

## PROBATE CORNER

By: David M. Garten, Esq.

### ARTICLE: CAN A PERSONAL REPRESENTATIVE TAKE POSSESSION OF PROTECTED HOMESTEAD PROPERTY?

Effective January 1, 2002, if homestead property is not occupied by a person who appears to have an interest in the property, the personal representative is authorized, but not required, to take possession of that property for the limited purpose of preserving, insuring, and protecting it for the person having an interest in the property, *pending* a determination of its homestead status. Refer to §733.608, Fla. Stat. and Florida Probate Rules 5.402 through 5.404.

If the personal representative expends funds or incurs obligations to preserve, maintain, insure, or protect the homestead, he is entitled to a lien on the homestead and its revenues to secure repayment of this debt.

In Herrilka v. Yates, 13 So. 3d 122 (Fla. 4<sup>th</sup> DCA 2009), the court found that it was improper for the curator to place a lien on the homestead because: (1) the homestead was occupied by a joint owner, and (2) the curator's attorney's fees were not incurred for the specific purpose of preserving, maintaining, insuring, or protecting the homestead.

A notice of lien must be recorded in the public records, filed in the probate proceeding, and served on interested persons by formal notice. Additionally, the personal representative must file and serve a petition to determine the amount of the lien by formal notice and obtain a court order adjudicating the amount of the debt.

The personal representative may enforce the debt by: (1) foreclosing on the lien in the manner of foreclosing a mortgage under Chapter 702, or (2) offsetting some portion of the debt against probate property that would be distributable to a person having an interest in the homestead, or (3) offsetting the debt against revenues from the homestead. The personal representative does not have the authority to sell the homestead. *See Harrell v. Snyder*, 913 So.2d 749 (Fla. 5th DCA 2005).

The lien shall terminate upon the earliest of: (a) recording a satisfaction or release signed by the personal representative in the official records of the county where the property is located; (b) the discharge of the personal representative when the estate administration is complete; (c) one year from the recording of the lien in the official records unless a proceeding to determine the debt or enforce the lien has been filed; or (d) the entry of an order releasing the lien.