



Florida Law for Non-Florida Attorney's

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Continuing Legal Education Arm
of the Pennsylvania Bar Association

Program Agenda

- 12:00 – 12:50 Probate
- 12:50 – 1:30 Trust Administration
- 1:30 – 1:45 *Break*
- 1:45 – 2:45 Trust Administration (cont'd.)
and Homestead
- 2:45 – 3:15 Elective Share, Durable Powers
of Attorney and Caselaw Updates



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
- Convicted Felons not qualified § 733.303(1)(a)



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
- Affidavit of non-felon in some jurisdictions



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” Fla. Stat. 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. 4th 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 obtained 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. 5th DCA 2004)
- Husband & wife exempt from confidential relationship – *Tarsagian v. Watt*, 402 So. 2d 471 (Fla. 3d DCA 1991)



Overview Florida Trust Code

- Enacted 2006, effective July 1 2007
- Largely follows Uniform Trust Code
- Applies to charitable and non-charitable trusts
- Except as otherwise provided – retroactive
- F.S. § 736.01003 “Qualified beneficiary” = living beneficiaries:
 - Current beneficiary, permissible income/principal
 - Intermediate beneficiary – would become current beneficiary on date determined if current beneficiary’s interest terminated
 - First tier remainder beneficiaries



Overview Florida Trust Code

- Trust code supplements the trust agreement when trust agreement is silent
- Except certain mandatory terms – trust agreement cannot override
 - Creation trust
 - Public policy
 - Certain court rules/powers
 - Duties of trustee (e.g. accountings)
 - Rule Against Perpetuities



Notices

- Reasonable manner first class mail, FedEx, fax
 - New legislation electronic posting
- Change in trust's principal place administration F.S. § 736.0105 (2)(p)
- Trust modification, termination, decanting



Nonjudicial Settlements

F.S. § 736.0111

- Interested persons may agree, if
 - Settlement agreement could be approved by court
 - Settlement agreement does not violate Trust Code
- F.S. §736.0111(4) non-exclusive list:
 - Interpretation/construction
 - Approve accountings
 - Trustee's compensation
 - Grant trustee certain powers



Judicial Proceedings – Part II Trust Code

- Absent court order – no judicial review
- Start by filing complaint
- Circuit court original jurisdiction F.S. §736.0112 & F.S. §736.0203
- Testamentary trusts- file in probate F.S. §736.0201 (5)



Representation

F.S. §736.0301

- Fiduciary, parents, attorney-in-fact – as long as no conflict of interest
- Virtual Representation F.S. §736.0304 – minor, unborn, incapacitated – by person with substantially same interest – only if no conflict of interest
- Court appointed F.S. §736.0305
- Holder of power appointment F.S. §736.0302
 - General or non-general power may bind appointees & takers in default



Designated Representative

§736.0306

- Settlor can appoint
- Trustee may not serve as Designated Representative other than as provided in Trust Code mandatory
- Beneficiary may serve but only if designated by settlor by name or if designated representative/beneficiary is spouse, grandparent or descendant of beneficiary being represented



Judicial Modification of Trust

- F.S. §736.04113 modification not inconsistent with settlor's intent/purpose
- F.S. §736.04115 modification in best interests of beneficiaries
- Under either statute trusts can be:
 - Amended- administration or distributions
 - Terminated in whole or part
 - Modified to allow trustee to act
 - Modified to preclude trustee from acting
 - Spendthrift provision does not preclude
 - F.S. § 736.04113 – settlors intent/purpose is the polestar
 - F.S. § 736.04115 – beneficiary's interest is controlling



Judicial Modification of Trust Continued

- F.S. §736.0415 – Reformation to correct mistakes
 - To achieve settlor’s intent – with “clear & convincing evidence of mistake of fact or law
- F.S. §736.0416 – Modification to achieve tax purposes
 - To achieve settlor’s tax objectives – Court may modify trust but not contrary to settlor’s intent



Nonjudicial Modification Irrevocable Trusts §736.0412

- Can use F.S. §736.04113 with unanimous agreement of trustee and all qualified beneficiaries
- Any beneficiary or trustee may seek court review
- Trust must have been created after 2000
- Cannot modify if charitable deduction – unless charitable interests terminated
- Cannot modify if settlor is alive
- This modification option is mandatory if RAP is longer than “lives in being plus 21” or 90 year RAP



Decanting §736.04117

- *Phipps v. Palm Beach Trust Co.*, 196 So 299 (Fla. 1940)
- Originally codified in July 1, 2007
- Substantially re-written effective July 1, 2018 now allows for decanting even if trustee does not have absolute power to invade principal



Phipps v. Palm Beach Trust Co., 196 So 299 (Fla. 1940)

- Trustee absolute power to invade principal for one or more beneficiaries
- Husband of Margarita Phipps had power to appoint entire trust principal to any one or more of Phipps children
- Husband wanted to appoint to trusts for young man/son with enhanced protections
- Bank filed decanting action for construction of trust terms
- Court ruled husband could appoint to trust



Decanting Under Trust Code Prior 2017:

- Trustee absolute power to invade principal
- Absolute power – “best interests”, “welfare”
- Trustee provides 60 day notice
- Exercise power in writing
- If first trust qualified for tax deduction second trust must also
- Second trust could not eliminate or reduce any right to income under first trust
- Trustee power to decant ≠ GPOA



Florida's New Decanting Statute §736.04117

- Allows decanting similar to prior rules
- Adds power to decant even if trustee does not have absolute power to invade trust under limited circumstances
- Definitions – “absolute power” not limited to ascertainable standard – best interests welfare, comfort, happiness
 - “authorized trustee” trustee other than settlor or beneficiary with power to invade principal of trust
 - “beneficiary with disability” may qualify for government benefits
 - “current beneficiary” beneficiary on date qualifications determined, including holder of presently exercisable GPA
 - “supplemental needs trust” would not be considered a resource for determining eligibilities for government benefits



Florida's New Decanting Statute §736.04117

- “Government benefits” any state, federal, public agency
- “Substantially similar” no material change in beneficiary’s interest
 - Distribution benefits beneficiary if, applied for benefit of beneficiary, if beneficiary under legal disability and distribution made for benefit of beneficiary as otherwise under the code, or distribution made under terms of first and second trust instrument



Distribute First Trust to Second Trust When Absolute Power §736.04117(2)

- Unless trust expressly provides otherwise absolute power distribute principal is power to distribute to new trust if:
 - second trust only includes beneficiaries of first trust (note- can exclude some beneficiaries but cannot add)
 - Decant to second trust unless first trust expressly prohibits
 - Second trust does not reduce any vested rights of beneficiary in first trust
 - Extend term of second trust beyond first trust but not change RAP of first trust



No Absolute Power

F.S. §736.04117(3)

- Trust agreement does not expressly prohibit decanting
- Each beneficiary of first trust substantially similar interests in second trust (cannot eliminate a bene)
- If first trust give POA to beneficiary, second trust must also, and permissible appointees must be same
- If first trust does not give POA to beneficiary, second trust cannot either



Distributions to Supplemental Needs Trust F.S. §736.04117(4)

- Authorized trustee with power to invade principal first trust for benefit of beneficiary with disability may instead appoint to second trust if:
 - Second trust benefits beneficiary with disability
 - Second trust benefits only beneficiaries of first trust
 - Authorized trustee determines – further purpose trust
 - Except regarding beneficiary with disability – all beneficiaries first trust in substantially similar position in second



Prohibited Distributions

F.S. §736.04117(5)

- Cannot decant if loss tax benefits
- If S stock held first trust cannot decant to second trust if not permitted
- If settlor not treated as owner first trust cannot be in second trust unless power to switch off ownership in second trust



Miscellaneous

- F.S. §736.04117(6) writing/notice
- F.S. §736.04117(7) not GPOA – trustee
- Cannot change RAP F.S. §689.225
- Notice does not limit beneficiaries right to object
- Spendthrift clause does not prevent decanting
- No trustee duty to decant



§736 Part VII of Code Office of Trustee

- Prior to acceptance, if designation known and no action = deemed declined
- If individual name acts = deemed acceptance
- May resign with or without court approval, 30 day written notice
- F.S. §736.0706 – any beneficiary may remove,
 - Serious breach, unfit, change circumstances



F.S. §736.0802(10) Use of Trust Funds – Legal Fees

- If allegation of breach of trust, trustee prohibiting from using trust funds – legal fees
- Trustee may be provisionally authorized – use trust funds if notice to qualified beneficiaries
- Notice must inform beneficiaries right to object
- If trustee uses funds without first giving notice- court required to order return funds
- If allegation breach withdrawn/dismissed trustee authorized without court order to use trust funds



Limitation Breach Against Trustee

- F.S. §736.1008(1)(a) six months limit on matters adequately disclosed
- Trust disclosure document – trust accounting or other written report of trustee
- F.S. §736.08135 – trust accounting information
- Notice language – substantially: an “action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a six month statute of limitations from receipt of the trust accounting or other written report. If you have questions please consult your attorney. F.S. §736.1008(4)(c)”



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 – REM – Enron Exec
- 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 apply for homestead w/o changing mom’s status)



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



Florida Homestead Protections Havoco

- *Havoco of America, Ltd v. Hill*, 790 So.2d 1018 (Fla. 2001) – homestead protection even where acquired 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 in order to convey out
- 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 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 decedents 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 FCA 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. 4th DCA 2006)
- Leasehold – 98 year – qualifies. *Higgs v. Warrick*, 994 So.2d 492 (Fla. 3rd 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. 5th 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. 3rd 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 trustee – direction re dec'd's “just debts” didn't lose protections



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 – but limited remedy



Homestead – Doctrine Equitable Liens

- Generally homestead is exempt – Third party creditors
- Seminal case – Havoco of America v. Hill, 197 F.3d 1135 (11th 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. 4th 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. 11th 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 4th 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 (11th 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



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)
 - Etc., for complete list see statute



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
- Etc., 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 – not 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 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



Florida Durable Power of Attorney

F.S. §709.2101

- May provide for Florida super powers, F.S. §709.2202
 - Create an intervivos trust
 - Amend, modify, revoke or terminate a trust but only if the trust instrument also explicitly provides for same
 - Make gifts, disclaim
 - Create rights of survivorship
 - Create , change or delete a beneficiary designation



Florida Law for Non-Florida Attorneys

THANK YOU

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