

**CURRENT REAL PROPERTY HOMESTEAD ISSUES**

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## CURRENT REAL PROPERTY HOMESTEAD ISSUES

### BACKGROUND

What is "Homestead"? Art. X, §4, Florida Constitution.

Constitutional homestead protections are intended to protect the family against financial reversals. Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925).

Character of Homestead. Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 13 So.2d 448 (1943).

- Intention to reside on property
- Intent to return to property when absent
- Actual residency
- For purposes of intestate descent, property held as tenants by the entirety is not homestead property. §732.401, Florida Statutes.

-remains homestead until abandoned or transferred as permitted by law. Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 13 So.2d 448 (1943).

Extent of Homestead. Art. X, §4(a)(1), Fla. Const.

- 160 acres outside a municipality.
- 1/2 acre if within a municipality.
- must be contiguous. Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912).
- need not own the entire estate in the property. Morgan v. Bailey, 90 Fla. 47, 105 So. 143 (1925).

### ALIENATION OF HOMESTEAD

Sale, Mortgage, Gift.

- Unmarried individual--NO PROBLEM.
- Married individual--must be "joined by spouse."
- joinder should be in same instrument.
- joinder may be accomplished by power of attorney. §689.111, Fla. Stat.

Failure of the spouse to join in the instrument alienating the homestead:

-if conveyance by deed, the deed is a nullity, void *ab initio*. Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940). Robbins v. Robbins, 411 So.2d 1024 (Fla. 2d DCA 1982).

-if mortgage, the mortgage is voidable. Pitts v. Pastore, 561 So.2d 297 (Fla. 2d DCA 1990).

Liability of non-owner spouse joining in instrument alienating homestead:

-wife who joined in mortgage containing clear promise to pay the amounts due under the promissory note could be held liable for payment of note even though she did not sign the note. Ehrlich v. Mangicapra, 626 So.2d 702 (Fla. 4th DCA 1993).

-Warranty Deed ???

Equitable Subrogation.

-where mortgage of homestead property is voided for failure of spouse to join in the mortgage, the mortgagee may be subrogated to the rights of creditors paid with the mortgage proceeds, to the extent that such creditors held prior valid liens. Palm Beach Savings & Loan Association v. Fishbein, 619 So.2d 267 (Fla. 1993).

## **INTESTATE SUCCESSION OR DEVISE OF HOMESTEAD**

Intestate Succession to Homestead.

-If survived by a spouse or a minor child, the homestead may not be devised; and it passes as follows:

-If survived by spouse and minor child/children, spouse gets a life estate and the decedent's lineal descendants in being at the time of decedent's death receive a vested remainder, shares per stirpes. §732.401, Fla. Stat.

Devise of Homestead. §732.4015, Fla. Stat.

-If decedent is survived by a spouse and no minor child, the homestead may be devised to the surviving spouse.

-If decedent is not survived by a spouse or a minor child, then the homestead may be devised to whomever the testator chooses.

Caveat.

-Unless a situation arises where the homestead can be and is lawfully devised, it passes outside of probate. For Florida probate purposes, the decedent's homestead is not part of the estate. However, the value of the homestead is included as part of the estate for both Federal and consequently for Florida estate tax purposes.

### **EXEMPTION FROM FORCED SALE**

Forced Sale is a sale under applicable judicial (or nonjudicial) process or a civil or criminal forfeiture. Forced sale does not include the foreclosure of a voluntary lien. Hodges v. Cooksey, 33 Fla. 715, 15 So. 549 (1894).

-Homestead of homeowner convicted under Florida RICO Act, was exempt from forfeiture provisions of §895.05(2)(a), Fla. Stat. Butterworth v. Caggiano, 605 So.2d 56 (Fla. 1992).

-Although the jury found that 100% of the purchase price for the homestead was derived from the proceeds of an illegal marijuana growing operation, the homestead was exempt from forfeiture under the Florida Contraband Forfeiture Act, §§932.701-707, Fla. Stat. (1993). Tramel v. Stewart, 697 So.2d 821 (Fla 1997).

-Exemption applies to proceeds of voluntary sale, where party claiming homestead protection intends to reinvest in another homestead property. Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962).

-Exemption applies to proceeds of insurance policy where homestead improvements are destroyed. Kohn v. Coats, 103 Fla. 264, 138 So. 760 (1931).

Upon devise or intestate succession:

-Exemption from forced sale inures to the benefit of the surviving spouse or heirs of the owner. Art. X, §4 (b), Fla. Const.

-”Heirs” is statutorily defined, as “those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent. §731.201 (18), Fla. Stat. Davis v. Snyder, 681 So.2d 1191 (Fla. 2d DCA 1996), overruled Snyder v. Davis, 699 So.2d 999 (Fla. 1997).

-However, in Walker v. Mickler, 687 So.2d 1328 (Fla. 1st DCA 1997), the First DCA determined that as used in Art. X, §4(b), Fla. Const., the term “heirs” included not only those who are entitled to receive the decedent’s estate, but also anyone in the class of persons who could be entitled to receive the decedent’s property under the laws of intestacy.

-In Snyder v. Davis, 699 So.2d 999 (Fla. 1997), the Florida Supreme Court resolved the conflict, agreeing with the analysis of the First DCA.

### **EQUITABLE LIEN ON HOMESTEAD**

-A party may be able to establish and enforce an equitable lien against homestead property, based on equitable subrogation to the rights of the holder of a valid voluntary lienholder. Palm Beach Savings & Loan Association v. Fishbein, 619 So.2d 267 (Fla. 1993).

-A party may be able to establish and enforce an equitable lien against homestead property where funds which the owner obtained by fraud from the enforcing party are traced to the owner’s homestead property. Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925).

-However, if funds traced to the owner’s homestead property are obtained by the fraud of someone other than the owner, the defrauded party may not be able to establish an equitable lien against the homestead property of the owner, even if the owner knew about the fraud. Greenberg v. Fontaine, 618 So.2d 299 (Fla. 2d DCA 1993).

### **SUMMARY**

The real property practitioner should be aware of the dictates of the homestead provisions of Article X, Section 4 of the Florida Constitution, especially those relating to: (1) alienation of the homestead requiring joinder of the owner’s spouse; (2) the limitations on the devise of the homestead, and that the decedent’s homestead passes differently than other property under the laws of intestacy; and (3) the letter of the law and exceptions to the exemption of the homestead property from forced sale. However, the practitioner should be aware that the provisions of Article X, Section 4 are as honored in the exception to the law as they are in the letter of the law.