



## What Every Estate Planning Attorney Should Know About Florida Homestead Law

By: Eric S. Kane, Esq.



In addition to its warm weather and magnificent beaches, the Sunshine State is a popular destination of choice for its Homestead Protection. This article summarizes the three basic categories of Florida Homestead law and provides ten important things every estate planner should be aware of when advising clients. Florida's Homestead protection can be categorized into three distinct protections under Florida law each with a specific purpose: protection from creditors, protection of surviving spouses and minor children and reduction in property taxes.

The Florida Constitution terms certain property as "homestead" thereby protecting it from levy by creditors of the owner, subject to the following exceptions: taxes and assessments on the property, mortgages on the property, and mechanics' liens for labor performed on the property. The homestead protection from the forced sale by creditors inures to the surviving spouse or heirs of the owner. This provision allows the Florida testator with no surviving spouse or minor children to pass by will the homestead property with its accompanying protection from creditors to any family member within the class of persons categorized in the intestacy statute.

Homestead protection is limited by size. If the homestead property is located within a municipality, homestead protection is extended to one-half acre of contiguous land. If the property is located outside a municipality protection is extended to 160 contiguous acres. If the homestead lot is greater than one-half acre or 160 contiguous acres respectively the protection will be applied pro rata.

The Florida Constitution places restraints on voluntary conveyance of the property away from a spouse and on devise of the property away from a spouse or minor child. The restraint to the devise of homestead only applies to solely owned property. If the owner is not survived by minor children, the homestead may be devised to the owner's spouse. If no spouse or minor children survive, the home-

stead may be devised to whomever the owner chooses. If the homestead is not devised, it descends in the same manner as other intestate property. However, if the decedent is survived by a spouse and lineal descendants, the surviving spouse takes a life estate in the property with a vested remainder in the lineal descendants surviving at the time of the decedent's death per stirpes.

Under the Florida Save Our Homes Act, the assessed value of a Florida Homestead is restricted to an increase of no more than 3% per year. In addition, under Florida law homeowners can claim up to a \$50,000 "Homestead Exemption" on their primary residence. The first \$25,000 of this exemption applies to all taxing authorities, and the second \$25,000 exemption excludes School Board taxes and applies only to properties with assessed values greater than \$50,000.

The following are ten rules every attorney should be aware of regarding Florida homestead law.

- In the testamentary instrument do not direct the homestead property to be sold and the proceeds distributed as such language will cause the property to lose its homestead creditor protection.
- In the testamentary instrument make sure that homestead protection is not waived by language that instructs expenses or debts to be paid from homestead or exempt personal property.
- If placing homestead property into a revocable trust make sure that the specific language to retain homestead is included both within the trust agreement and on the deed itself. It is important to note that it is still unresolved whether homestead property should be placed into a revocable trust.
- Think twice before transferring a Florida residence into a family limited partnership, limited liability

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company, revocable or irrevocable trust as such transfer can result in the loss of homestead protection.

- Be aware that you cannot circumvent devise restrictions by placing homestead property into a revocable trust.
- Avoid devising the homestead residence to a credit shelter trust. A purported devise of less than the decedent's entire interest in the homestead to a surviving spouse is invalid even if the spouse may wind up receiving a life estate by statute. If the will, however, specifically devises the homestead to the surviving spouse and the will includes the necessary disclaimer language then it is believed that the homestead will pass to the credit shelter trust assuming that there are no minor children. Although, there is currently no case law deciding this issue.
- Be advised that a spouse can waive his or her rights to the homestead property through a pre-nuptial or post-nuptial agreement. Doing so is the legal equivalent of the waiving spouse having predeceased the owner of the homestead.
- Understand that property that the decedent and surviving spouse owned as tenants by the entirety does not qualify as homestead property for the purpose of descent and distribution until the death of the surviving spouse.
- Note that a disclaimer of property held as tenants by the entirety does not cause the property to become homestead devise restricted by statute.
- Take affirmative steps to make sure that the surviving spouse is not trapped by a life estate that they no longer want or can afford.

with clients who live in Florida, stand to inherit Florida Homestead property or are contemplating moving to the Sunshine State.

*Eric S. Kane, Esq. is a licensed Florida attorney whose office is located in Miami, Florida. Mr. Kane practices in the areas of estate planning, probate, trust administration, and guardianship law. Mr. Kane received his J.D. and L.L.M. from the University of Miami School of Law. Mr. Kane can be reached at 305-937-7280 or at [eric@kanelawpl.com](mailto:eric@kanelawpl.com).*

In short, Florida Homestead protection protects homeowners and their surviving heirs while reducing property taxes. It is essential to contact a Florida attorney when dealing