse.
2. *Marger v. De Rosa*, 57 So. 3d 866, 867 (Fla. 2d DCA 2011)
  - a. Son and mother purchased residence as “joint tenants with full right of survivorship and not as tenants in common”. Son died, was not survived by a spouse, but was survived by two minor children. Mother claimed that she was entitled to all interest in the residence. The Second DCA held that the residence was not homestead property, and therefore the residence became the sole property of the mother upon the son’s death. “This language [of Article X, § 4(c)] does not restrict the type of interests in real property a person may acquire or how a person may title his or her property. Instead, it restricts a person’s attempt to devise property he or she owns when homestead status has attached to the property.”
    - i. But note, if the mother had died first, the property likely would have instantly become homestead property when held solely by the son.

**C. Effect of Disclaimer**

1. A disclaimer of the survivorship interest in real property held as TBE does not cause the disclaimed interest to become homestead property for purposes of devise and descent. § 739.203(4), Fla. Stat. (2013).

- a. But note: When first spouse dies, the residence could now become the surviving spouse's homestead property (provided the other definitions of homestead property are met)

**VII. EQUITABLE LIEN FOR BREACH OF FIDUCIARY DUTY OR FRAUD – *When* property “exempt from forced sale” can be subject to a forced sale**

**A. Intent to Defraud All Creditors**

- 1. *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001)
  - a. Non-exempt assets can be used to purchase homestead property, which is then protected from the claims of creditors.

**B. Intent to Defraud Specific Creditor Who Provided the Money to Purchase the Homestead Property**

- 1. *Zureikat v. Shaibani*, 944 So. 2d 1019 (Fla. 5th DCA 2006)
  - a. Shaibani loaned Zureikat money, which Zureikat used to purchase and improve real property. Zureikat claimed that the property was protected from Shaibani's creditor's claim. The Fifth DCA upheld trial court's imposition of an equitable lien.
- 2. *Randazzo v. Randazzo*, 980 So. 2d 1210 (Fla. 3d DCA 2008)
  - a. Divorce judgment required former wife to pay former husband the proceeds from the sale of the marital residence. Instead, former wife sold marital residence, purchased a new residence, filed for bankruptcy, then claimed that the new residence was homestead property and not subject to the former husband's claims. The Third DCA imposed an equitable lien on the former wife's new residence for the benefit of the former husband.
- 3. *Willis v. Red Reef, Inc.*, 921 So. 2d 681, 684 (Fla. 4th DCA 2006)
  - a. “The imposition of equitable liens on homesteads is limited to cases in which the homestead were purchased with the fruits of fraudulent activity.”

**VIII. CREDITOR’S CLAIMS FOR HOMESTEAD PROPERTY WITH AUTHORITY TO SELL OR IN RESIDUE TO PAY DEBTS – *When* property “exempt from forced sale” is not exempt from forced sale**

**A. Usually not in the hands of the PR for use to pay creditor’s claims**

1. *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2006)
2. *Harrel*, 913 So. 2d 749

**B. Not subject to apportionment for taxes**

1. § 733.817(2), Fla. Stat.

**C. But does have power if directed to do so**

1. *Estate of Price*, 513 So. 2d 767
2. *Knadle*
3. *Cutler*
4. *Pajares v. Donahue*, 33 So. 3d 700 (Fla. 4th DCA 2010)

**IX. HOMESTEAD REAL PROPERTY HELD IN TRUST – When a “natural person” is not a natural person**

**A. Natural Person Requirement**

1. Article X, § 4(a), Fla. Const.
  - a. Homestead is defined as “property owned by a natural person”.

**B. History**

1. *In re Bosonetto*, 271 B.R. 203 (Bankr. M.D. Fla. 2001)
  - a. Property that is held by a trustee under a trust is not owned by a natural person, so fails to meet the definition of homestead property.
2. *Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d DCA 2004)
  - a. The Third DCA held that property held in trust is entitled to homestead exemption.
3. *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006)
  - a. The Fourth DCA held that, because the settlor of a revocable trust has the right to revoke the trust at any time, a settlor therefore maintains an ownership interest in a residence, even though title to the residence is held by a revocable trust.
4. *In re Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006)
  - a. Declined to follow *Bosonetto*
5. *In re Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006)
  - a. Declined to follow *Bosonetto*
6. *Cutler v. Cutler*, 994 So. 2d 341 (Fla. 3d DCA 2008)
  - a. Real property held in land trust was subject to homestead protections, but settlor provided that the real property could be used to pay debts of the estate, thus subjecting it to the claims of creditors.

**C. Florida Statutes**

1. § 732.4015(2)(a), Fla. Stat.

- a. For homestead restriction on devise, “owner” “includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which [sic] is in existence at the time of the grantor’s death as if the interest held in trust was owned by the grantor.”

**D. Creditor Protection**

1. *Higgs v. Warrick*, 994 So. 2d 292 (Fla. 3d DCA 2008)
2. *Donovan*, 550 So. 2d at 39.
3. *Elmowitz*, 647 So. 2d 10-64
4. *HCA Gulf Coast*, 594 So. 2d 774
5. *In re Cocke*, 371 B.R. 554

**E. Restrictions on Devise**

1. Transfer to inter vivos trust is not a transfer per 732.4017(2).
2. Must have right of revocation as defined in Section 733.707
3. *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4<sup>th</sup> DCA 1981)