HOMESTEAD HEADACHE:
Understanding Florida's Devise Restrictions

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Introduction

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Homestead Devise Restrictions

FLA. Const. Art. 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.

If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law."

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Homestead Devise Restrictions

Devise *Defined*

Pursuant to Florida Statutes, “Devise” means “a testamentary disposition of real or personal property” and includes a disposition of real property from trust if the property would otherwise qualify as the grantor’s homestead.

Invalid Devise Consequences

If the devise is invalid, homestead passes pursuant to Florida statutes to surviving spouse and/or descendants.



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Homestead Devise Restrictions

Rules for Homestead Devise

If a Minor child is living at decedent's death

1. Minor child cannot waive homestead right
2. Any “devise” will be invalid and pass pursuant to Florida Statutes:

- If **no surviving spouse**, then 100% interest divided among descendants (***not just minors***), per stirpes

- If surviving spouse, then:

  A Life Estate for surviving spouse and Remainder to descendants; or
  Spouse takes a direct 50% ownership interest as tenants in common with descendants (*if election made within 6 months of date of death*)



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Homestead Devise Restrictions

Rules for Homestead Devise (*cont.*)

Spouse living but no minor child living at decedent's death

1. A spouse may waive homestead rights using a pre or post nuptial agreement or via deed with statutory waiver language

2. May devise fee simple interest to surviving spouse, anything less will be invalid and pass:
   - If decedent has a living descendant (does not require minors), then a Life Estate/Remainder or 50/50 ownership
   - If no living descendants, then 100% to spouse outright



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Qualification as Homestead Subject to Devise Restriction - Art. X, §4(C) FLA. Const.

1. Ownership Interest

Fee simple ownership interest is not necessary. Any beneficial interest in land permits homestead exemption, including life estates and ownership through property drafted trusts.

However, leasehold interest may be insufficient to trigger devise restriction

See In re Wartels' Estate, 357 So.2d 708 (Fla. 1978) (found "homestead property must consist of an interest in realty" in denying application of devise restriction to a co-op)

2. Permanent Residence

Owner and/or family of owner must reside on the homestead

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Qualification as Homestead Subject to Devise Restriction - Art. X, §4(C) FLA. Const.

3. Size Limitation

Section 4 of Article X of the Florida Constitution

1. Paragraph (a) provides that "**a** homestead" owned by a natural person, occupied by the owner or owner's family, and that does not exceed ½ acre if in city limits or up to 160 acres if outside city limits, is exempt from forced sale
2. Paragraph (c) applies a devise restriction to "**The** homestead" without any specific reference to ownership, occupancy, or size limitations

Interpreting the definition of homestead for purposes of devise

1. Use of "a" (indefinite) versus "the" (definite)
2. Judicial rules of Constitutional construction provide that the plain meaning controls and when reading provisions they should be interpreted consistently

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Qualification as Homestead Subject to Devise Restriction - Art. X, §4(C) FLA. Const.

Size Limitation (*cont*.)

Holden v. Garden's Estate, 420 So.2d 1082, 1085 (Fla. 1982)

- "It is important to read section 4 in its entirety. Subparagraph (a) provides … homestead … requirement... Subparagraph (c), the provision in issue in this proceeding, begins with the phrase, "The homestead shall not be subject to devise ...." We believe that this refers to homestead as it is otherwise used in section 4."

Thayer v. Hawthorn, 363 So. 3d 170, 175 (Fla. 4th DCA 2023)

- "If the municipal limit applies, then the exempt homestead is 0.5 acres, and the court must determine what remaining portion of the total property was devisable by James."
- However, some courts have interpreted different standards for homestead as between creditor protection and devise restriction

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)

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Ownership Not Subject to Devise Restriction

Tenants by the Entirety and Joint Tenants with Rights of Survivorship

("TBE") **("JTROS")**

Fla. Stat. §732.401(5) – the devise restriction "does not apply to property that the decedent owned in [TBE] or in a [JTROS]"

Upon death, property is owned "Per Tout," which means each tenant owns the whole

1. Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45 (Fla. 2001)
   - "[F]or purposes of survivorship, each joint tenant owns the whole ('per tout'), so that upon death the remainder of the estate passes to the survivor." (*citing to Bailey v. Smith*)



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Ownership Not Subject to Devise Restriction

Tenants by the Entirety and Joint Tenants with Rights of Survivorship (*cont*.)

Upon the death of a joint tenant, decedent's interest terminates and interest remains vested solely in survivor(s) by operation of law

1. Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925)
    - "Upon the death of one spouse the entire estate goes to the survivor, but the survivor takes no new estate, since there is a mere change in the person holding, and not an alteration in the estate held"
2. Ostyn v. Olympic, 455 So.2d 1137 (Fla. 2d DCA 1984)
    - Decedent created deed with JTROS between self and 3 other persons
    - Decedent later married
    - Court found upon decedent's "death, there was no property interest then owned by him to which a homestead interest could attach for the benefit of the defendant"
3. Marger v. De Rosa, 57 So.3d 866 (Fla. 2d DCA 2011)
    - Decedent acquired homestead property as JTROS with mother and then died with minor children (no spouse)
    - When decedent "died, his interest in the property terminated, and it became the sole property of his mother as the surviving joint tenant"

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Ownership Not Subject to Devise Restriction

Life Estate/Remainder

- Life tenant's interest terminates at death = No devise

Florida Irrevocable Grantor Homestead Trust

- A special irrevocable trust created to avoid there being any "devise" upon the death of the transferor
- *See Fla. Stat. §732.4017*

Leases (Short or Long-term – *Excluding Condos & Co-ops*)

See In re Wartels' Estate, 357 So.2d 708 (Fla. 1978) (Interest in realty requirement); Phillips v. Hirshon, 958 So.2d 425 (Fla. 3d DCA 2007); 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)

But see Archer v. Marshall, 355 So. 2d 781, 784 (Fla. 1978) (finding 99 year lease akin to fee simple)

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Ownership Subject to Devise Restriction

Fee simple ownership by one spouse of 100% of the property

Tenants in Common

Revocable Trust (single, joint, or separate trusts)

- Fla. Stat. §736.1109
- Johns v. Bowden, 66 So. 155 (Fla. 1914); Aronson v. Aronson, 81 So.3d 515 (Fla. 3d DCA 2012)



Condominiums

- Fla. Stat. §718.106
  - A condo "**is a separate parcel of real property**, even though the condominium is created on a leasehold"



Cooperative

- Fla. Stat. §719.103(26)
  - "An interest in a unit is **an interest in real property**"

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Ownership Subject to Devise Restriction

Lady Bird Deed (aka, Enhanced Life Estate Deed)

1. Generally subject to devise restriction b/c equivalent to testamentary disposition
   - *Johns v. Bowden, 66 So. 155 (Fla. 1914)*
     - "If an attempted conveyance of homestead real estate is in legal and practical effect and operation a will, it may not be effective when the owner of the homestead leaves a wife or child"
2. Life estate interest
   - May be owned as tenants in common, TBE, or JTROS
   - Does the devise restriction apply at death of first spouse or first joint tenant?
     - If reserved power must be exercised jointly (or spousal joinder is necessary), the devise restriction should not apply upon the first death of a joint tenant
     - If reserved power can be exercised by either joint tenant unilaterally, devise restriction may apply upon the first death of a joint tenant
   - If reserved power can be exercised by the last surviving tenant, devise restriction applies
3. Careful drafting is necessary to address ownership and how the reservation of powers may or may not be exercised during the lifetime of tenants and after the death of a tenant
   - *See Brock v. Willhoite, No. 2014-CA-000640 (Fla. Cir. Ct., May 12, 2016), aff'd 227 So.2d 596 (Fla. 5th DCA 2017) (unpublished table decision)*

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Specific Bequest of Homestead: Is an absolute fee simple devise necessary?

In re Estate of Finch, 401 so 2d 1308 (Fla. 1981):

"Petitioner contends that the intent of the testator was to provide his wife with a life estate and the daughter of his choosing with a vested fee simple remainder interest, and that neither the statutes nor the constitution should frustrate this expressed intent. Furthermore, petitioner argues that neither the Florida Constitution, article X, section 4(c), nor section 732.4015, Florida Statutes, requires that the devise to the surviving spouse must be in fee simple absolute. We disagree with both of these contentions and adopt the position of the district court as our own. We hold, therefore:

> (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. The Constitution states, "... except the homestead may be devised to the owner's spouse if there be no minor children." This exception is exclusive and prohibits the testator from devising less than a fee simple interest to his surviving spouse"

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Specific Bequest of Homestead: Is an absolute fee simple devise necessary?

In re Estate of Donovan, 550 So.2d 37 (Fla. 2d DCA 1989):

i. Homestead owned by trust that terminated upon the earlier of 45 days after deceased spouse's death or upon payment of all final expenses at which time property would pass to surviving spouse

ii. "Unlike the instant case, the devises in Finch and Cleeves failed because both decedents willed to their surviving spouses less than their full interests in the homestead properties … By operation of the will and trust, Mrs. Donovan attains her husband's one-half interest, thereby owning the homestead outright. This is certainly the logically desirable result."

iii. "**It must be remembered that the purpose behind the constitution's homestead devise provision is to protect the interest of the surviving spouse. Thus, the homestead law is to be liberally construed for the benefit of the surviving spouse it was designed to protect**. M.O. Logue Sod Service, Inc. v. Logue, 422 So.2d 71, 72 (Fla. 2d DCA 1972)"

iv. "As Mrs. Donovan points out, by the operation of the will and the trust, she is both trustee and sole beneficiary of the inter vivos trust. Thus, the legal and equitable estates have merged in her irrespective of the trust's terms. Axtell v. Coons, 82 Fla. 158, 89 So. 419 (1921)"

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Fee Simple Defined

Fee Simple

"An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs"

"Traditionally, the fee simple has two distinguishing features: first, the owner ('tenant' in fee simple) has the power to dispose of the fee simple, either inter vivos or by will; second, on intestacy the fee simple descends, in the absence of lineal heirs, to collateral heirs — to a brother, for example, if there is no issue." Peter Butt, Land Law 35 (2d ed. 1988)."

Absolute Fee Simple

"An estate of indefinite or potentially infinite duration (e.g., "to Albert and his heirs"). — Often shortened to fee simple or fee. — Also termed fee simple absolute in possession"

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Fee Simple Defined

Characteristics of Florida Fee Simple Ownership

- Highest quality of real property ownership
- Power of enjoyment and disposition
- Former property owner “retains no interest in the land”
- Power to exclude others from property
- Power to alienate property in any fashion
- Power to pass property by devise or bequeath
- Ownership is absent of limitations



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Fee Simple Equivalents

“A rose, by any other word would smell as sweet” - Shakespeare

i. Fla. Stat. §736.0505(1)(a)
   i. “The property of a revocable trust is subject to [ ] claims … [as] if owned directly by the settlor”

ii. Archer v. Marshall, 355 So. 2d 781, 784 (Fla. 1978)
   i. Leaseholders had 99 years with 99 year renewal option
   ii. “Since these leaseholders have the equivalent of fee simple ownership”

iii. Sorrels v. McNally, 89 Fla. 457, 463 (Fla. 1925)
   i. “It may be a dry passive trust or mere resting place for the legal title, or it may be an active continuing trust with power to sell and manage the estate equivalent to a fee simple absolute.”

iv. United States v. Shoshone Tribe of Indians of Wind River Rsrv. in Wyoming, 304 U.S. 111, 117 (1938)
   i. “Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title.”

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Intent of Decedent

Intent of decedent and settlor is polestar to interpretation

- See In Re Barrett's Estate, 33 So.2d 159 (Fla. 1948); Knauer v. Barnett, 360 So. 2d 399, 405 (Fla. 1978)

In re Estate of Finch, 401 so 2d 1308 (Fla. 1981)

- Court found that testator's intent, devising only a life estate to spouse, may not circumvent the Florida Constitution
- However, the Court only spoke to an intent that would violate the Florida Constitution and did address an intent that would be in compliance with the Florida Constitution

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Intent of Decedent

In re Mueller's Estate, 419 so.2d 784 (Fla. 2d DCA 1982)

- Decedent's Will left all real estate to wife for life and then to children, and residuary clause left all assets to spouse outright
- Court found that specific gift of real estate "was a sufficient expression of his intent to prevent the property from becoming part of his residuary estate"
- Court found an invalid devise of the homestead which passed to surviving spouse and descendants, and not to the surviving spouse via the residuary clause
- Decedent's "intent" created an invalid devise whereas if intent was ignored, the devise would have passed pursuant to residuary estate and spouse would have received 100% fee simple interest in homestead (= valid devise)

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Intent of Decedent

Therefore, does the "intent" of a decedent to create an equivalent fee simple conveyance to spouse avoid an invalid devise because the intent can be followed without violating Florida's Constitution?

- "That which the law forbids to be done directly cannot lawfully be done by indirection"
  - Johns v. Bowden, 66 So. 155 (Fla. 1914)
- Is the converse true - That which the law permits to be done directly can be done indirectly?
  - In Re Estate of Donovan, 550 So.2d 37 (Fla. 2d DCA 1989)
    - "We think, however, that the obvious intent and the resulting effect of Mr. Donovan's will and trust are of greater importance than the technicalities of terms used in those documents"
  - But see Stirberg v. Fein, 357 So.3d 1233 (Fla. 4th DCA 2023)
    - Decedent, survived by descendants, conveyed homestead to a trust which upon decedent's death was held for the lifetime benefit of spouse with a LPOA exercisable only in favor of her granddaughter
    - Homestead petition was filed as invalid devise, Appellee petition to extend time to respond, Appellee initiated a Trust reformation action (to leave fee simple to wife) without notice to Appellants, & reformation was granted
    - Motion to vacate trust reformation action due to Appellant's alleged interest in homestead
    - Remanded to trial court to determine Appellant's asserted homestead interest
    - Citing to In re Finch's Estate, the court held that reformation could not cure an invalid devise and stated that "any devise of homestead property that does not grant a fee simple interest to a surviving spouse fails, regardless of intent"
      - Overstatement of In re Finch?
      - Expressed language of trust could not be interpreted to be a valid devise – hence the reformation action

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Substance Over Form



Synder v. Davis, 699 So.2d 999 (Fla. 1997)

Florida supreme court found that "substance over form" controlled when determining who qualified as an "heir" for homestead creditor protection purposes and disagreed with the strict interpretation that a devisee by definition is not an heir (because common law definition of heir is defined as a "person designed to inherit in the event of intestacy at the death of the decedent.")

For additional applications of substance over form s*ee also HCA Gulf Coast Hosp. v. Est. of Downing, 594 So. 2d 774, 775 (Fla. Dist. Ct. App. 1991) (involving homestead creditor protection); McPhee v. Estate of Bahret, 501 So.2d 1319 (Fla. 2d DCA 1986) (involving a specific devise in a Will)*

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Conclusion

Homestead owned as TBE or JTROS is not subject to devise restriction

Homestead in a trust remains subject to devise restriction

- Safest approach is to avoid a potential invalid devise is:
  1. Leave the interest outright to surviving spouse or
  2. Use an appropriate waiver of the homestead devise restriction
- Transfers at death to a trust of which the surviving spouse has the power to revoke and/or vest self with fee simple ownership of homestead should not violate the devise restriction if there are no minors (b/c fee simple equivalent, valid intent, & substance over form)

Lady Bird Deeds appear to be subject to devise restriction and, therefore, should generally not be used by a party with a spouse or a minor child

- Unless no minor child and LBD leaving homestead 100% to spouse

Lady Bird Deeds may be created such that the life tenant interest and/or remainder interest may be owned as TBE or JTROS

- Drafting conveyance of interest and reservation of powers properly is critical

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Questions?

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