FLORIDA HOMESTEAD:
The Submerged Alligator Laying In Wait

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New York trust and estate practitioners who draft documents for Florida domiciliary clients must beware of the potential traps in drafting for disposition of Florida homestead property and administering Florida estates. Florida homestead law has created a wealth of confusion, litigation and, to be frank, major heartburn, for Florida lawyers who deal with homestead issues on a regular basis. Trying to properly draft provisions for devise of homestead, and administration of Florida estates with homestead issues, without the requisite expertise, is kind of like wading in alligator-infested waters: some people do it, but why would you want to?

This article provides an overview of the basic principles concerning Florida homestead property which are most relevant to a trusts and estates practitioner. Be cautioned: an entire treatise could be devoted to these issues, which in some respects are completely counter-intuitive and extremely complex. In addition, Florida law regarding homestead is a moving target and continues to evolve -- without a conscious effort to keep up to date, it is easy for one's knowledge of homestead law to become stale.

Introduction

The concept of "homestead" under Florida law is established in the Florida Constitution and Florida statutes and encompasses three distinct principles. First, Florida homestead law restricts the permissible devise and descent of homestead property when the decedent is survived by a spouse or minor child. Second, Florida law provides broad protection of homestead property from creditors' claims. Last, there are property tax benefits which apply to

homestead property. All three principles must be considered in connection with a Florida estate plan.

1. What is -- and is not -- Homestead

Article X, § 4(a), of the Florida Constitution establishes homestead as (i) 160 acres of contiguous land and improvements, if located outside a municipality, or one-half an acre of contiguous land if located within a municipality, limited to the residence of the owner and his or her family, and (ii) personal property of up to $1,000. Section 4(b) provides: "These exemptions shall inure to the surviving spouse or heirs of the owner."

In order to qualify for homestead protections, the homestead owner must be a Florida domiciliary and, to obtain the property tax cap, a homestead exemption application must be filed. Non-domiciliaries, including snowbirds and other part-timers, are not entitled to Florida homestead protections.

Property owned as tenants by the entirety by a married couple can be the homestead of both spouses for the purposes of lifetime creditor protections and property tax benefits, but not for purposes of restrictions on devise and other purposes under the Florida Probate Code including for elective share purposes. (This is a huge exclusion, as will be discussed.) In addition, while a condominium may be homestead property, a cooperative apartment is not, at least for purposes of the restrictions on devise. *Estate of Wartels*, 357 So. 2d 708 (Fla. 1978); but see *Southern Walls, Inc. v. Stilwell Corp*., 810 So. 2d 566 (Fla. 5th DCA 2002) (co-op constitutes homestead property for purposes of exemption from forced sale by creditors).

Finally, although the question was unsettled for some time, it is now reasonably clear that homestead may be owned by a revocable trust without waiving the creditor protections for homestead. *Engelke v. Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006).

2. Restrictions on Devise of Homestead

Article X § 4(c) of the Florida Constitution provides: "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except that homestead may be devised to the owner's spouse if there be no minor child."

Florida Statutes § 732.4015 provides:

> (1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.
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> (2) For the purposes of subsection (1), the term:
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> (a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.
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> (b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor trust, would be the grantor's homestead.

Florida Statutes § 732.401 provides:

> (1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendents, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendents in being at the time of the decedent's death per stirpes.

In the simplest terms, if a decedent is survived by a spouse and no minor children, the decedent's homestead property may not be devised to anyone other than the spouse. If there is an attempted devise of anything other than a fee simple interest to the surviving spouse -- including a devise in trust, a devise which contains restrictions, conditions or limitations, or a devise of a life estate to the spouse -- then the devise is invalid under Florida law, and the homestead property passes to the spouse outright if the decedent has no issue, or if there are issue, life estate to spouse and remainder to issue. *Estate of Finch*, 401 So. 2d 13081309 (Fla.

1981) (attempted devise of life estate to spouse was invalid because it was less than a devise of a fee simple interest); *Cleeves v. Cleeves*, 509 So. 2d 1256, 1258 (Fla. 2d DCA 1987) (decedent's attempt to devise one-half interest in homestead to surviving spouse was invalid); 12 Fla. Practice, Estate Planning § 19:28 (2009-2010 ed.) ("The devise to a surviving spouse, if no minor child exists, must be in fee simple . . . .").

If the decedent is survived by one or more minor children, the decedent's homestead is not subject to devise at all. If there is a surviving spouse and a minor child, the spouse gets a life estate, remainder to child. If there is no spouse, the minor child inherits the homestead property outright. An attempted devise of the property to the trustee of a trust for the benefit of the minor child, even if for that child's exclusive benefit, is invalid.[1]

However, as mentioned above, for purposes of restrictions on devise at death and other after-death issues, "protected homestead" as defined in the Florida Probate Code (Florida Statute § 731.201(32)) specifically excludes real property held as tenants by the entirety. Therefore, if the decedent is married and owns real property as tenants by the entirety with his spouse, the property is <u>not</u> homestead for purposes of devise and passes to the spouse by operation of law, irrespective of the existence of minor children.

Consider this example: John is married to Jane. John has three adult children by a prior marriage. Their marital residence is titled in John's name alone and meets the definition of "homestead" property. John dies, devising the residence to his three children. Unless Jane has waived her homestead rights pursuant to a valid prenuptial or postnuptial agreement, the devise fails -- Jane has a life estate in the homestead property, vested remainder in the adult children.

What if John devised the property to a credit shelter trust, with Jane as the life beneficiary, remainder to John's children? That attempted devise also fails, because it is less

than a fee simple interest to Jane. The only way that John can validly devise his homestead in this example is outright to Jane -- any other devise is invalid.

And what if John's children are minors? Then no matter how John attempts to devise the homestead property, it will pass by operation of law, with a life estate to Jane, remainder to his minor children as tenants in common. When minors are involved, a guardian of the property will be necessary to protect their financial interests in the property.

However, if John and Jane own the residence as tenants by the entirety, then even if John has minor children, the residence passes to Jane by operation of law. It is ironic that the only way to completely disinherit minor children in Florida is to remarry.

Also ironic is the perhaps unintended result under Florida's elective share statute. For elective share purposes, the decedent's fractional share of property owned as tenants by the entirety is included in determining the elective share (30%), although such property will obviously pass to the surviving spouse with the offsetting fractional interest received by the surviving spouse reducing the elective share. Thus, the elective estate will include 15% (30% of a 50% interest) of the value of the residence, offset by 50% of the value of the residence which is deducted as property passing to the spouse. However, property owned by the decedent alone is "homestead" property, exempt from calculating the elective share and the spouse's rights in such property are in addition to homestead. Florida Statutes §§ 732.2045(1)(i); 732.2105. Thus, the spouse's life estate in such homestead property (or her fee simple interest if the decedent has no issue) is above and beyond that spouse's elective share.

Take this example: A marital residence worth $600,000 is owned by John and Jane as tenants by the entirety. John has an additional $400,000 in assets which would be includible in determining the elective share. Jane's elective share amount would be 30% of $300,000 (as

John's fifty percent interest in the residence) plus 30% of $400,000 (other assets), or $210,000, less $300,000 (value of John's 50% interest in the residence passing to Jane by operation of law), thus satisfying Jane's elective share claim. If the residence were owned by John alone, Jane would receive $120,000 (30% of $400,000) plus either a life estate in the $600,000 home or, if John had no issue, the entire $600,000 home outright. Thus, if the intent is to minimize a surviving spouse's interests at death, it may be better for the estate planning client to own a marital residence as tenants by the entirety with the spouse than in his name alone.

It is worth noting, however, that the homestead provisions which were apparently designed to protect spouses often place the surviving spouse in a difficult if not impossible situation. The spouse, as a life tenant, is responsible for payment of property taxes, mortgage interest, and costs of maintaining the property. Under present Florida law, life estate and remainder interests in real property are not subject to partition. As a result, spouses are often saddled with life tenancies in property they cannot afford to maintain, and if the remainder beneficiaries are not cooperative in buying the spouse's interest or agreeing to sell to a third party, the spouse's only option is to walk away. (See Baskies, Jeffrey A., *The New Homestead Trap: Surviving Spouses are Trapped by Life Estates They No Longer Want or Can Afford*, 81 Fla. Bar J. 69 (June 2007).[2]

Two additional points:

(1) Homestead protections may indeed be waived by a spouse during his or her lifetime, for example in a valid prenuptial or postnuptial agreement. Florida Statutes § 732.702(1); *City Nat'l Bank of Florida v. Tescher*, 578 So. 2d 701 (Fla. 1991); *Wadsworth v. First Union Nat'l Bank*, 564 So. 2d 634 (Fla. 5th DCA 1990); but see *Jacobs v. Jacobs*, 633 So. 2d 30 (Fla. 5th

DCA 1994) (holding attempted waiver by spouse after death of homestead owner is not effective).

(2) if the owner of homestead property is married and wants to sell or transfer homestead property during the owner's lifetime, the spouse must also sign the deed even though that spouse has no ownership interest. *Nordman v. McCormick*, 715 So. 2d 310 (Fla. 5th DCA 1998) (attempted conveyance by deed of homestead to spouse without spouse's joinder in deed was ineffective); *Clemons v. Thornton*, 993 So. 2d 1054, 1056 (Fla. 1st DCA 2008) (attempt to convey remainder interest in homestead in deed without joinder of spouse was void).

3. Protection from Creditors

Article 10, § 4, of the Florida Constitution provides that homestead property "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 . . . ." Homestead property, and the proceeds of sale thereof, cannot be used to pay for estate administration expenses including expenses of the decedent's last illness, funeral expenses, and, importantly, fiduciary and attorneys' fees.

For creditor protection purposes, where the decedent is not survived by a spouse or minor child but is survived by lineal descendants, homestead protections will inure to those heirs. *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997) (homestead exemptions inure to any devisee falling within the class of "heirs" as defined by Florida Statutes § 732.103.) Moreover, homestead not specifically devised, will pass to the residuary devisees who were the decedent's heirs and not the general devisees, unless there is a specific direction in the Will that the homestead be sold. *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2006).

If the decedent's Will directs that the homestead property be sold and the proceeds distributed to any devisees, even to a spouse or minor child, the homestead will not be protected from creditors' claims. *Knadle v. Estate of Knadle*, 686 So. 2d 631 (Fla. 1st DCA 1997); *Estate of Price v. West Florida Hosp.*, 513 So. 2d 767 (Fla. 1st DCA 1987). Thus, in *Cutler v. Cutler*, 994 So. 2d 341 (Fla. 3d DCA 2008), the appellate court, en banc, held that the decedent waived the creditor protections afforded homestead where the decedent's Will directed that payment of all expenses should reduce the gifts equally under an article pursuant to which her homestead was devised. However, if the Will does not direct the sale of homestead, the proceeds of sale of homestead property sold after the decedent's death may remain exempt from creditors' claims. *In re Estate of Hamel*, 821 So. 2d 1276 (Fla. 2d DCA 2002).

The Florida procedure for dealing with homestead property during estate administration is as follows: the personal representative (executor) will file a petition for determination of homestead, which will include allegations establishing that the residence was in fact the decedent's homestead property. This petition must be served on all interested parties, including creditors of the estate. Florida Probate Rule 5.405 (Proceedings to Determine Protected Homestead Real Property). Some judges will not grant the petition until the creditors' period has expired -- in other words, the Florida statutory period during which creditors may file claims against an estate. In the absence of a challenge, the personal representative will obtain an order determining homestead, which will then establish that the homestead property (or proceeds of sale after the decedent's death) is immune from creditors' claims and expenses of administration.

Notwithstanding that the personal representative will seek to have the property determined to be protected homestead, the personal representative generally has no right to take

possession of homestead, and it is not subject to the estate administration process. *Spitzer v. Branning*, 184 So. 770 (Fla. 1938). Pursuant to a statutory change in 2002, the personal representative is authorized, but not required, to take possession of homestead property only if necessary to protect or preserve the homestead property. Florida Statute § 733.608(2); Florida Probate Rule 5.404.

The takeaway lesson here is this: unless there is a specific reason for waiving homestead protections, the estate planner must be careful that the devise of homestead is to a spouse or lineal descendant of the testator, and that the instrument does not direct sale of the homestead or provide that the proceeds of sale of homestead may be used to pay debts, taxes, or expenses of administration. Once at the estate administration phase, the personal representative's counsel must take the necessary steps to determine homestead and must avoid any actions that could subject the proceeds of sale of homestead to creditors' claims.

4. Property Tax Exemption and Cap on Increase

Effective in 1995, the Florida "Save Our Homes" legislation (also called Amendment 10) created a $25,000 homestead exemption from property taxes and imposed a 3% cap on annual property tax increases. Amendment One, effective January 1, 2008, increased the homestead exemption for most properties to $50,000, and now allows for "portability" or transfer of up to $500,000 of the actual assessment cap to a new property. Florida Statutes §§ 193.155, 193.1554, 193.1555 and 193.1556. There are additional property tax benefits for homestead for veterans and people over age 65.

In addition to the loss of creditor protection, the property tax benefits of homestead can be lost if title to the property is changed to an irrevocable trust or to the owner's adult children. The loss of such property tax benefits can be significant, particularly if the property is valuable.

The website for the Florida county's property appraiser can be a helpful tool in determining whether property has homestead status for purposes of property taxes, as well as how such property is titled. For example, the property appraiser's website for Palm Beach County is: www.pbcgov.com/papa/index.htm. Using that website, one can search for a property using either the owner's name or the property address.

Conclusion

Without comment on the repercussions of unauthorized practice of law, a New York trusts and estates attorney should proceed carefully in handling estate planning and administration for Florida domiciliaries because of the many issues that can surface from below the visible waterline like an alligator laying in wait for its prey. If after reading this article, you are still inclined to tackle Florida homestead issues as a non-Florida practitioner, then you may want to consider a consultation with Florida counsel. It may be that we're no more qualified to fight off the gator, but as a result of our many lakeside walks, we may be able to spot him before he strikes.

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[1] But see *HCA Gulf Coast Hosp. v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1992) (decedent's homestead property was not subject to creditors' claims where devised to a spendthrift trust for the sole benefit of her daughter). Moreover, there may be some methods for avoiding these result using sophisticated techniques as has been suggested by renowned Florida attorney Bruce Stone, but Mr. Stone has observed that these strategies remain untested.

[2] The Real Property, Probate and Trust Law Committee of the Florida Bar is working on a legislative solution to this problem.