

**FLORIDA IRREVOCABLE GRANTOR HOMESTEAD TRUST**

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## II. TYPES OF HOMESTEAD

- a. Devise Restrictions – Art. X, §4 (c) Fla. Const.
  - i. Prohibits devise of homestead when survived by a spouse or minor child, except for a fee simple interest to a spouse if there is no minor child
  - ii. Requirements: Identical to Creditor Protection requirements (below)
  - iii. Triggers
    1. Spouse
    2. Minor child
- b. Creditor Protection – Art. X, §4 (a) Fla. Const.
  - i. Homestead property is exempt from general creditor claims
  - ii. Requirements:
    1. Florida Ownership interest requirement
    2. Permanent Residence requirement
    3. Size limitation - up to ½ acre within the city and up to 160 acres outside of the city
- c. Tax Benefits –Art. VII, §§4 & 6, Fla. Const.
  - i. Up to \$50,000 (Fla. §196.031) assessment exemption and Save Our Homes tax cap limiting increases in assessed homestead property value to no greater than 3% per year (Fla. Stat. §193.155)
  - ii. Requirements:
    1. Legal or equitable title
    2. Permanent residence

## III. INTER VIVOS CONVEYANCE OF HOMESTEAD PROPERTY

- a. Fla. Stat. §732.4017 (with emphasis added):

“(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.”

b. Fla. Stat. §733.707(3)(e):

“For purposes of this subsection, a “right of revocation” is a power retained by the decedent, held in any capacity, to:

1. Amend or revoke the trust and revest the principal of the trust in the [transferor]; or
2. Withdraw or appoint the principal of the trust to or for the [transferor]’s benefit”

#### IV. PURPOSE OF THE FLORIDA IRREVOCABLE GRANTOR HOMESTEAD TRUST

a. Avoiding Devise Restrictions

- i. Using the FIGHT properly avoids the Florida Constitutional devise restrictions. Fla. Stat. §732.4017.

- ii. *Zuckerman v. Alter*, 615 So.2d 661, 663-64 (Fla. 1993).
  - 1. “If by the terms of the trust an interest passes to the beneficiary during the life of the settlor, although that interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not testamentary.”
- iii. *Stone v. Stone*, 157 So.3d 295 (Fla. 4th DCA 2014)
  - 1. Only reported case with analysis of Fla. Stat. §732.4017
  - 2. Involved application of homestead devise restriction to real property owned via an irrevocable trust known as a Qualified Personal Residence Trust (“QPRT”) discussing devise restriction.
  - 3. Found that a homestead property in a QPRT was subject to devise restriction when the property passed to and through decedent’s estate, as the grantor died prior to the QPRT term expiring and retained a reversion to his estate, but ultimately the court found the homestead was not devise restricted as it found the devise restrictions were waived by the deeds.
  - 4. The Court in its analysis rightfully determined that “property owners may give away or dispose of homestead property during their lifetimes, including by transfer to a trust,” that the “initial transfer was not a devise subject to [Devise Restriction],” and that had husband survived the term of the QPRT the subsequent transfer to daughter would not have been considered a devise
- b. Maintaining Creditor Protection
  - i. Ownership Interest Requirement
    - 1. Any beneficial interest in land, including a life estate, permits homestead exemption. Fee simple ownership interest is not necessary
      - a. *Bessemer Props. v. Gamble*, 27 So.2d 832, (Fla. 1946); *Geraci v. Sunstar EMS*, 93 So.3d 384 (Fla. 2d DCA 2012); *Southern Walls, Inc. V. Stilwell Corp*, 810 So.2d 566 (Fla. 5th DCA 2002)
    - 2. Ownership through revocable trust = qualifying beneficial interest
      - a. *Callava v. Feinberg*, 864 So.2d 429 (Fla. 3d DCA 2003); *Engleke v. Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006); *In re Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006); *In re Mary L. Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006); *In re Cocke*, 371 B.R. 554 (Bankr. M.D. Fla. 2007); contrast *In Re Bosonetto*, 271 B.R. 403 (2001) (seemingly repudiated even if not directly over-ruled).
    - 3. Support for application of homestead to irrevocable trust
      - a. *Cutler v. Cutler*, 994 So.2d 341 (Fla. 3d DCA 2008)
        - i. Decedent conveyed homestead to an irrevocable land trust but reserved a life estate interest in herself
          - 1. Note court opinion indicates that decedent retained the right to revest herself with trust assets

- ii. Property retained its homestead status when remainder interest passed to the trust upon decedent's death
      - 1. However, the trust directed distribution based upon decedent's will, which stated that the properties (including the homestead) should be used to satisfy decedent's debts. Such direction caused a loss of homestead protection
    - iii. Original 2007 opinion was withdrawn on grant of rehearing en banc. Before being withdraw the opinion the court analyzed application of homestead to revocable trusts and found "immaterial that legal title to the residence in this case was held in an irrevocable trust during [decedent's] lifetime." (32 Fla. L. Weekly D583, 2007 Fla. App.)
  - b. *Stone v. Stone*, 157 So.3d 295 (Fla. 4<sup>th</sup> DCA 2014)
    - i. Application of devise restriction applies if property was homestead, thus while within the QPRT the property must have maintained its homestead nature during the pendency of the QPRT term.
    - ii. The devise restriction appears in Art. X Section 4, the same section that provides the Constitutional creditor protection.
      - 1. Devise and creditor protection qualification both stem from same homestead requirements - *Holden v. Gardner*, 420 So.2d 1082 (Fla. 1982) held the same definition of homestead used in Art. X Section 4(a) also applies to (c).
- ii. Creditor Protection – After the Death of the Transferor
  - 1. Creditors of Decedent – Does the Exemption from Creditors Inure? Art. X, §4 (b) Fla. Const.
    - a. Devise of life estate in homestead to non-heir and remainder interest to heir of decedent, maintained exemption from decedent's creditors
      - i. *Hubert v. Hubert*, 622 so.2d 1049 (Fla. 4<sup>th</sup> DCA 1993)
    - b. Devise of homestead to trust for benefit of heir of decedent maintained homestead status
      - i. *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So.2d 774 (Fla. 1st DCA 1992); *Estate of Donovan*, 550 So.2d 37 (Fla. 2nd DCA 1989); and *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006) – finding the exemption inured where the trust terminated 45 days after testator's

death (Donovan), or where the trust provisions gave the spouse or child a specific right to the use of the residence for life (Engelke and Downing)

- c. Devise of homestead to trust where decedent's sister was beneficiary lost homestead protection seemingly because she "was only entitled to an equivalent in value from the assets of the trust"
  - i. *Elmowitz v. Estate of Zimmerman*, 647 So.2d 1064 (Fla. 3rd DCA 1994) – Homestead devised to a trust lost its homestead creditor protection and the court noted in a footnote that the beneficiary "was only entitled to an equivalent in value from the assets of the trust").
  - ii. However, *Elmowitz*, which also cites to *In re Estate of Morrow*, 611 So.2d 80 (Fla. 2d DCA 1992) and *Hartwell v. Balsigame*, 564 So.2d 543 (Fla. 2d DCA 1990) as authority for homestead losing its creditor exemption upon devise to a trust, was decided before the Florida Supreme Court, in *Synder v. Davis*, 699 So.2d 999 (Fla. 1997), significantly broadened the definition of "heirs" to include anyone who take under the Florida intestacy statutes.

iii. Creditor Protection – Remainderman Interest

- 1. Not entitled to homestead protection where remainder interest holders did not reside on the property while life tenant was alive
  - a. *Aetna Insurance Co. v. LaGasse*, 223 So.2d 727 (Fla.1969); *Anemaet v. Martin–Senour Co.*, 114 So.2d 23, 27 (Fla.2d Dist.Ct.App.1959)
- 2. Entitled to homestead protection where remainder interest holders lived in the home with the life tenant and made it their residence
  - b. *In re Hildebrandt*, 432 B.R. 852 (Bankr. N.D. Fla 2010); *In re Williams*, 427 B.R. 541 (Bankr. M.D. Fla. 2010)
  - c. Note: these are bankruptcy court decisions

c. Maintaining Tax Benefits

- i. Beneficial ownership through a trust qualifies as "equitable title"
  - 1. Fla. Stat. §196.041(2); Fla. Admin. Code §12D-7.011
  - 2. No distinction drawn between revocable and irrevocable trust, and no requirement that trust be revocable or amendable
  - 3. See also Fla. Att'y Gen. Op. 2008-44 (2008); Fla. Op. Att'y Gen. 90-70 (1990).
- ii. Application of tax benefits to homestead in irrevocable trust
  - 1. *Nolte v. White*, 784 So.2d 493 (Fla. 4th DCA 2001); *Robbins v. Welbaum*, 664 So.2d 1 (Fla. 3<sup>rd</sup> DCA 1995)
    - a. Both cases involved QPRTs receiving continued homestead tax benefits

2. See also Fla. Att’y Gen. Op. 2003-11 (2003), Fla. Att’y Gen. Op. 90-70 (1995)

V. ADDITIONAL CONSIDERATIONS

a. Federal Tax

- i. FIGHT does not offer estate, gift, or income tax benefits by its design
- ii. Estate Tax
  1. Retained life estate interest by grantor will cause gross estate inclusion upon grantor’s death. IRC §2036 and §2038
  2. Possibility of reversion by grantor will cause gross estate inclusion. IRC §2037
  3. Trust/beneficiaries will receive a FMV basis in the entire homestead property. IRC §1014.

iii. Gift Tax

1. Completed gifts are subject to gift tax. IRC §2511
  - a. If remainder interest is a completed gift for gift tax purposes to the trust, it will necessitate reporting a gift
  - b. The gift value could be the entire FMV of the homestead if the trust benefits family. IRC §2702
2. Incomplete gifts are not subject to gift tax
3. Power of grantor to change beneficial enjoyment, such as through a lifetime limited power of appointment or power to exclude trust beneficiaries, avoids creating a completed gift
  - a. Treas. Reg. §25.2511-2(b)-(c)

iv. Income Tax

1. Grantor Trust status desired so as to treat the transferor as the owner of the trust assets for income tax purposes
  - a. IRC §673 - Reversionary interests
    - i. However, IRC §673(b) excludes grantor trust status if trigger by death of descendant who “holds all of the present interests in any portion of a trust”
    - ii. Having spouse or 3<sup>rd</sup> party negate this concern?
  - b. IRC §674 – Power to control beneficial enjoyment
    - i. Lifetime POA provided distribution can be made to someone other than only income beneficiaries (such as a charity)
  - c. IRC §677 – income for benefit of grantor
    - i. If grantor or grantor’s spouse is income beneficiary
    - ii. If trust may be used to pay life insurance premiums on the life of grantor or grantor’s spouse
2. Remain eligible for IRC §121 (exclusion of gain on sale of principal residence)
  - a. Treas. Reg. §1.121-1(c)(3)(i)
3. Deductions permissible under IRC §164 (SALT deductions, including real property taxes)

b. Acceleration/Due on Sale Clause

- i. Mortgages generally contain an acceleration clause (aka a due on sale clause) that allows the lender to call the note due in full when there is a change of ownership to the mortgaged property
- ii. Garn-St Germain Act (Federal Act) - 12 U.S.C. 1701j-3(d)
  - a. As long as the beneficiaries consist of the grantor or grantor's family, then lenders are prohibited from calling the loan due, whether the trust is revocable or irrevocable
- 2. Upon initial conveyance to FIGHT, a lender may not exercise its option pursuant to a due-on-sale clause if there is:
  - a. "(8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property."
  - b. No requirement trust be revocable or grantor have right to amend, revoke, or revest property
  - c. Reversionary causes Transferor to remain a beneficiary of the trust. Fla. Stat. §736.0103(4)
- 3. Upon a change of beneficial interest in FIGHT due to death of Transferor, a lender should not be able to exercise its option pursuant to a due-on-sale clause if there is:
  - a. "(5) a transfer to a relative resulting from the death of a borrower"
  - b. "(6) a transfer where the spouse or children of the borrower become an owner of the property"
  - c. Is granting an "equitable interest" sufficient to create deemed "ownership" for these purposes?
- c. Future Transactions with Homestead
  - i. Borrowing or refinancing or using homestead as collateral will be more challenging
  - ii. Sale of Homestead will require Trustee consent and participation
    - 1. Sale proceeds will need to be divided based upon respective interests of life estate and remainder interest
  - iii. Purchase of replacement homestead property will require Trustee consent and participation if Trust funds are to be used towards the purchase
- d. Property Tax Reassessment
  - i. Conveyance to trust not a change of ownership triggering reassessment
    - 1. Fla. Stat. §193.155(3)(a) – no change of ownership if "the transfer is between legal and equitable title and no additional person applies for homestead exemption on the property"
  - ii. RPPTL Legislative Position Request Form and White Paper for §732.4017
    - a. "[C]onveyance of an interest that meets the requirements of the [Fla. Stat. §732.4017] will not cause the homestead owner's retained interest to be revalued for assessment purposes, as long as the person conveying the interest retains a life estate or other interest that qualifies as homestead for real property tax purposes under current law."



- iii. Death of Transferor
  - 1. Fla. Stat. §193.155 requires reassessment in year homestead is established or the year in which there is a “change of ownership”
  - 2. Fla. Const. art. VII, §4(d) limits the increase in value for tax assessment purposes to no greater than 3% per year unless “[n]ew homestead property” is established
  - 3. Fla. Const. art. VII, §6 provides that “another legally or naturally dependent upon the owner” who has “equitable title” and maintains the homestead as a “permanent residence, is entitled to the homestead tax exemption
  - 4. No new homestead is being established, as a surviving spouse and/or minor children are dependent upon the Transferor so they are eligible for the continuation of the Transferor’s homestead tax benefit
  - 5. Fla. Stat. §193.155(3)(a)(2) & (4) exclude from the definition of “change of ownership” a “change or transfer to a surviving spouse” and “a transfer [] between the owner and another who is a permanent resident and who is legally or naturally dependent upon the owner.”
  - 6. Following the transferor’s death, reassessment of the homestead should not occur if a surviving beneficiary continues to reside on the property and, pursuant to the terms of the FIGHT, holds a beneficial interest for life
- e. Florida Documentary Stamp Tax – Fla. Stat. §201.02
  - i. Fla. Stat. §201.02 imposes a tax on a “transfer for consideration of a beneficial interest in real property”
    - 1. Three requirements to trigger Doc Stamp Tax:
      - a. Transfer,
      - b. Consideration, and
      - c. Change of Beneficial Interest.
    - 2. Consideration is present if property has a mortgage. Fl. Admin. Code §12B-4.012(2)(a)
  - ii. What constitutes a change of the “beneficial interest”?
    - 1. Term is not defined in Chapter 201, however, it does provide:
      - a. Fla. Stat. 201.02(1)(b)(6)
        - i. “The purpose of this paragraph is to impose the documentary stamp tax on the transfer for consideration of a beneficial interest in real property. The provisions of this paragraph are to be construed liberally to effectuate this purpose.”
      - b. Fla. Stat. 201.0201(3)
        - i. “it is the Legislature’s intent by this act to impose the documentary stamp tax when the beneficial ownership of real property is transferred to a new owner or owners by the use of techniques that apply the Supreme Court’s decision in Crescent in

- combination with transfers of ownership of, or distributions from, artificial entities”
2. While the term is also not defined in the Fl. Admin. Code, it does provide an illustration explaining:
    - a. there is no change of beneficial interest if the transferor is sole beneficiary of trust; and
    - b. if transferor is not sole beneficiary, then doc stamp tax applies “to the extent of the consideration, if any, for the beneficial interest in the real property transferred to such other persons”
  - iii. Department of Revenue guidance on what kind of transfers do not constitute a transfer of a beneficial interest to someone other than the transferor:
    1. TAA 09B4-003 (Apr. 14, 2009)
      - a. 7 encumbered units were transferred to a joint trust between a husband and wife
      - b. 6 units owned solely by husband were subject to doc stamp tax on 50% of the mortgage value for those units due to a change of beneficial interest
        - i. Wife’s 50% interest in joint trust
        - ii. However, no tax was applicable to Husband’s 50% interest since he retained his beneficial interest in the property through the joint trust
      - c. Single jointly owned encumbered unit was not subject to doc stamp tax because there was no change in beneficial interest
        - i. “Husband and Wife [were] currently in title to the property, and a deed to a revocable trust where Husband and Wife [were] the only beneficiaries during their lifetimes would not represent a conveyance to another person or entity.”
    2. TAA 2004(b4)-011 (Dec. 2, 2004)
      - a. H&W sought DOR opinion as to whether a transfer of their homestead to their QPRT was subject to doc stamp tax.
      - b. “Husband and Wife, as grantors, upon the transfer of the real property to the Qualified Personal Residence Trust, retained beneficial ownership of the real property. Since the grantors retained beneficial ownership of the real property and there is no consideration for the transfers, these transfers are exempt from documentary stamp tax”
    3. TAA 20B4-003 (Oct. 16, 2020)
      - a. Issue was whether the Doc Stamp Tax was applicable to a lady bird deed (“LBD”)
      - b. The DOR concluded that the LBD “does not transfer any present beneficial interests in real property.” Stating further that the life tenants “retain all rights to the subject

- properties” and the remainderman’s interest “is contingent upon the death of the Life Tenants.”
- c. The DOR held that “since there is no present transfer of beneficial interests in the subject properties, [the LBD] is not subject to documentary stamp tax regardless of any consideration.”
4. TAA 12B4-001 (Mar. 6, 2012)
    - a. Owner of mortgaged real property requested DOR opinion as to whether the transfer of a life estate interest to parent with remainder back to owner was subject to doc stamp tax.
    - b. “It is the Department's position that the transfer of an interest in property is not taxable if the deed transfers only a life estate interest, i.e., the right to possess and use the property for a time limited by the life of the grantee. In such case, the grantor continues to own the fee simple title subject to the life estate
- iv. Analysis of Application to FIGHT
    1. If the grantor retains a life estate and the remainder interest passes to a trust of which the grantor has a reversionary interest (provided he or she survives until youngest is 18), then it would appear there has been no change in beneficial ownership and no doc stamp tax due. Support for this conclusion:
      - a. TAA 09B4-003 provided jointly owned unit conveyed to joint trust was not a change of beneficial interest
      - b. TAA 2004(B4)-011 provided no tax even though at the end of the QPRT term the home would pass to someone other than the grantor
      - c. TAA 20B4-003 the future interest of a LBD did not constitute a change of beneficial interest
      - d. TAA 12B4-001 found that a grantor who had the remainder interest of life estate still was the owner of the property (i.e. no change in beneficial ownership) and no doc stamp tax was due.
  - v. If DOR disagreed, what would be the result?
    1. “If the real property is encumbered by any mortgage, then the stamp tax is based on the other beneficiaries’ proportionate share of the mortgage indebtedness allocated according to their respective percentage beneficial interest.” Fl. Admin. Code §12B-4.013(28)(c).
    2. The value of the remainder interest applicable to beneficiaries, other than the grantor who retained the life estate, divided by total FMV of the real property would be the “percentage beneficial interest” potentially “transferred.”
      - a. The consideration subject to doc stamp tax would be the aforementioned percentage multiplied by the mortgage.
      - b. Remainder interest valuation

- i. IRC §7520 tables?
    - 1. Fla. Stat. §738.801(2)(d) provides if “a trust has not been created” IRC §7520 tables are to be used in the contents of valuing improvements to property that will outlast a life tenant
  - ii. Florida DCF Appendix A-17 Life Estate and Remainder Interest Tables is “used to determine the value of life estate or remainder interest held in real property”
    - 1. Via this table valuation, a 40 year old has a life interest of 91.6% and the remainder interest is 8.4%
    - 2. \$1M mortgage x 8.4% = \$84,000/100 = \$840 x \$0.70 = \$588 doc stamp tax
- f. Self-Settled Trusts
  - i. Florida has a strong public policy against protection of assets placed in trust where grantor is creator and beneficiary of the trust
    - 1. Fla. Stat. §736.0505
      - a. Revocable trust – treats all assets in trust as if owned by the grantor, and therefore available to creditors to the extent not otherwise exempt
      - b. Irrevocable trust – creditors can reach the maximum amount that can be distributed to or for grantor’s benefit
    - 2. FIGHT is a self-settled trust since Transferor is a beneficiary due to future reversionary interest
  - ii. In re Brown, 303 F.3d 1261 (11th Cir. 2002)
    - 1. Grantor created an irrevocable trust that paid the grantor income for life, then to daughter for life, with remainder to charities after grantor and daughter’s death. No discretionary distribution standard existed.
    - 2. “Where the only interest a settlor has retained for herself under a trust is the right to income for life, it is solely this interest which her creditors can reach”
      - a. Footnote 10 – elaborates that if additional benefits are retained by the grantor, such as discretionary distribution standards or general power of appointments, that trust corpus may be available to creditors
    - 3. Court found income of trust was reachable by grantor’s creditors, but the corpus was not
  - iii. FIGHT
    - 1. Homestead creditor protection should apply regardless of being a self-settled trust
    - 2. If homestead did not apply to some or all of the property, creditor would be limited since FIGHT does not allow distributions to Transferor (just a future reversionary interest)

- iv. Questions:
  1. If transferor only has a contingent remainder interest and there is no present right to distribution, is there anything available for a creditor?
  2. If only interest retained in the trust is the right to stay on and use the property, what can a creditor reach?
- g. Common Law and/or Statutory Powers to Revoke/Amend
  - i. Will common law power and/or statutory powers to revoke trust by agreement among grantor and beneficiaries be considered a retained grantor power?
  - ii. If so, Fla. Stat. §732.4017 is ineffective of avoiding devise restrictions
  - iii. Polestar to interpretation of statute is legislative intent.
    1. Borden v. East-European Ins. Co., 921 So.2d587, 595 (Fla. 2006); Maggio v. Fla. Dep't of Labor & Employment Sec., 899 So.2d 1074, 1076 (Fla. 2005)
  - iv. RPPTL Legislative Position Request Form and White Paper for §732.4017
    1. Provides explicit intent to permit grantor to make inter vivos transfer of homestead and avoid devise restrictions provided certain powers/rights are not retained by the grantor
    2. Contemplates QPRT transfers, retained life estate with remainder transferred to trust, and homestead passing back to Grantor at a future point
  - v. Transferor could “waive” his or her statutory and/or common law rights to terminate or modify trust (see Demircan v. Mikhaylov, 306 So. 3d 142 (Fla. 3rd DCA 2020))
- h. Married Couple with Minor Children
  - i. Using trust gives up tenants by the entirety ownership
    1. Is step transaction doctrine an issue if home was first jointly owned?
  - ii. Homestead no longer a marital asset subject to equitable division
    1. Oxley v. Oxley, 695 So. 2d 364 (Fla. 4th DCA 1997); Nelson v. Nelson, 206 So. 3d 818 (Fla. 2d DCA 2016)
    2. However, if marital assets used to paydown mortgage or home expenses, homestead could become subject to equitable division
      - a. §61.075(6)(a)(1)(b) & (c)
  - iii. Style Options
    1. Traditional FIGHT (incomplete gift)
      - a. If Spouse 1 owns the homestead and creates FIGHT
      - b. Home is transferred into trust with joinder of Spouse 2
      - c. Spouse 1 retains inter vivos LPOA to class that includes Spouse 2 and/or descendants
        - i. Spouse 1 would not be retaining right to revest in self
        - ii. Spouse 1 could use LPOA to appoint homestead to Spouse 2 – no gift tax because of IRC §2523

- iii. Spouse 2 could later retitle homestead into both Spouse 1 and Spouse 2's name
  - 2. Inter vivos QTIP FIGHT (completed gift + marital deduction)
  - 3. SLAT FIGHT (completed gift – no marital deduction)
  - 4. Florida Community Property Trust FIGHT
    - a. Potential full basis adjustment on first spouse's death
    - b. Creditor protection & tax benefits retained. Fla. Stat. §736.151
    - c. Concern over ability of spouse's unilateral right to amend 50% of FLCPT upon first spouse's death. Fla. Stat. §736.151
      - i. Could this be waived? Would that impact Community property treatment?
        - 1. Demircan v. Mikhaylov, 306 So.3d 142 (Fla. 3rd DCA 2020) (implies waiver of common law right is possible)
- i. Alternatives to FIGHT
  - i. Tenants by the entirety, joint tenants with rights of survivorship, and/or life estate interest
    - 1. Can JTROS be setup less than equal?
  - ii. LLC ownership
    - 1. Tax reassessment trigger
    - 2. Doc stamp tax
    - 3. Loan acceleration
    - 4. Loss of homestead status – no tax or creditor protection benefits
      - a. DeJesus v. A.M.J.R.K. Corp., 255 So. 3d 879 (Fla. 2nd DCA 2018) (involving a corporation); In re Steffen, 405 B.R. 486 (M.D. Fla. 2009) (involving a limited partnership); Buchman v. Canard, 926 So. 2d 390 (Fla. 3rd DCA 2005) (involving a partnership).
      - b. However, it may be possible to receive homestead benefits by leasing real property for a term of 98 years or more.
        - i. See Geraci v. Sunstar EMS, 93 So. 3d 384 (Fla. 2d DCA 2012) (giving homestead creditor protection to condominium owned as 99-year land lease); Higgs v. Warrick, 994 So. 2d 492 (Fla. 3d DCA 2008) (holding that property subject to 99-year lease qualified as homestead for property-tax purposes)

## VI. DRAFTING THE FIGHT

- a. Purpose of Trust
  - i. Avoid devise restrictions while maintaining creditor protection and tax benefits of homestead property while there is a minor child living
  - ii. Suggest single primary homestead purpose trust with statement in the trust indicating such and referencing intent to comply with Fla. Stat. §732.4017

1. Minimizes risk of inadvertently triggering devise restriction, creditor exposure, or loss of tax benefits
- b. Revocability
  - i. Statement that trust is irrevocable, and that grantor retains no right to alter or amend it
    1. Default if not stated is “Revocable” status. Fla. Stat. §736.0602
- c. Funding
  - i. Need to convey an irrevocable, vested interest (life estate, remainder or fee simple deed) in homestead property to avoid homestead devise restriction. Fla. Stat. §732.4017(1)
    1. One option – the **Grantor retains a life estate via deed with remainder interest to trust**
    2. Second Option – Fee simple deed transfer to trust of which grantor is a beneficiary of such trust with a continued right to use/possess the property
      - a. (However, see Self-Settled Trust section below)
      - b. Imperative that trust contain language creating a beneficial interest for grantor pursuant to Fla. Stat. §196.041(2) or tax benefits will be forfeited
- d. Lifetime Limited Power of Appointment (“LPOA”)
  - i. Grantor should retain lifetime LPOA
  - ii. Causes transfer to trust to be incomplete, thus avoiding federal gift tax implications (can be coupled with a veto power over distributions)
  - iii. Lifetime LPOA should prohibit any appointment to grantor, grantor’s estate, grantor’s creditors, or to satisfy grantor’s legal obligations. Fla. Stat. §732.4017(2)
  - iv. Prudent to limit to class of beneficiaries named in the trust, such as descendants, to clearly fall within Fla. Stat. 732.4017(2) to not be considered a “right of revocation”
    1. Could include “spouse” (as long as spouse is not considered a grantor of the trust)
- e. Trust Term
  - i. To have homestead pass back to the grantor, the trust may be drafted to terminate and transfer back to grantor upon the earlier of (1) youngest living child attaining age 18 and (2) no living minor children
    1. Reversion back to grantor upon death or child turning 18 is permissible. Fla. Stat. §732.4017(3)
  - ii. Upon grantor’s death during term of the trust, there must be provisions for how assets are divided, distributed, held, and/or administered
- f. Beneficiaries During Grantor’s Life
  - i. Statute has no limitations on who may be a beneficiary of the trust
    1. Grantor, grantor’s spouse, children, descendants, charity, etc.
  - ii. Prudent to:
    1. limit class of beneficiaries to identifiable persons, entities, or classes

2. expressly exclude any creditors of the grantor for being able to benefit from the trust or the trust from being able to discharge any legal obligations (especially if Grantor is serving as Trustee)
- g. Benefits of Beneficiaries During Grantor's Life
  - i. Grantor – could have income benefit but cannot have any ability to receive principal (mandatory or discretionary)
    1. Prudent to avoid providing Grantor any distributions that can be made to or for grantor's benefit (includes creditors and legal support obligations)
    2. Grantor can have use and possession of real property so as to qualify as an "equitable interest" in real property
      - a. May be beneficial to include for purposes of acceleration clause avoidance
  - ii. Others – mandatory or discretionary (best interest or HEMS) distributions for income and/or principal
    1. Distributions should not be permissible to discharge legal obligation of grantor
- h. Death of Grantor Before End of Trust Term
  - i. Suggest including language providing that trust beneficiaries have right to use and occupancy of real property in the trust so as to create "equitable title"
  - ii. Suggest including language that requires the Trustee to receive the beneficiary's consent to sell the real property
    1. If including, consider requiring beneficiary to cover all expenses associated with the property and failure to do so permits Trustee to sell property without beneficiary consent
- i. Grantor Trust Powers
  - i. Consider including power to add charitable beneficiaries
    1. PLR 9010065 provided that an independent trustee's power to add charitable beneficiaries caused the trust to be taxed as a grantor trust pursuant to IRC §674(a)
  - ii. Powers given to a spouse can also cause grantor trust status. IRC §672(e)(1)
    1. Veto power by spouse over distributions = IRC §674(a)
      - a. PLR 200730011
    2. Income to spouse = IRC §677 grantor trust
    3. Spouse power to substitute = IRC §675
    4. DOES THIS CREATE HOMESTEAD ISSUE?
- j. Trustee Selection
  - i. Grantor or related party may serve as trustee
  - ii. Removal and replacement
    1. Grantor may retain power to remove and replace trustee
  - iii. Be cautious of Defacto ownership argument to trigger devise restriction
    1. Is grantor an income beneficiary under the trust?
    2. Consider:
      - a. Whether Grantor should be trustee



- b. Limiting who may be appointed (such as requiring unrelated, professional, or corporate trustee)
  - k. Limitations to Avoid Exposure
    - i. Grantor should retain no power (in any capacity) to amend trust, or revoke or revest interest in grantor. Fla. Stat. §732.4017(1)
      - 1. Trust must not be amendable or revocable in a manner that would revest assets to grantor
      - 2. Trust may not permit distributions of corpus to grantor
      - 3. Grantor may not have right to withdraw or to appoint assets to or for the grantor's benefit
      - 4. Avoid retaining power to sell and direct distribution to grantor
      - 5. Avoid power of substitution over trust corpus for Grantor
    - ii. Avoid testamentary general or limited power of appointment (likely to be considered testamentary transfer and could trigger devise restriction)

## VII. ADDITIONAL RESOURCES

- a. *Florida Homestead: The Legal Chameleon That Grew Into a Dragon*, Bruce Stone
- b. [\*New Florida Homestead Laws Add Flexibility in Estate Planning\*](#), Jeff Baskies
- c. *Estate Planning & Asset Protection in Florida*, Barry A. Nelson
- d. [\*Protecting and Preserving the Save Our Homes Cap\*](#), Richard S. Franklin and Roi E. Baugher III
- e. *Practice Under Florida Probate Code*, Chapter 19, Homestead and Exempt Personal Property, Tae Kelley Bronner and Rohan Kelley
- f. *Estate and Related Issues in the Estate Administration Process*, Michael A. Sneeringer, 37-APR ProbProp 22
- g. RPPTL Legislative Position Request Form and [White Paper](#) for §732.4017
- h. The Florida Senate [Bill Analysis and Fiscal Impact Statement](#), CS/SB 1557 (March 29, 2010) at page 11
- i. [\*Creating a Florida Irrevocable Homestead Trust for Ad Valorem, Income, and Transfer Tax Purposes\*](#), Thomas O. Wells & Jennifer E. Okcular, Florida Bar Journal (Sept/Oct 2020)
- j. *Transferring Real Property into Limited Liability Companies in Florida: Benefits and Considerations*, Joseph M. Percopo, Florida Bar Journal (July/Aug 2023)