FLORIDA HOMESTEAD DESCENDENT DISTRIBUTION

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The term homestead means different things depending on your situation. If you are a winter visitor owning real estate in Florida, it means being treated differently when it comes to property taxes. If you are a Florida resident, it means that your property tax increases are limited from year to year and your home cannot be forcibly sold to pay a judgment against you except for a mortgage foreclosure, taxes and improvements made to your property. If you are a descendant of a Florida person who has died, it means that the value of the proceeds from the sale of their residence cannot be used to pay creditor bills. It also means under normal conditions that your property will pass to your descendants outside the administration of an estate proceeding.

Because of the complexity of Florida's homestead law, this article will be limited to how homestead is treated regarding descent and distribution at the death of a Florida resident (excluding cooperatives or 99 year lease property).

The first thing that you need to know is how homestead is defined in Florida. Florida's Constitution and statutes state in part that Florida real property consisting of 160 contiguous acres outside of a municipality and a ½ contiguous acre inside a municipality owned by a natural person who resides thereon is considered homestead. Section 4 also states that the homestead property shall not be subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child.

When a person dies, their homestead property immediately passes to the lineal descendants or heirs of that person. Lineal descendants and heirs may consist of a surviving spouse, the decedent's children related by blood, legal adoption and heirs of the decedent. If the decedent has a Will or Trust, the property will pass according to the directives contained in the testamentary document, provided there is no surviving minor child or spouse.

Intestate Estates:

An intestate estate is one where a decedent did not prepare a Last Will and Testament or Trust document prior to their death. These situations can potentially present some terrible outcomes to a surviving spouse.

Suppose one of the spouses (we'll call him or her "Spouse 1") purchased Florida residential property, followed by marriage which is followed by the birth of a child. Let us also assume that Spouse 1 forgot to place the other spouses name on the deed to their residence nor did Spouse 1 prepare a Last Will and Testament or Trust. In this situation, the property will pass via Florida's intestate statutes to the surviving spouse as a life estate with a vested remainder to the lineal descendant's of Spouse 1. This means that upon the death of the surviving spouse, the ownership of the property will be transferred to the children of Spouse 1.

Suppose Spouse 1 was previously married with children or had children out of wed-lock prior to marrying the present spouse. Given those facts, the residential property will pass by law as a life estate to the surviving spouse with a vested remainder to all of the children who are connected lineally by blood to Spouse 1 (including legally adopted children).

What happens if the surviving spouse has a child from a previous marriage? The law ignores the surviving spouse's children from a previous marriage and vests the property in the lineal descendants of Spouse 1. It will not matter how long Spouse 1 and the surviving spouse were married; nor will it matter if Spouse 1 cared for the children of the surviving spouse from a previous marriage. The fact remains that the property will vest in Spouse 1's lineal descendants with the surviving spouse taking a life estate.

Testate (Last Will and Testament or Trust)

If Spouse 1 has a Will, and directs his entire property to pass to his surviving spouse, then in that event, the property will pass according to the directions of the testamentary document; provided, there is no living lineal minor child at the time of Spouse 1's death. If there is a living minor child, the law prevents the property from passing directly to the surviving spouse. This situation can occur when Spouse 1 purchases a home and titles it in his sole name, followed by marriage with a child born shortly out of the union of his spouse.

Although this situation does not occur that often, when it does, the situation becomes complex because the property will not pass to the surviving spouse regardless of the directives of the testamentary document because of the surviving minor child. In such cases, the property vests to the lineal descendant child subject to a life estate in the surviving spouse. To avoid this problem, Spouse 1 should have re-titled the property in the married couples name as husband and wife during Spouse 1's lifetime. This would have created a tenants by the entirety interest and would have avoided problems associated with a life estate inuring to the surviving spouse.

Change in Homestead Descent:

You should also be aware that at the death of Spouse 1 and there is no existing testamentary document, Spouse 2 has an option that is open for 6 months following Spouse 1's death. That option gives Spouse 2 the right to record an intention to take the Homestead property as a 50% tenant in common owner with the descendants of Spouse 1 or with Spouse 1's heirs if no lineal descendant survived him or her. If that option is not elected (6 months runs and nothing is recorded), the property transfers automatically as a life estate to the Spouse 2 with a vested remainder to Spouse 1's descendants. Electing to take the tenant in common path is not without its consequences. If the surviving spouse is a tenant in common with the deceased spouse's children, the children will have the ability to file a partition action with the court which could ultimately divest the surviving spouse of the homestead.

Conclusion:

The above examples are not exhaustive of what can happen to a couple's homestead following the death of one of them. However, as you can see, failing to have your property titled correctly can have significant consequences at the death of the property owner. This is especially true now that same sex marriages are becoming a reality in Florida and in other States. If you are uncertain as to the status of your residence, you should consult with an attorney and find out if there will be problems upon the death of the sole homestead owner (regardless of whether you have a Will or Trust).