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HOME, SWEET HOMESTEAD:
Mastering Florida's Homestead and Probate Issues

RPPTL Probate Seminar – May 2026

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Agenda

I. Introduction to Florida Homestead and Probate

II. Florida Homestead – A Review

III. Qualification as Homestead from Forced Sale & Subject to Devise Restriction

IV. Homestead Devise Restriction

V. Forms of Ownership – When the Devise Restriction Applies

VI. Inurement of Exemption from Decedent's Creditors

VII. Probate Administration & Non-Protected Homestead

VIII. Protected Homestead: Possession & The Homestead Lien

IX. Determination of Homestead Status

X. Approaching Homestead in Practice



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I. Introduction to Florida Homestead & Probate Issues

- Florida Homestead – 3 Types
  - Tax Benefits (Art. VII, Fla. Const.)
    - (Outside the scope for today's presentation)
  - Creditor Protection & Inurement (Art. X Fla. Const.)
  - Devise Restriction & Alienation (Art. X, Fla. Const.)

- Purpose of Homestead
  - To protect the family unit during life, and at death, specifically, the surviving spouse and minor children

- Probate



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II. Florida Homestead – A Review

Section 4 of Article 10 of the Florida Constitution

(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**;…

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II. Florida Homestead – A Review

Section 4 of Article 10 of the Florida Constitution



(b) The exemptions shall insure to the surviving spouse or heirs of the owner.

(c) **The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child**. The **owner** of homestead real estate, **joined by the spouse** if married, **may alienate** the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse... (emphasis added)

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II. Florida Homestead – A Review

Exemption from Creditors During Lifetime

Homestead, regardless of value, is generally exempt from creditors.

Exceptions …

- Per the Florida Constitution:
  - Taxes and assessments on Homestead
  - Contracts for purchase, improvement or repair of Homestead
  - Contracts for work or labor related to Homestead
- Other Exceptions:
  - Super Creditor Exception (US Gov/IRS)
  - Preexisting (before homestead) judgment lien
  - Equitable Lien - Fraudulent or reprehensible conduct

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II. Florida Homestead – A Review

Exemption from Creditors During Lifetime

Level of Protection Afforded

- Right cannot be waived during life
- Protected whether owned directly or through a revocable trust
- Protects investment of nonexempt assets into homestead
  - Even with intent to hinder, delay, or defraud creditors
- Conversion exemption rule
  - Insurance payment or if homestead is sold
- Rental of Homestead may be protected – 2 Part Test
  - Is debtor's residence a fraction of the entire property?
  - Can the residence be severed from remainder of the property?

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II. Florida Homestead – A Review

Restraints on Alienation During Lifetime

Alienation

- Unmarried = no limits even with minor children

- Married = Spousal consent required
  - Conveyance is **INVALID** without spousal consent
  - Unless conveying to spouse or creating TBE
  - Spouse can waive right

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III. Qualification as Homestead from Forced Sale & Subject to Devise Restriction

Definition of a Homestead

- Section 4 of Article X of the Fla. Const.
- Three requirements for homestead:
  - (1) Ownership
  - (2) Residence
  - (3) Size
- Homestead definition is for both Creditor Protection & Devise Restriction



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III. Qualification as Homestead from Forced Sale & Subject to Devise Restriction

(1) Ownership Interest

Must be owned by a natural person

- Trust can qualify
- Business entities do not

Must be in real property

- But fee simple ownership interest is not required

Any beneficial interest in "**realty**" may qualify

- Including a life estate

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III. Qualification as Homestead from Forced Sale & Subject to Devise Restriction

(2) Permanent Residence

- **2 Prong Test** – Intent (subjective) & Occupancy (objective)
  - Owner must **intend** to make property permanent residence
  - Owner and/or family of owner **must reside** on the homestead
- Abandonment will negate intent required for homestead status
  - Factual analysis
  - Temporary absence with intent to return = homestead qualification
- A nonresident alien is unable to satisfy intent prong
  - However, if a family member living in the home is a permanent resident, property may still qualify as homestead
  - Immigration Status
    - Visa (alone) = nonresident alien = insufficient
    - Green Card = permanent resident alien = eligible

III. Qualification as Homestead from Forced Sale & Subject to Devise Restriction

(3) Size Limitation

- Up to ½ Acre, if within city limits, of contiguous land limited to the residence of the owner or owner's family; or
  - Includes pool or fence
  - Does not include adjacent land
  - May be limited to space occupied in a multi-family unit
- Up to 160 Acres, if outside of city limits, of contiguous land and improvements thereon
  - Includes more than the residence, such as business operations



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III. Qualification as Homestead from Forced Sale & Subject to Devise Restriction

(3) Size Limitation (*continued*)

- Impact of Annexation
  - Up to 160 acres size limitations "which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality"

- Devise restriction may not apply to portion of property exceeding size limitations
  - "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."
    - Thayer v. Hawthorn, 363 So. 3d 170, 175 (Fla. 4th DCA 2023)
  - The "restraint on the right of an individual to devise property at death should not be extended beyond that expressly allowed by the constitution"
    - City National Bank of Fla. v. Tescher, 578 So. 2d 701 (Fla. 1991)

IV. Homestead Devise Restriction

DEVISE RESTRICTION – 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" (Emphasis added)



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IV. Homestead Devise Restriction

Devise Defined



Devise means "a testamentary disposition of real or personal property"

Fla. Stat. §731.201(10)

Includes a disposition by a revocable trust

Fla. Stat. §732.4015(2)(b)

"**Testamentary disposition**" for purposes of homestead

Generally, encompasses any attempted conveyance of homestead by a person which disposes of a person's homestead on or after such person's death

See Johns v. Bowden, 66 So.155 (Fla. 1914)

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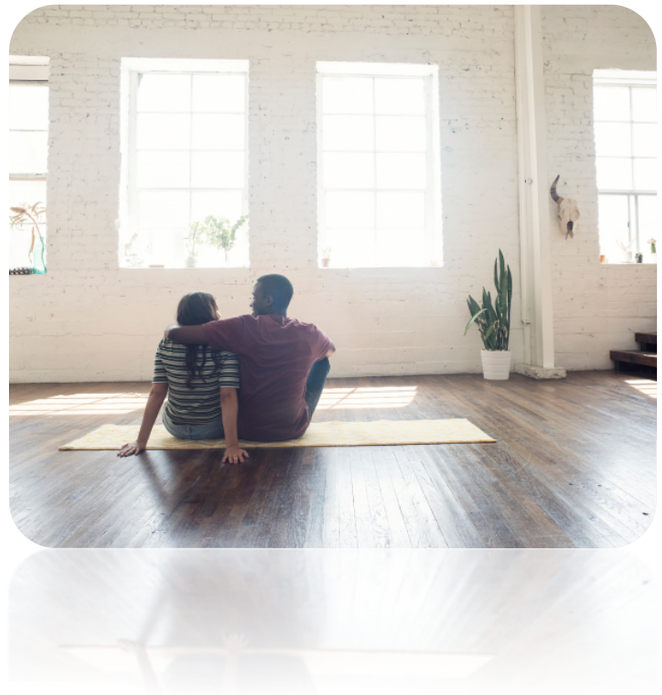
IV. Homestead Devise Restriction

Spouse & Child Defined



- Spouse – legal marriage required
  - Marriage Certificate & Ceremony
  - No common law marriage in Florida
  - Divorce treats formers spouse as being predeceased
    - including for homestead devise purposes
- Child –
  - "includes a person entitled to take as a child under this code by intestate succession from the parent whose relationship is involved, and excludes any person who is only a stepchild, a foster child, a grandchild, or a more remote descendant"
    - Adopted child treated as decedent's child
    - Wedlock child is child of mother, but only of father if certain conditions met

IV. Homestead Devise Restriction

Devise: Valid or Invalid

- No spouse or minor child = Devise always Valid
- Minor child = Devise always Invalid
- Spouse and no minor child:
  - Spousal waiver (predeath) = Devise always Valid
  - Devise entire interest to spouse = Valid
    - Temporary trust that passed “full interest” to spouse was sufficient
    - Trust which spouse has possessory right and unfettered ability to revoke trust and/or withdraw homestead *should* be sufficient as equivalent to fee simple interest
  - Devise less than entire interest to spouse = Invalid
    - Life estate is insufficient
    - Traditional “Marital Trust” is insufficient



IV. Homestead Devise Restriction

Invalid Devise Consequences

Invalid Devise - Fla. Stat. §732.401(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."

(Quote broken apart and emphasis added)

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IV. Homestead Devise Restriction

Invalid Devise Consequences

Intestacy

"If there is no surviving descendant of the decedent, the entire intestate estate" to surviving spouse (Fla. Stat. §732.102(1))

If there is no surviving spouse, then property descendants to the decedent's descendants, per stirpes (Fla. Stat. §732.103)

- If there are no descendants, then property passes to parents, if living, otherwise to siblings, per stirpes
- If none of the foregoing, 50/50 to paternal and maternal grandparents
- If none of the foregoing, to descendants of last deceased spouse of decedent
  - i.e. step-children and their descendants



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IV. Homestead Devise Restriction

Invalid Devise Consequences

Revocable Trust is subject to Fla. Stat. §732.401(1)

Improperly devised homestead vests "in a twinkle of an eye"

Intent of Owner Subservient to Devise Restriction

1. Intent of decedent cannot override Devise Restriction
2. Disinheritance/Abandonment of child fails if survived by a minor
3. Reformation after death cannot fix an invalid devise
4. Stepchild is not a descendant and does not receive an interest in invalidly devised homestead (*even if that was decedent's intent*)



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IV. Homestead Devise Restriction

Election of Surviving Spouse to Take a ½ Interest

Fla. Stat. §732.401(2)

- Instead of a life estate, a surviving spouse may elect to take 50% tenants in common interest with the decedent's descendants receiving the other 50%
- Why is this important?
  - Partition
    - Not unilaterally available to life tenant or remainderman
    - Available to any tenant in TIC ownership
  - Expenses are shared differently
    - Life tenant = ordinary upkeep, interest on mortgage, & property taxes
    - Remainder = extraordinary expenses & principal on mortgage
    - TIC = responsible for proportionate share



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IV. Homestead Devise Restriction

Election of Surviving Spouse to Take a ½ Interest

- Election may be made by:
  - Surviving spouse within 6 months after the decedent's death
    - Time for election **CANNOT** be extended
  - Attorney-in-fact or guardian for surviving spouse, provided:
    - Petition for approval filed within 6 months after the decedent's death;
    - Court finds election to be in the best interest of the surviving spouse and approves petition; &
    - Election is made within time provided in order of approval (but not less than 30 days from entry of order)

- Election:
  - Is irrevocable once made
  - Must be made while surviving spouse is alive
  - Must be filed in compliance with statutory form
    - which requires legal description of homestead



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IV. Homestead Devise Restriction

Waivers of Homestead Devise Restriction

- Minor children may not waive homestead right
- Marital Agreement (Pre or Postnuptial Agreement) - Fla. Stat. §732.702

1. A spouse may waive homestead rights provided the waiver is in writing and signed by the waiving party before two witnesses
    - Prenup does not require asset disclosure
    - Postnup does require asset disclosure
2. A waiver of “all rights” or equivalent language will waive homestead rights
3. Breach of marital agreement by decedent results in requirement of surviving spouse to assert a claim as a creditor
    - Surviving spouse can seek specific performance related to contract provisions involving homestead



IV. Homestead Devise Restriction

Waivers of Homestead Devise Restriction

- Waiver of homestead rights through deed
  - Fla. Stat. §732.7025
    1. A spouse may waive homestead devise restriction rights in a properly executed deed that includes statutory waiver language
    2. Concern about whether fair disclosure of assets is required
  - Case Law
    - Spousal joinder in a deed may constitute valid waiver
- Waiver post-death not valid
- Impact of waiver
  1. Generally, results in predeceased treatment of the surviving spouse
  2. Does not prohibit devise to surviving spouse
  3. Does not prevent inurement against creditor claims
  4. Devise of any interest to surviving spouse does not negate waiver of devise restriction



IV. Homestead Devise Restriction

Disclaimer & Divestment of Homestead Interest

Disclaimer of Interest

1. Will generally treat the disclaimant as having predeceased the decedent
2. Surviving Spouse
   - Invalid devise = disclaimer only of life estate interest (unable to divest descendants)
   - Valid = ordinary treatment as disclaimer

Divestment of Interest

1. Slayer/Abuse Rule = surviving spouse treated as predeceased
2. Void Marriage = no surviving spouse



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IV. Homestead Devise Restriction

Rules for Homestead Devise

Minor child living at decedents death:

- Any “devise” will be invalid and pass pursuant to Florida Statutes
  - If surviving spouse, then a Life Estate/Remainder or 50/50 ownership (w/ election)
  - If no surviving spouse, then 100% interest among descendants, per stirpes

No minor child living but surviving spouse at decedent’s death and:

- No waiver of spousal rights:
  - May devise entire interest to surviving spouse, anything less will be invalid and pass pursuant to Florida Statutes
    - If **descendent** is living, then Life Estate/Remainder or 50/50 ownership (w/ election)
    - If **no descendent** is living, then 100% to spouse
- Waiver of spousal rights:
  - May devise to anyone (no limitations)

No spouse and no minor child living at decedent’s death:

- May devise to anyone (*no limitations*)



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V. Forms of Ownership – When the Devise Restriction Applies

Ownership Not Subject to Devise Restriction

- Tenant by the Entirety (“TBE”) & Joint Tenants with Rights of Survivorship (“JTROS”)
- Life Estate Interest
- Leases: Short or Long Term – Excluding condos and co-ops
- Irrevocable Homestead Trust

V. Forms of Ownership – When the Devise Restriction Applies

Ownership Subject to Devise Restriction

- Fee Simple Ownership
- Tenants in Common Interest
- Condominiums
- Cooperative
- Revocable Trust (*including joint revocable trust*)
- Lady Bird Deed (aka Enhanced Life Estate Deed)

V. Forms of Ownership – When the Devise Restriction Applies

Community Property

Community property ("CP") used to acquire real property in Florida that qualifies as Homestead is subject to the Devise Restriction

1. Florida Uniform Disposition of Community Property Rights at Death Act - Fla. Stat. §§732.216-732.228
   - o CP reinvested in homestead = conclusive presumption to terminate CP
2. Direct spousal ownership of homestead property
   - o Titling of property will control
   - o TBE & JTROS = no devise restriction
   - o 100% or TIC = devise restriction
3. Foreign Joint trust ownership of homestead property (not FLCPT)
   - ➢ How does Trust treat CP termination?
   - ➢ Does trust devise homestead at first death?

IV. Forms of Ownership – When the Devise Restriction Applies

Community Property

Florida Community Property Trust (FLCPT) is subject to the Devise Restriction

1. FLCPT Act - Fla. Stat. §§736.1501-1512
   - Fla. Stat. §736.151 – Homestead
   - Fla. Stat. §736.151 – Death of a Spouse
     - 50% survivor's and 50% decedent's subject to devise
     - Non-pro rata division permitted

2. Devise at 1st Death
   - Pro Rata Division
     - ➢ All devised to spouse?
   - Non-Pro Rata = Avoid "Devise" ???



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VI. Inurement of Exemption from Decedent's Creditors

Inurement of Exemptions (Fla. Const. art. X, §4(b))



- "These **exemptions** shall **inure to** the **surviving spouse** or **heirs** of the owner." (Emphasis added)
- The lifetime creditor protection afforded to the decedent passes to a surviving spouse, minor children, and heirs, but only to the extent of interest received by such beneficiary

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VI. Inurement of Exemption from Decedent's Creditors

Relevant Probate Terms

Intestate: Any part of a decedent's estate not passing by will

Heir (= protected class) "means those persons, including the ***surviving spouse***, who are *entitled under the statutes of intestate succession [Fla. § 732.103]* to the property of a decedent" (emphasis added)

- Fla. Stat. § 732.103 – Share of Other Heirs - Includes descendants, parents, siblings, siblings' descendants, grandparents, aunts/uncles and their descendants, and similar family of last deceased spouse



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VI. Inurement of Exemption from Decedent's Creditors

Relevant Probate Terms

Descendant: Any direct generational level down (child, grandchild, great-grandchild, etc.)

Adoption

1. Descendant of the adopting parent
2. Not a descendant of natural parent (NP), except
   - If adopter is NP's spouse, then still NP descendant
   - If adopter marries NP after death of other NP, then still other NP's descendant
   - If adopter is a close relative, then still NPs descendant



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VI. Inurement of Exemption from Decedent's Creditors

Relevant Probate Terms

Wedlock

1. Descendant of the maternal line
2. Descendant of the paternal line IF
   - Parents had wedding ceremony (even if marriage is void);
   - Paternity established before or after death of father; or
   - Paternity of father acknowledged in writing by father

Escheat: "When a person dies leaving an estate ***without being survived by any person entitled*** to a part of it, that part shall escheat to the state" (emphasis added)

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



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VI. Inurement of Exemption from Decedent's Creditors

Inurement Impact

- Exemption may Inure whether passing by intestacy or devise
- Inurement =
  - Protected Homestead
  - Not an asset subject to probate administration
  - Not *generally* subject to Personal Representative's control
- No Inurement =
  - Non-Protected Homestead
  - Interest is an asset subject to probate administration
  - Interest is subject to Personal Representative's control
- Scenarios:
  - (1) Intestacy, (2) Invalid Devise, (3) Devise to Non-Heirs
  - (4) Devise to Spouse or Heirs, and (5) Devise to Trust



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VI. Inurement of Exemption from Decedent's Creditors

Homestead Interest Passing Via Intestacy

- Intestate =
  - No Will or
  - No specific and no residuary devise of homestead in Will or Trust
- Inurement IF living spouse or heir
  - Homestead will pass to spouse or heir
  - Spouse and heir are protected class
  - Protection will inure to interest received
- No Inurement IF NO living spouse or heir
  - Homestead will Escheat
  - Homestead therefore does not pass to spouse or heir
  - Protection will not inure



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VI. Inurement of Exemption from Decedent's Creditors

Homestead Interest Passing via Invalid Devise



- Invalid Devise =
  - Failure of attempted Will, Trust, or other testamentary disposition
  - Surviving Spouse or minor child living

- Inurement
  - Entire homestead interest passing to protected class
  - Protection will inure to entire homestead interest

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VI. Inurement of Exemption from Decedent's Creditors

Homestead Interest Devised to Non-Heirs

- Devise =
  - Conveyance by Will or Trust
  - If not specifically devised, interest passes via residuary clause

- No Inurement of interest received by a non-heir
  - Any interest which passes to an individual or entity, other than a surviving spouse or heir, is not part of the protected class
  - Protection will not inure to a non-spouse non-heir



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VI. Inurement of Exemption from Decedent's Creditors

Homestead Interest Devised to Spouse or Heirs



- Devised Validly by Will or Trust to Spouse or Heirs

- Inurement to spouse and/or heirs, even if:
  - General direction to pay expenses by Will or Trust
  - Insufficient other assets to satisfy pecuniary devises
  - Sale of homestead during or after probate
  - Waiver by spouse of homestead rights

- BUT No Inurement if direction to:
  - Sell homestead
  - Pay debts from homestead
  - Pay pecuniary gifts from homestead

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VI. Inurement of Exemption from Decedent's Creditors

Homestead Interest Devised to Trust

- No Inurement if all non-heirs are trust beneficiaries

- Inurement possible if trust beneficiaries are heirs
  - Case law support for inurement
  - Depends on extent of heir's beneficial interest
  - Concerns if heir does not have equitable title/ right of possession



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VI. Inurement of Exemption from Decedent's Creditors

Rules for Inurement

1. If intestate and passes to:
   - Spouse = inurement
   - Heir = inurement
   - Escheat = no inurement

2. If devise invalid = inurement (always)
   - Homestead will pass to spouse and/or heirs
   - A direction to sell/pay expenses does not change this outcome

3. If devise valid & Direction to sell = no inurement



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VI. Inurement of Exemption from Decedent's Creditors

Rules for Inurement

4. If devise valid & No direction to sell:
   - Non-heir interest = no inurement
   - Spouse interest = inurement
   - Heir interest = inurement
   - Trust interest:
     - Spouse or heir beneficiary = inurement possible if trust provides equitable title/interest to beneficiary
     - Non-heir beneficiary = no inurement

Inurement passing to interest?

- Yes = interest Protected Homestead = non-probate asset
- No = interest Non-Protected Homestead = probate asset



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VII. Probate Administration & Non-Protected Homestead

Probate Terms

Formal Service

- Means notice Formal Notice per Fla. Prob. R. 5.040(a)

Formal Notice - Fla. Prob. R. 5.040(a)

- Served on Interested Persons
- Provide notice of 20 days after service to file response and failure to do so may result in entry of order for relief requested or further action without notice
- Service: If represented, the on Attorney. If not represented
  - (1) mail w/ signed receipt, (2) general Civ Pro, or
  - (3) 1st class mail if signed receipt not available, refused, or not picked up (in rem or quasi in rem)

Estate

- “means the property of a decedent that is the subject of administration”

Interested Person

- “means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved”
- However, meaning may vary and should be “ determined according to the particular purpose of, and matter involved”

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VII. Probate Administration & Non-Protected Homestead

Probate Administration – *Summary Probate*



- **Availability**
  - $75K limit or 2 years for date of death
  - Protected Homestead is exempt so the value is not used for purposes of qualifying
- **No personal representative is appointed**
- **Petition**
  - Should include some asset besides homestead
  - Homestead should be listed (even when exempt)
- **Formal notice of petition must be served on:**
  - Any beneficiary not joining in the petition
  - Any known or reasonably ascertainable creditor

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VII. Probate Administration & Non-Protected Homestead

Probate Administration – *Formal Probate*

- **Notice of Administration**
  - Served on surviving spouse, beneficiaries (sometimes including trust beneficiaries), and persons who may be entitled to exempt property
- **Formal Notice**
  - Formal notice is sufficient for court to establish in rem jurisdiction over a person's interest in homestead
- **Representation**
  - Persons may be bound by orders binding other parties under certain circumstances
  - Unborn, unascertained, minor, or disabled person not represented is bound by another represented party having an equal or greater interest in the proceeding
- **Inventory**
  - Non-Protected Homestead should be listed
  - Although Protected Homestead is not an asset of the estate, it should be listed on the inventory without a value but as Protected Homestead

VII. Probate Administration & Non-Protected Homestead

Personal Representative

Duty

To act in the best interest of interested persons, including creditors

To take control and possession of estate assets

To “take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution”



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VII. Probate Administration & Non-Protected Homestead

Personal Representative

Authority

Takes possession of the “estate” (i.e. assets subject to administration), excluding “protected homestead” since it is not part of the “estate”

Has general authority over all assets of the estate, including Non-Protected Homestead

May not sell real property without court approval unless authorized by the Will

May partition real property, including Non-Protected Homestead

VII. Probate Administration & Non-Protected Homestead

Personal Representative

Compensation for Ordinary Services

PR "shall be entitled" to a commission "payable from the *estate assets*" for "*ordinary services*" based on the inventory "*value of the estate*" and income earned by it.

Commission is presumed reasonable on a graduated system as follows:

- 3% on the first $1M
- 2.5% from $1M-$5M
- 2% from $5-$10M
- 1.5% for everything above $10M.

Compensation for *Extraordinary* Services

PR "*shall* be allowed further compensation as is reasonable for any *extraordinary services*," which can include selling, litigating issues, or other special services related to the Non-Protected Homestead and *"[d]ealing with Protected Homestead."*

VII. Probate Administration & Non-Protected Homestead

Personal Representative

Compensation for Attorney for Personal Representative

Entitled to “reasonable compensation *payable from the estate* assets without court order.”

Compensation for *ordinary services* is presumed reasonable based on the inventory “*value of the estate*” and income earned by it on a graduated system.

“Shall be allowed further *reasonable compensation* for any extraordinary service”, including “(i) Legal *advice regarding homestead status* of real property *or proceedings involving that status* and *services related to protected homestead*.”

VII. Probate Administration & Non-Protected Homestead

Personal Representative

Homestead Petition for:

- Non-Protected Homestead
  - Value included on the Inventory
  - PR ordinary service & ordinary fee
  - Extraordinary service category for PR's attorney

- Protected Homestead
  - Value Not included on the inventory
  - PR extraordinary service & further compensation
  - Extraordinary service category for PR's attorney



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VII. Probate Administration & Non-Protected Homestead

Non-Protected Homestead Expenses

PR has broad discretion over management and duty to protect and preserve real property, *which includes Non-Protected Homestead*

- Incident to duty to preserve estate assets.

PR is authorized to “[m]ake ordinary or extraordinary repairs,” "insure the assets of the estate against damage or loss," and "pay taxes, assessments, and other expenses incident to the administration of the estate"

Source of Payment

- Absent specific direction in the Will, expenses of administration are paid from the estate as follows:
  - Intestate assets
  - Residuary assets
  - Non-specifically or demonstratively devised assets
  - Specifically or demonstratively devised assets

A court may surcharge preservation costs of real property when it is ready for distribution and the beneficiary refuses distribution

VIII. Protected Homestead: Possession & The Homestead Lien

Protected Homestead



- Not an asset of the probate “Estate” and therefore not subject to probate administration or the PR
- PR may take possession of Protected Homestead under certain specific circumstances and subject to specific rules pursuant to Fla. Stat. §§733.608(2)-(13) & Fla. Prob. R. 5.402-5.404

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VIII. Protected Homestead: Possession & The Homestead Lien

Possession of Protected Homestead (FL Stat. §733.608(2))

- **PR <u>may</u> take** possession of Protected Homestead only if:
  1. Prior to a determination of homestead status,
  2. It is "not occupied by a person who appears to have an interest in the property," <u>and</u>
  3. For the "limited purpose of preserving, insuring, and protecting it"
- PR has <u>no obligation</u> to take possession <u>or liability for not doing so</u>
- Careful consideration is necessary before taking possession
  - Upside down on mortgage, environmental issues, etc.
  - Impact on other beneficiaries: risk of recovery for expenditures & loss of earnings on estate assets
- Possession does not grant PR power to sell Protected Homestead
- PR may rent property after taking possession but is not obligated to do so. If rented, proceeds belong to Protected Homestead owners, subject to offset

VIII. Protected Homestead: Possession & The Homestead Lien

Notice of Possession of Protected Homestead (FL Prob. R. 5.404)

- If PR takes possession, the PR must file notice of the act
- The notice must contain:
  1. Legal description of property
  2. "a statement of the limited purpose for preserving, insuring, and protecting it for the heirs or devisees pending a determination of the homestead status"
  3. Name and address of PR and PR's attorney
  4. Date PR took possession (if prior to filing notice)

- Notice must be served via Formal Notice and served on:
  - Interested persons
  - Any person in actual possession of the property

VIII. Protected Homestead: Possession & The Homestead Lien

Fees & Expenses for Protected Homestead (FL Stat. §733.608(3))

1. PR may incur debt chargeable against the homestead for:
   - Expenses or obligations "to preserve, maintain, insure, or protect the property,"
   - "fees and costs" related thereto, and
   - "any amounts paid for these purposes" after the decedent's death



2. Fees & Cost Include:
   - Costs customarily associated with property upkeep (taxes, HOA, utilities, etc.)
   - Attorney Fees – Fla. Stat. §733.6171(4)(i) for Protected Homestead Services
     - Herilka v. Yates (Fla. 4th DCA 2009)
   - PR Fees – Fla. Stat. §733.617(3)(e) for "Dealing with Protected Homestead"
     - Langford, Trustee of Kirk Family Foundation v. Phemister (Fla. 5th DCA 2022)

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VIII. Protected Homestead: Possession & The Homestead Lien

Fees & Expenses for Protected Homestead (FL Stat. §733.608(3))

3. PR Fee Amount:
   - Burden on PR to prove reasonableness of fee if challenged
     - PR "must also show, by competent evidence, the reasonable value of such services in light, among other things, of the value of the estate and the compensation paid him for ordinary services"
   - Court may:
     - On petition of interested party, adjust fee up or down based on factors
     - Determine fee without expert testimony
     - Not "decline an award of fees for extraordinary services upon proper proof"
   - Could ordinary service value calculation be an appropriate starting point since the Protected Homestead property value is not included in the ordinary PR fee??
     - Regardless – good idea for PR to keep track of time

VIII. Protected Homestead: Possession & The Homestead Lien

Homestead Lein Entitlement (FL Stat. §733.608(3) & (4))

a) If PR takes possession and expends funds to preserve, maintain, insure, or protect the property, including fees and costs, the PR "shall be entitled to a lien on that property and its revenues to secure repayment of those expenditures and obligations incurred."

b) PR lien secures expenditures incurred before and after recording the notice

c) PR lien may be filed before adjudicating the amount

d) No lien if PR never took control or spent funds on homestead

VIII. Protected Homestead: Possession & The Homestead Lien

Notice of Lein on Protected Homestead (FL Stat. §733.608(4) & FL Prob. R. 5.402)

a) PR must record lien against the property in the county where the property is located

b) The notice of lien must contain:
- Name and address of PR and PR's attorney
- Legal description of property
- Name and address of persons with an interest in the property
- "a statement that the personal representative has expended or is obligated to expend funds to preserve, maintain, insure, or protect the property and that the lien stands as security for recovery of those expenditures and obligations incurred, including fees and costs"

c) If PR recorded a notice of lien on Protected Homestead, the PR must file a copy of the recorded notice in the probate
- Failure to file does not impact validity of lien

d) Copy of recorded notice of lien must be served via Formal Notice on interested persons

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VIII. Protected Homestead: Possession & The Homestead Lien

Proceedings to Determine Amount of Lein (FL Stat. §733.608(3)(A) & FL Prob. R. 5.403)

a) A PR or interested person may file a petition to determine amount of lien
   - Interested person can make written request Fla. Stat. §733.608(6)

b) The petition must contain:
   - Name and address of PR and PR's attorney
   - Interest of petitioner
   - Legal description of property
   - Name and address of persons with an interest in the property
   - Debt incurred, including fees and costs, to the extent known

c) Petition must be served via Formal Notice on interested persons



VIII. Protected Homestead: Possession & The Homestead Lien

Collection of Homestead Lein (FL Stat. §733.608(3)(B) & (7)-(10))

- Persons having an interest in the Protected Homestead have no personal liability for the repayment of the lien

- Offset against revenue generated by property and received by PR
- Offset against estate property passing to person's receiving Protected Homestead
  - Allocation of costs among Owners
    - Fla. Stat. §738.508 – life estate/remainderman, unless & until an election is made for 50% TIC
    - If TIC, then expenses are allocated based on % of ownership from time of election onwards
- Foreclosure
  - PR may file a foreclosure action to force sale and collect payment of the debt
  - Action for enforcement = entitlement to Attorney fees and costs on action

- PR can be relieved from duty to enforce collection and not liable for failure to attempt collection if economically impractical

VIII. Protected Homestead: Possession & The Homestead Lien

Termination of Lein Against Homestead (FL Stat. §733.608(5), (6), (11) & (12)

- **If homestead determined to be Non-Protected Homestead, then any lien previously filed shall be deemed released**

- **Transfer of Lien to accommodate sale before determination of lien amount**
  - Upon petition, court may permit deposit of sale proceeds into a restricted account & transfer lien from the property to the proceeds
    - Any proceeds in excess of lien amount asserted by PR may be distributed
  - PR & apparent owners, alternatively, can agree to hold funds in escrow
  - Court maintains jurisdiction over deposited or escrowed funds

  NOTE – PR should be cautious to ensure enough funds available for the debt and additional litigation costs to establish the debt

VIII. Protected Homestead: Possession & The Homestead Lien

Termination of Lein Against Homestead (FL Stat. §733.608(5), (6), (11) & (12) (*continued*)

- **Lien payoff**
  - Any interested party can request payoff amount from PR
  - PR must provide payoff amount within 14 days of request
  - Within 30 days of lien payoff, PR must record release of lien
  - Entitlement to attorney fees if action is necessary to compel compliance

- **Lien terminates the earlier of:**
  a) Recorded satisfaction by the PR;
  b) Recorded release by the PR;
  c) Discharge of the PR upon closing estate;
  d) One (1) year from recording of lien unless action to determine debt or enforce lien filed; or
  e) Entry of order releasing lien.

IX. Determination of Homestead Status

Methods

Summary Probate

Formal Probate

Standalone Homestead Petition

- If no assets are subject to probate, then a probate petition would not be appropriate or valid
- Any circuit court has proper subject matter jurisdiction to determine homestead status of property
- Separate Civil Petition
    a) Declaratory Judgment
    b) Quiet Title proceedings
    c) Case law support
    d) Not governed by Probate Rules
    e) General rules of civil procedure apply

IX. Determination of Homestead Status

Homestead Petition – *Petition & Contents*

Petition

- Any interested person may file a “verified” petition
- Verified = oath/affirmation under penalty of perjury

Contents

- Interest of petitioner (PR, beneficiary, creditor, etc.);
- Date of death;
- County of decedent’s domicile;
- Whether Testate or Intestate;
- Whether survived by a spouse, and if so the name of the spouse, whether homestead rights were waived, and if so the method of waiver;
- List of descendants, and whether any minors as of date of death (including legal name and year of birth);
- Legal description of property;
- Whether property was domicile of decedent, and if not, whether within city and domicile of family;
- How real property was titled at death; and
- Any other facts in support of petition (such as divorce, marital agreement, beneficiary agreement)

IX. Determination of Homestead Status

Homestead Petition – *Trust Treatment*

Homestead titled in revocable trust

Petition should explain legal title in Trust but beneficial title in decedent

Homestead devised to trust of which heirs are beneficiaries

Petition should explain title will vest in the Trustee but exemption from creditors inures to the heir-beneficiaries due to possession of sufficient equitable interest in the property



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IX. Determination of Homestead Status

Service of Notice of Homestead Petition

- Service (probate style) – Fla. Prob. R. 5.405(c)
  1. Formal service of petition on interested persons is required
  2. Creates a 20 day window for any interested person to object
  3. Note – if not filed within a probate, then general rules of civil procedure apply for proper service

- Interested persons (aka anyone who can be impacted) include:
  1. Spouse, heirs, and beneficiaries;
  2. Creditors (to the extent not barred);
     - Guardian ad litem if no known creditors and claim period remains open (to bar unknown creditors since their interest would not otherwise be represented)
  3. Persons in possession of property.

IX. Determination of Homestead Status

Homestead Order

- Order
  - Describe property (legal description)
  - Whether any of the property constituted Protected Homestead
  - If any portion is Protected Homestead, the name of the persons entitled to the Protected Homestead and their interest therein
  - Trust Treatment
    - Order should include language mirroring the petition with regards to vesting of title and inurement of exemption
- Order determining interest as Protected Homestead
  - Confirms title
  - No subsequent deed required (order sufficient)
  - Does not alter vesting of homestead
- Order determining interest as Non-Protected Homestead:
  - Non-protected interest subject to the Personal Representative's authority and control
  - Personal Representative's Release and Certificate of Distribution of Real Property (deed by PR) will be necessary to release ownership of non-protected portion to beneficiary

X. Approaching Homestead in Practice

STEP 1 – Identify the decedent's property interest at death

Where did decedent and decedent's family live?

How was the property titled?

- Consider if interest passed by operation of law
- Were lifetime alienation rules followed?
  - If not, deed may be void



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X. Approaching Homestead in Practice

STEP 2 – Determine if the property qualified as decedent's homestead during life

Apply ownership, residence, and size requirements analysis



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X. Approaching Homestead in Practice

STEP 3 – Determine if property was Devised Restricted

1. **Does form of property ownership exclude application of the Devise Restriction?**
   - TBE, JTROS, Life Estate, Lease, Irrevocable Homestead Trust
2. **Was decedent survived by spouse or minor child?**
   - Confirm surviving family
   - Any spousal waiver or other spousal divestment of interest?
3. **Apply the homestead devise rules to non-excluded property**
   - Minor child living at decedent's death
     - Devise restriction = Invalid Devise always
   - No minor child living but surviving spouse at decedent's death and:
     - No waiver of spousal rights = Devise valid if to spouse otherwise Invalid Devise
     - Waiver of spousal rights = no devise restriction = Valid Devise
   - No spouse and no minor child living at decedent's death
     - No devise restriction = Valid Devise

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X. Approaching Homestead in Practice

STEP 4 – Determine if exemption inures, making the interest Protected Homestead or Non-Protected Homestead

Does protection from creditors inure?

- If intestate and passes to:
  - Spouse and/or Heir = inurement
  - Escheat = no inurement
- If devise invalid = inurement (always)
  - Homestead will pass to spouse and/or heirs
  - A direction to sell does not change this outcome
- If devise valid & Direction to sell = no inurement
- If devise valid & No direction to sell:
  - Non-heir interest = no inurement
  - Spouse interest = inurement
  - Heir interest = inurement
  - Trust interest = depends

Treatment of each Interest

- Inurement = Protected Homestead
- No Inurement = Non-Protected Homestead

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X. Approaching Homestead in Practice

STEP 5 – Determine proper probate treatment of each homestead interest

Non-Protected Homestead

1. Part of probate Estate & PR may take fee based on value
2. Treat as any other asset in probate
3. Subject to creditor claims
4. PR may sell property (may require court permission)
5. PR has duty and responsibility for property

Protect Homestead

1. Not part of probate Estate
2. Not subject to creditor claims
3. PR may NOT sell property
4. PR has no duty or responsibility for property
5. PR may take possession of property under certain circumstances

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Let’s Connect!



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