HOMESTEAD - WILL I LOSE MY HOME AND WHO WILL GET IT

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I often get asked if my spouse dies and he or she has many medical or nursing home bills that can't be paid because of our financial situation, will I lose the home. The answer is NO with some caveats. If you are a Florida resident your home cannot be forcibly sold to pay a judgment against you or your deceased spouse. The exceptions unpaid taxes, mortgage or improvements made to your property without paying the contractor. If you are the lineal descendant of a Florida person who has died, it means that the value of the proceeds from the sale of the homestead residence cannot be used to pay creditor bills. Although the property will be protected from forced sale, it is the passing of the property to the surviving spouse, descendants or heirs that has some unique outcomes.

Article X, Section 4, of Florida's Constitution states in part that exemptions shall inure to the surviving spouse and heirs of a persons estate. 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, and relatives 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. To understand how all of this works, let's examine a few situations of what happens to a decedents homestead property at their death.

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 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 homestead deed nor did Spouse 1 prepare a Last Will and Testament or Trust. In this situation, the property will pass by the probate intestate statutes to the surviving spouse as a life estate with a vested remainder to the lineal descendant's of Spouse 1 (in this case that would be the surviving child). 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 linearly by blood to Spouse 1.

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 with a life estate in surviving spouse. 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)

Using the following facts, Spouse 1 purchases a house (which serves as his permanent residence), and then marries. Spouse 1 does not re-title the homestead property in the names of both Spouse 1 and Spouse 2. The property serves as the permanent residence of both Spouse 1 and Spouse 2. Spouse 1 now dies.

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 the Spouse 1's death.

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.

Suppose the minor child is not the lineal descendant of Spouse 1, but is the descendant of the surviving spouse from a previous marriage and Spouse 1 did not legally adopt the child nor does he have lineal children of his own. In this situation, the combination of Florida's Constitution and Probate Statutes would allow the property to pass by Spouse 1's Will to the surviving spouse since the minor child is not the lineal descendant of Spouse 1 nor are their any surviving lineal children of Spouse 1.

Suppose Spouse 1 devises his homestead by a testamentary document to his mother and not to his surviving spouse and Spouse 1 has lineal descendants. In this situation, the devise will fail and the surviving spouse will take a life estate in the property, with the lineal descendant's of Spouse 1 taking a vested remainder interest in homestead property. If there are no lineal descendants of Spouse 1 or heirs, the property will vest entirely to the surviving spouse and not to the mother.

Suppose Spouse 1 devises his homestead in their Will to his or her children from a former marriage, with nothing to Spouse 2. In this situation, the devise will fail and Spouse 2 will take the property as a life estate with a remainder to Spouse 1's children or heirs if none survive Spouse 2's death.

You should also know that if any of the above situations occur, Spouse 2 has an option that is open for 6 months following Spouse 1's death. That option gives Spouse 2 the right 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 none survived him or her. If that option is

not elected (6 months runs and nothing is recorded), the property transfers as a life estate to the Spouse 2 as a life estate.

Although you do not have to worry about losing the homestead property to creditors (excluding taxes, mortgagee or improvements to property) you must take time to consider to whom you want the property to pass to following death. As you can see, failing to have your property titled correctly (when it is homestead) can have significant consequences at the death of the owner. 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 your death.

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