

PROBATE CORNER

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ARTICLE: Homestead Statutes (effective October 1, 2010)

§732.401, F.S.: In recent years, Florida's homestead laws have actually created a burden on surviving spouses and descendants because of increasing taxes, insurance costs, assessments, and property upkeep to the point that some people feel trapped in their homestead property (i.e., surviving spouse holding a life estate and being subject to obligations of current expenses, with decedents vested with remainder). As a result, some surviving spouses have attempted to disclaim their interest in the homestead property to relieve themselves of the burden of expenses. Section 732.401, F.S., is amended to authorize a surviving spouse to elect to take an undivided one-half interest in homestead property as a tenant in common, rather than a life estate. If an election is not made, the statute provides that expenses relating to the ownership of the homestead are to be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with ch. 738, F.S. However, if an election is made, the expenses are to be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares.

§732.4017, F.S.: Section 732.4017, F.S. authorizes an inter vivos conveyance of an interest in homestead property, including a transfer in trust, without it being considered a devise if certain conditions are met. If the conditions are met, an interest in homestead property that is conveyed inter vivos will not be subject to the restrictions on homestead property upon death, even without a waiver of homestead rights by the surviving spouse. By way of example, this statute will allow a surviving spouse to place her homestead interest in trust for her minor child which would extend beyond the minor reaching the age of majority, or to exclude her minor child as a beneficiary without losing her Constitutional Homestead exemptions.

The statutes read as follows:

§ 732.401. Descent of homestead

(1) If not devised as authorized by law and the 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 descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

(a) The right of election may be exercised:

1. By the surviving spouse; or

2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.

(b) The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).

(c) A petition by an attorney in fact or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

(d) Once made, the election is irrevocable.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:

ELECTION OF SURVIVING SPOUSE TO TAKE A ONE-HALF INTEREST OF
DECEDENT'S INTEREST IN HOMESTEAD PROPERTY STATE OF..... COUNTY
OF.....

STATE OF

COUNTY OF

1. The decedent, , died on . On the date of the decedent's death, The decedent was married to , who survived the decedent.

2. At the time of the decedent's death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, that real property being in County, Florida, and described as:
(description of homestead property)

3. Affiant elects to take one-half of decedent's interest in the homestead as a tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse's attorney in fact or guardian of the property and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

(Affiant)

Sworn to (or affirmed) and subscribed before me this day of (month) , (year)
, by (affiant)

(Signature of Notary Public-State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)
Personally Known OR Produced Identification
(Type of Identification Produced)

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

(5) This section does not apply to property that the decedent owned in tenancy by the entireties or joint tenancy with rights of survivorship.

§ 732.4017. Inter vivos transfer of homestead property

(1) If the owner of homestead property transfers an interest in that property, including a transfer in trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred does not descend as provided in s. 732.401 if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.

(2) As used in this section, the term "transfer in trust" refers to a trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor's lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate or exercised to discharge the transferor's legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.

(3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:

(a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by

the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or

(c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.

(4) It is the intent of the Legislature that this section clarify existing law.