



# Florida Probate Nuts & Bolts

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Continuing Legal Education Arm  
of the Pennsylvania Bar Association

# Probate Overview

- Qualifying Personal Representative
- Court supervision – real, restricted accounts, bonds, requirement for court approval hearings
- Compensation for Personal Representative and Attorney
- Gifts to lawyers and Florida Bar Rules
- E-filing
- Homestead in Probate
- Real Estate in Probate
- Litigation – Tips and Tricks



# Qualifying Personal Representatives

- F.S. §§ 733.302, 733.303, 733.304
- Florida Resident or
- Non-Florida Resident, spouse, parent, child, uncle, aunt, or lineal consanguinity
- Spouse of someone who qualifies
- Non-relative, non-Florida resident – will not work



# Restricted Accounts, etc.

- Palm Beach County and many others – add administration & costs
- Bonds – more and more often
- Letters of Administration with restrictions – need order to sell real estate; another order to release funds
- Waivers with notary



# Compensation of Personal Representative – F.S. §733.617

- 3% - First million → \$30,000
- 2.5% - \$1M - \$4.99M → \$100,000
- 2% - \$5M – 9.99M → \$80,000
- 1.5% - above \$10M
- Approximately \$10 Million estate -\$210,000
  - Plus:
    - Sale of real estate
    - Taxes
    - Business
    - homestead



# Compensation of Attorney- F.S. §733.6171

- 3% - First \$900,000 → \$27,000
- 2.5% - \$1M - \$2.99M → \$50,000
- 2% - \$3M – 4.99M → \$40,000
- 1.5% - \$5M - \$9.99M → \$60,000
- Approximately \$5 Million estate → \$117,000
  - Plus:
    - Will contest
    - Elective share
    - Contested claim
    - Litigation



# Miscellaneous Items

- Death Certificates – without cause of death
- E-filing – set-up portal with Florida Courts online
  - File any jurisdiction in Florida
  - Different rules for different courts – frustration
- Gifts to lawyers – including being named as executor/trustee - get it in writing. F.S. § 732.806 void after October 1, 2013 –except relatives
- If named as fiduciary – signed letter from client. Florida Rules of Professional Conduct 4-1.8.



# Probate & Homestead – If Homestead = Exempt

- See homestead section – Ad valorem & creditor protected
- For probate- focus on descent & devise and restrictions
- Taking control of homestead F.S. § 733.608
- Note exempt – different beneficiaries estate vs homestead – expending estate assets on homestead
- Statute allows estate to be reimbursed
- Personal Representative is authorized but not required to take possession – limited purpose





# Real Property in Probate

- Urgency – sale – courts cooperative
- Expedited hearings, obtain Letters of Administration
- Expect restrictions – sale proceeds in trust
- Court order release trust proceeds after creditor period expires
- Expect order determining homestead or non-homestead
- If will mandates sale of homestead – lose creditor protection



# Litigation Tips and Tricks - Probate

- Correct defendant – Personal Representative – not estate
  - Spradley v. Spradley, 213 So. 3d 1042 (Fla. 2nd DCA 2017)
- Personal Representative acts before LOA's – If benefits estate “relation back” F. S. § 733.601 & Depriest v. Grieson, 213 So. 3d 1022 (Fla. 1st DCA 2017)
- No duty to act, Richard v. Richard, 193 So. 3d 964 (Fla. 3rd DCA 2016)



# Litigation Tips and Tricks - Probate

- Surviving spouse who files for elective estate may be entitled to recover legal fees and costs if estate objects and spouse prevails. F. S. § 732.2151. Court may award taxable costs as in chancery actions involving an objection
- Legal fees, Attorney fees and costs – see Fla. RPPTL publication, ActionLine, Winter 2017-2018, by Brandon Pratt & Jennifer Fox of Huth, Pratt & Millhauser



# Litigation Tips and Tricks - Probate

- In Personam Jurisdiction vs In Rem Jurisdiction
- Probate generally allows for “Formal Notice”
- “Formal Notice” limited to extent of interests in estate F. S. § 731.301(2)
- Unless party waives by voluntary appearance
- Galego v. Robinson, 695 So. 2d 443, (Fla. 2d DCA 1997); Paradise of Port Richey v E/O Boulis, 810 So. 2d 1044 (Fla. 4<sup>th</sup> DCA 2002)
- Obtain in personam jurisdiction by service of process per Chapter 48
- Note PR is subject to in personam for all purposes including surcharge b/c of filing of petition for administration



# Litigation Tips and Tricks - Probate

- Adversary Proceeding – Probate Rule 5.025
- Removal or surcharge of PR, or guardian
- Probate lost, destroyed, later discovered will
- Determine beneficiaries
- Reform, modify will
- Determine elective share



# Litigation Tips and Tricks - Probate

- Adversary Proceedings (continue)
- Other proceedings may be declared adversary
- Initiate adversary proceedings with formal notice, Fla. Prob. R. 5.040
- After service of formal notice – follow Fla. Rules Civil Procedure



# Litigation Tips and Tricks - Probate

- Will Contests
- Lack of testamentary capacity – ability to understand in a general way: nature and extent of property, relationship natural objects of bounty, general understanding of practical impact of will
- See *In Re Wilmott's Estate*, 66 So. 2d 465 (Fla. 1953); *Rami v. Forlong*, 702 So. 2d 1273 (Fla. 3d DCA 1997), rev. den., 717 So. 2d 531 (Fla. 1998)
- Presumption of capacity, burden re lack of capacity on party filing contest



# Litigation Tips and Tricks - Probate

- Will contests (cont)
- Old age, physical frailty, failing memory, frequently intoxicated, use of narcotics – all do not establish lack of capacity on their own
- An insane person with a “lucid interval” is sufficient capacity to make a will in Florida, see Raimi (cited above)





# Litigation Tips and Tricks - Probate

- Undue Influence – most common grounds used to set aside a will in Florida
- Presumption of undue influence established if
  - Alleged undue influencer is a substantial beneficiary of the will
  - AUI – occupied a confidential relationship with the testator
  - AUI was “active in procuring” the will



# Litigation Tips and Tricks - Probate

- “Active Procurement” established under Carpenter’s 7 factors
- In Re Carpenter’s Estate, 253 So. 2d 697 (Fla. 1971)
  - Presence of beneficiary at execution
  - Presence of beneficiary when testator expressed desire to make will
  - Beneficiary obtained lawyer to draft will
  - Beneficiary’s knowledge of will contents prior to execution
  - Beneficiary’s instructions to attorney on contents of will



# Litigation Tips and Tricks - Probate

- “Active Procurement” (cont)
  - Bene secured witnesses
  - Safe keeping of will by beneficiary
    - Note – not an exclusive list of factors to establish active procurement and proof of some of these 7 factors without proof of all may be sufficient to establish active procurement



# Litigation Tips and Tricks - Probate

- Undue Influence – shifting burden of proof
- 2002 FL legislature enacted F.S. § 733.107(2) – once presumption of undue influence established – burden of proof shifts to proponent of will
- § 733.107(2) implements public policy against abuse of fiduciary or confidential relationship, therefore shifts burden of proof under sections 90.301 and 90.304 of Florida Evidence Code, see *Hack v. James*, 878 So. 2d 440 (Fla. 5<sup>th</sup> DCA 2004)
- Husband & wife exempt from confidential relationship – *Tarsagian v. Watt*, 402 So. 2d 471 (Fla. 3d DCA 1991)



# Homestead Overview

- Three elements of Homestead
  - Ad valorem - Fla. Const. Art. VII §6
  - Creditor protection - Fla Const. Art. X §4
  - Descent & devise - Fla. Const. Art. X § 4(a)(1)
- Different issues arise under all three elements, the substantive rights arise under different constitutional law, and hundreds of cases and different Florida Statutes impact these three elements of homestead law



# Homestead – Step One

- Step one – classify the homestead issue – is it A, B, C
  - A ----- Ad Valorem - Fla. Const. Art. VII §6
  - B ----- Creditor protection – Fla Const. Art. X §4
  - C ----- Descent & devise – Fla. Const. Art. X § 4(a)(1)



# Homestead – Step Two

- Step two – confirm requirements for homestead have been met
  - Primary residence of Florida resident
    - Cannot qualify for more than one residence
    - Possible to qualify for one spouse, other spouse may be resident of different state – but very limited circumstances – separate households, separate lives, separate financial resources, case by case review



# Requirements of Homestead Continued

- Size issues – ½ acre within municipality
  - 160 acres outside municipality
- Owned by natural person – e.g. LLC does not qualify, may be owned by a revocable trust
- If transfer homestead to a revocable trust must notify property appraiser re qualify for homestead





# Requirements of Homestead Continued

- For ad valorem purposes – owner must notify property appraiser – eligible for homestead – establish first cap year
- For ad valorem – can sell homestead and “pour over” the tax advantage for new home purchase
- Joint ownership – can qualify e.g. mom, Florida resident, son PA resident, mom puts son on deed as joint owners to avoid probate – mom can retain homestead ad valorem, but son’s interest is not creditor protected - son cannot file for homestead or mom loses cap



# Homestead Protection Forced Sale

- FL Const. Art. X §4(a) protects from forced sale under process of any court and from judgment liens
- Exceptions – taxes & assessments
  - Obligations for purchase, improve, repair
  - Obligations for house, field, labor



# Bankruptcy & Homestead

- Federal Bankruptcy Law/Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) passed 2005
- Florida is an opt-out state on Federal Bankruptcy Laws – but BAPCPA seems to impact homestead
- *In Re Garcia* – unpublished – 2010 WL 2697020 (Bankr. S.D Fla. July 6, 2010) Supremacy Clause preempts Florida Constitution homestead exemption
- *In Re Osejo*, 2011 – Affirms *Garcia*



# Bankruptcy & Homestead

- 11 U.S.C. 522 (o) reduce homestead protection if monies used to purchase done with “intent to hinder, delay or defraud a creditor” within 10 years of filing
- 11 U.S.C. 522(p) if homestead required within 1215 days of filing for bankruptcy reduce homestead protection to max \$146,450



# Florida Homestead Protections Havoco

- *Havoco of America, Ltd v. Hill*, 790 So.2d 1018 (Fla. 2001) – homestead protection even where required with non-exempt funds, “with specific intent- hinder, delay, defraud”



# Homestead Restrictions Descent & Devise

- When homeowner is married, spouse must join in deed if not on title
- Joinder is recognition that spouse has rights inter vivos as well as testamentary
- Joinder in deed now (2017) can constitute “waiver” of spouse’s rights in homestead. F.S. §732.7025



# Homestead Restrictions Descent & Devise Continued

- F.S. §732.7025 “By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.”



# Homestead & Nuptial Agreements

- Married person owning homestead must convey to surviving spouse out right in fee, *In Re Finch*, 401 So.2d 1308 (Fla. 1981)
- One can waive rights in homestead by a nuptial agreement. F.S. §732.702(1). And See *City National Bank v. Tescher*, 578 So.2d 701 (Fla. 1991)





# Blown Homestead Devise

- If devise other than as provided by FL Constitution and FL law – look to FL Statutes on resolution
- F.S. §732.401 – if blown – passes under intestacy – but . . .



# Blown Homestead Devise Continued

- If decedent survived by spouse and lineal descendants
  - Life estate in surviving spouse
  - Vested remainder in lineal descendants in being at time of death, per stirpes



# Blown Homestead Devise Continued

- New option – F.S. §732.401(2)
  - Surviving spouse can elect – ½ interest tenants in common
  - Decedent's descendants in being at date of death, per stirpes take ½ tenants in common
- Election – exercised by
  - Surviving spouse, or attorney-in-fact -- guardian
  - If other than surviving spouse – court must determine in surviving spouse best interests
  - Election within 6 months after date of death, and during surviving spouse's lifetime
  - If timely filed objection – up to 30 days additional time
  - Once made – irrevocable
  - See form provided in statute



# Blown Homestead Devise Continued

- Use of a revocable trust does not resolve restriction issues on descent and devise – *In Re Estate of Johnson*, 397 So.2d 970 (Fla. 4th DCA 1981)
- Johnson cites to *Johns v. Bowden*, 68 Fla 32 (1914) “That which the law forbids to be done directly cannot lawfully be done by indirection.”
- Devise of anything less than 100% outright in fee = blown devise – *In Re Estate of Finch*, 401 So.2d 1308 (Fla. 1981)



# Inurement – Who Gets Protection

- On death of owner of homestead, creditor protection inures to surviving spouse or heirs. Fla. Const. Art. X §4(b)
- Heirs is anyone in class of heirs doesn't mean to follow in order of consanguinity (e.g. *Snyder v. Davis*, 699 So.2d 999(Fla. 1997)) decedent left to grandchild while decedent's son was surviving – inurement to grandchild



# Residency & Physical Presence Test

- Prior case law held individuals without permanent visa (e.g. nonresident aliens) cannot claim homestead because they could not satisfy residency requirement
- Now – See *Garcia v. Andonie*, 101 So.3d 539 (Fla. 2012). Ad valorem exemption allowed for Honduran citizen with temporary visa
- Decedent need not reside at property to qualify for homestead, *Bayview Loan Servicing, LLC v. Giblin*, 9 So.3d 1276 (Fla. 4th DCA 2009)



# Property That Qualifies For Creditor Protection

- Improvements – rural homestead – barns, fences, even crops. *Davis v. Davis*, 864 So.2d 458 (Fla. 1st DCA 2004)
- Houseboat – when permanent residence and no motor, *Miami Country Day School v. Bakst*, 641 So.2d 467 ( Fla. 3rd DCA 1994)
- Partial interest – undivided one-half tenant in common, *Engelke v. Estate of Engelke*, 921 So. 693 (Fla. 4<sup>th</sup> DCA 2006)
- Leasehold – 98 year – qualifies. *Higgs v. Warrick*, 994 So.2d 492 (Fla. 3<sup>rd</sup> DCA 2008)



# Property That Qualifies For Creditor Protection Continued

- Leasehold, year to year – does not qualify, *In Re Tenorio*, 107 B.R. 787 (Bankr. S.D. Fla 1989)
- Co-op apartments – creditor protected but not devise restricted
  - *Creditor protected, Southern Walls, Inc. v. Stilwell Corp.*, 810 So.2d 566 (Fla. 5<sup>th</sup> DCA 2002)
  - Not devise restricted, *In Re Estate of Wartels*, 357 So.2d 708 (Fla. 1978)





# Direction to Sell – Loses Creditor Protection

- If Will provides express direction to sell, Personal Representative can sell and homestead loses protection. *Estate of Price v. West Florida Hospital, Inc.*, 513 So.2d 767 (Fla. 1st DCA 1987)



# Homestead in Further Trust For Beneficiary May Not Be Protected

- Not protected, *Elmowitz v. Estate of Zimmerman*, 647 So.2d 1064 (Fla. 3<sup>rd</sup> DCA 1994) beneficiary had mere income interests, no specific rights
- Protected, *In Re Donovan*, 550 So.2d 37 (Fla. 2d DCA 1989) wife was sole beneficiary and direction to trustee “just debts” didn’t lose inurement



# Homestead – Asset Protection

- Analysis – start with basics:
  - Florida resident, & property principal residence
  - ½ acre municipality, 160 acres rural
  - Liens taxes, & assessments
  - Liens house, labor
- Consider Doctrine Equitable Liens



# Homestead – Doctrine Equitable Liens

- Generally homestead is exempt – Third party creditors
- Seminal case – Havoco of America v. Hill, 197 F.3d 1135 (11<sup>th</sup> Cir. 1999) and 790 So.2d 1018 (Fla. 2001)
- Assets in homestead even with intent to hinder, delay or defraud creditors still exempt as long as not procured by fraud or egregious conduct by debtor



# Homestead - Doctrine Equitable Liens Continued

- Case law seems to be narrowing protection
- *Spector v. Spector*, 226 So.3d 256 (Fla. 4<sup>th</sup> DCA 2017) homestead protection cannot be used to thwart creditor directly aggrieved by the fraudulent or egregious conduct of the debtor – husband failed to transfer residence to former wife and claimed homestead protection



# Homestead etc.

- *In Re Bifani*, 580 Fed. Appx 740 (C.A. 11<sup>th</sup> Cir. (Fla.) (2014), court imposed equitable lien, result from fraudulent transfer without finding any fraud or egregious conduct on debtor



# Homestead etc.

- *Mirzataheri v. FM East Developers, LLC*, 193 So.3d 19 (Fla. 3d DCA 2016), where husband and wife execute a contract for sale of homestead property, homestead exemption will not act as a shield to specific performance



# Homestead etc.

- Current DLF case pending in 4<sup>th</sup> DCA
- Purchase of homestead with funds from bank, no mortgage
- Bank pled for equitable lien or alternatively that p/o will to revocable trust, with no specific devise to adult children in trust, prevented inurement of homestead protection to children
- Bank has recourse under agreements with decedent's closely held business
- Children argue = bank has remedy via business, no equitable lien available, and inurement





# Homestead Exceeding Limits

- In *Re Englander*, 95 F. 3d 1028 (11<sup>th</sup> Cir. 1996), debtor owned homestead 1 acre in a municipality – court ordered sale and proceeds entitled to exemption = 1/2



# Homestead Exceeding Limits Continued

- *In Re Quraeshi*, 289 B.R. 240 (S.D. Fla. 2002)
- Debtor owned homestead 2.69 acres inside a municipality, court ordered sale and proceeds to be protected equaled  $.5/2.69$ . Thus about 19% exemption from creditors



# Separate Homestead – Husband and Wife

- Good facts can support two homesteads
- *Law v. Law*, 738 So.2d 522 (1999), “Two people who are married but legitimately living apart in separate residences... where there is no fraudulent intent or egregious conduct can allow for two homesteads



# Separate Homesteads – Husband and Wife

- May be higher hurdle for ad valorem
- *Endsley v. Broward County*, 189 So.3d 938 (Fla. 4th DCA 2016), lost homestead exemption because husband taking residency based exemption – court noted F.S. §196.031(5) if receiving tax benefit from another state arising from permanent residency, not entitled to exemption in Florida



# Homestead in Further Trust For Beneficiary May Not Be Protected

- Not protected, *Elmowitz v. Estate of Zimmerman*, 647 So.2d 1064 (Fla. 3<sup>rd</sup> DCA 1994) beneficiary had mere income interests, no specific rights
- Protected, *In Re Donovan*, 550 So.2d 37 (Fla. 2d DCA 1989) wife was sole beneficiary and direction to trustee “just debts” didn’t lose inurement



# Overview Florida Elective Share

- Who has right – surviving spouse (or guardian with court approval, of a person who dies domiciled in Florida.  
F.S. §732.201
- Amount 30% of elective estate. F.S. §732.2065
- Elective estate §732.2035
  - Probate estate
  - Decedent's ownership in JTWRROS, POD, etc.
  - Now includes decedent's interest in protected homestead (new 2017)



# Excluded From Elective Estate

- Pre-marriage irrevocable transfer
- Transfers for adequate consideration
- Property in qualifying special needs trusts
- Protected homestead of decedent if surviving spouse waived rights and didn't receive any interests (new 2017)



# Valuation of Property Entering Elective Estate F.S. §732.2055

- Generally the fair market value of property on date of death (after deduction of mortgages, liens, etc)
- Homestead
  - If fee simple – fair market value on date of death
  - If life estate or tenants in common – ½ fair market value





# Valuation of Property Entering Elective Estate Continued

- If surviving spouse waived homestead rights, but received some interest, value as if not protected homestead
- Insurance – net cash surrender value just prior to date of death
- For complete list see statute



# Timing F.S. §732.2135

- Earlier of six months notice administration on surviving spouse or two years after date of death
- New 2017 – surviving spouse can file for extension up to 40 days after original deadline
- Can withdraw within 8 months date of death as long as no distributions made



# Satisfaction of Elective Share §732.2095

- If outright – 100% FMV property transfer
- Insurance policy – net proceeds payable to spouse
- Elective share trust
  - If qualifying principal invasion & POA - 100%
  - If only qualifying invasion power - 80%
  - Trust with less generous terms - 50%



# Who Must Contribute to Satisfaction F.S. §732.2085

- Generally direct recipients of property included in E.E. and beneficiaries of probate estate
- Liable pro rata for all members of the class
- New 2017 – if contribution not fully satisfied two years after date of death, required to pay interest at statutory rate



# Elective Share Floor Not Ceiling

- 2016 amend F.S. §732.201 “The election does not reduce what the spouse receives if the election were not made and the spouse is not treated as having predeceased the decedent.”



# When Does Marriage = Marriage

- Florida does not recognize common law marriages. F.S. §741.211
- Florida does recognize valid common law marriage from another state, *Pierre v. Trelles (In Re Estate of Sterile)*, 902 So.2d 915 (Fla. 2nd DCA 2005)
- Reputed spouses – civil ceremony in Israel, many rights of spouse recognized
  - However, not a party to a marital relationship because no religious ceremony = not married when under Florida law, *Cohen v. Shusan*, 212 So.3d 1113 (Fla. 2d DCA 2017)



# Waiver of Elective Share

## F.S. §732.702

- Spouse may waive rights E.S.
- Independent counsel strongly suggested
- Waiver of “all rights” in the property of a present or prospective spouse = waiver of elective share (and homestead)
- Financial disclosure prior to marriage is not required, but may be advisable
- Financial disclosure is required for post nuptial agreement
- No consideration required other than the agreement



# Award of Attorney Fees & Costs

## F.S. §732.2151

- Court may award taxable costs & fees as in chancery if objection over
  - Entitlement or amount E.S.
  - Property included
  - Satisfaction of E.S.
- Court may direct payment from estate, a party's interest, or other property of the party
- Applies to all proceedings after July 1, 2017





# Property Not Productive of Income

## F.S. §738.606

- Assets used to satisfy elective share under Elective Share Trust F.S. §732.2025(2)(a) and (c), if not productive of income, even if no marital deduction made or only partially made – spouse may require trustee to make productive within a reasonable time



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THANK YOU

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