

HOMESTEAD – WILLS AND TRUSTS WITH PAY DEBTS ON DEATH CLAUSES

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When preparing a Will or Trust conveying your homestead to your children or other surviving descendants, be careful not to demand the property be sold to pay debts. Why you ask; consider the following facts, Mom has a Will prepared that states that all her property is to be sold to pay her debts upon her death. What is important to realize from the language contained in Mom's Will is her properties are to be used to satisfy debts in the event her estate has insufficient assets to cover her debts. Mom also has real property titled in the name of her trust which also provided that her property be used for satisfaction of her debts. Following Mom's death, the personal representative applies to the court for homestead status which the court grants but not the exemption from creditors.

As you are about to learn, the outcome of such facts will be disastrous. The Constitutional and statutory protections against creditors will be ignored because the language contained in the Will and Trust stating that her property was to be sold to satisfy her debts cannot protect Mom's homestead exemption. In essence, Mom just waived her homestead protections against creditors.

The devastating part of this scenario is that the testamentary documents did not specifically state that her homestead property be sold, but that her real property be used to satisfy her debts. Generally speaking, if a testamentary document specifically states that homestead property be sold, it will lose its exemption against satisfying creditor claims. A ruling from the Third District Court of Appeals changed that rule to mean that language used in a Will or Trust that suggests a persons homestead property be made available to satisfy creditor claims is ripe for loss of the exemption from being used to satisfy creditor claims. In essence, the loss of a decedent's homestead protection against claims from creditor's is no longer limited to instructions in a Will or Trust that it be sold.

As a reminder, Florida's homestead laws exempt a person's permanent residence from being forcibly sold to satisfy a debt. The general exceptions to this rule are mortgages, claim of liens and the failure to pay taxes both property and income. In most estates, the most frequent creditors who file claims against an estate are credit card companies and health care facilities. These organizations cannot force a decedent's homestead property to be sold to satisfy their claims unless the property loses its exempt status. The ruling from the Third District Court of Appeals may have changed the thinking on the construction of language used to pay debts in a person's testamentary documents. You'll be pleased to know that more contemporaneous court rulings are stating that the use of all real property to pay debts language must include or specifically state a decedent's homestead is to be included.

So what does this mean to you? Most testamentary documents will have a pay debts clause. The idea behind these clauses is to ensure that the personal representative pays the decedent's debts before distribution of their estate. These paragraphs need to be reviewed to

determine if the language used has any reference to using real property to satisfy those debts. The real question will be to what degree such paragraph describes the property to be used to satisfy creditor claims. For example, if the paragraph says “all my property” this may be enough to cause loss of the homestead exemption even with recent rulings to the contrary. A simple fix might be to insert language that excludes the homestead property from creditor claims or removal of the debts clause altogether.

If you are not certain as to whether the language contained in your testamentary document runs the risk of losing your homestead exemption from creditors, you should contact the attorney of your choice and ask for a review of your pay debts on death clause. It might be the best gift you could give your descendants.

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