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The New Homestead Trap: Surviving Spouses Are Trapped by Life Estates They No Longer Want or Can Afford

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Florida's homestead laws have created a new trap for surviving spouses — the life estate that was designed to protect them has instead trapped them in homes they no longer want and can no longer afford.

This situation has become acute as a result of the convergence of several developments over the past five years. There has been a tremendous increase in property taxes statewide. While many homesteads have benefited from the "save our homes" cap on ad valorem property taxes, for those that were purchased in the last few years, the base for property taxes may already be inflated.¹ Homeowners' insurance costs for everyone have increased as much as several hundred percent. For many surviving spouses, there have been special assessments for condo and homeowners' associations for hurricane damage. For those in single family homes, many have had to pay for significant repairs not covered by insurance. Floridians benefiting from the "save our homes" cap on their property taxes have a generalized fear of moving, because to do so could result in significantly increased taxes as a result of purchasing a new home (even a less expensive one). Finally, as a result of increased property values, many surviving spouses who want to move fear they cannot find a reasonable alternative place to live.

Combined, these factors have created a difficult situation for many Florida residents. But, when coupled with an inability to alter or sell their life interests, many surviving spouses are trapped in their homesteads. If they no longer desire to live in their homes or they can no longer afford to do so, what can they do and where can they go?

Florida case law affords no relief for life tenants who want to move. There is neither a suitable remedy nor any means to sever the tenancies. To make matters worse, the Florida Statutes have become even more onerous for life tenants, not only causing them to bear 100 percent of the property taxes and insurance costs, but also virtually 100 percent of all assessments for repairs and improvements as well.

Thus, as property values have soared — to the benefit of the remainder beneficiaries — the costs of maintaining the properties have

also soared — to the detriment of the life tenants — with no relief in sight for the life tenants. This situation has created significant inequities in the life tenant and remaindermen relationships.

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Costs Borne by Life Tenants

F.S. §738.801 provides in part that “the provisions of F.S. §738.701-738.705 ... shall govern the apportionment of expenses between tenants and remaindermen when no trust has been created....” In the absence of some agreement, those provisions apply to all life estate/remainder situations created by the Florida homestead laws (created by the constitutional restrictions on devise in art. X, §4 of the state’s constitution and F.S. §732.401).

Taken together, these statutes require the life tenant to pay:

- All of the ordinary expenses incurred in connection with the administration, management, or preservation of property, including ordinary repairs (including condo or homeowners’ association maintenance charges) and regularly recurring taxes (ad valorem property taxes).²
- The interest portion of mortgage payments, if any, on the property.³
- Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.⁴
- The costs of, or special taxes or assessments for, an improvement representing an addition of value to property shall be paid by the tenant when the improvement is not reasonably expected to outlast the estate of the tenant. In all other cases, a part only shall be paid by the tenant, ascertainable based on the present value of the tenant’s estate (actuarially).⁵

Thus, surviving spouses — who are ostensibly “protected” by the Florida Constitution and statutes (given the “right” to live “rent-free in a homestead”) — are required to bear 100 percent of the burden of the state’s two largest fiscal crises: the escalation in property taxes and homeowners’ insurance. In addition, costs of ordinary upkeep, interest payments on mortgages and, in many cases, virtually all of the special assessments are also the burden of the surviving spouse. Further exacerbating the situation, many widows live in communities which have charged (and are still charging) assessments to repair common areas damaged by the hurricanes the state faced these past few years — with the promise of active hurricane seasons for the foreseeable future.

While the surviving spouses have borne all of these huge increases in their costs of living, the remainder beneficiaries have seen property values double in most of the state (and increase three to five times in some areas) over the past five to 10 years. One hundred percent of

that appreciation inures to the benefit of the remainder beneficiaries, while they are not forced to pay for any of these increased expenses.

Contrast the "rent free" use of the property by the widow with the "free ride" the remainder beneficiaries have had on property values, and ask who is being helped and who is being harmed by our homestead "protections"? The costs of property taxes and homeowners' insurance have skyrocketed at the same time property values have appreciated at a meteoric pace. This situation has exposed in stark relief the discrepancy in treatment and benefits of surviving spouse life tenants and remainder beneficiaries.

Impact on Families

In families where the surviving spouse is also the parent of the remainder beneficiaries, and where there is family harmony, this situation may not be intolerable. Indeed, where the homestead was not elected to be treated as QTIP (qualified terminable interest property) in the estate of the first spouse to die, there may be an estate planning benefit to the surviving spouse paying the high property maintenance and tax costs while the property appreciates for the benefit of the children. If the homestead will not be part of the surviving spouse's taxable estate, then the payments deplete the surviving spouse's personal and taxable assets while the property value increases inure to the children tax free. This is a positive estate planning opportunity for the family.

Further, if the costs of the life tenant are becoming too burdensome, and if there are not additional estate planning benefits to depleting the surviving spouse's assets, then cooperative families may make adjustments for one another. The children might gift their parent some funds to pay these expenses to ameliorate the impact of the increasing costs.

However, as so often happens many homesteads are owned in mixed families (e.g., a stepparent widow and stepchildren remainder beneficiaries). As also frequently happens, these familial situations are fraught with animosity. The children may resent the surviving spouse for a host of actual or perceived wrongs. Where the parties do not get along, the inequities that the surviving spouse may feel that he or she suffers as a result of the homestead trap could easily reach a boiling point.

Are There Any Remedies? Right to Rent but Not to Partition

For reasons described above, and also for other personal reasons, such as desire to move closer to family or a need to move into assisted living, many surviving spouses no longer wish to live in the homes they inherited or they can no longer afford to maintain. Unfortunately, they may not be able to afford to leave unless the homestead is sold and the surviving spouse's share of the proceeds either produces sufficient

income or provides enough assets (if the proceeds of the sale are split) to the surviving spouse.

Presently, the sole relief that seems available to the surviving spouse in that situation is the right to rent the property and keep the rent payments. But if the surviving spouse tries to rent the homestead, it is quite possible that the rent will barely cover, or be less than, all the costs the survivor is required to pay (the costs of a rental agent coupled with the taxes, maintenance costs, insurance, mortgage, and special assessments). If the rent payments do not cover the surviving spouse's statutory payment responsibility, the surviving spouse will have to dip into his or her own resources to make up the shortfall. Moreover, if the property is rented, then the life tenant will lose the "save our homes" tax benefits, further inflating the burden of continued ownership.

It seems logical and practical that the surviving spouse and the remainder beneficiaries could agree to sell the property and either split the proceeds (based on actuarial tables) or hold the proceeds in a trust that pays all the income to the survivor. But why should the remainder beneficiaries agree? If they do not like the surviving spouse, they might take perverse pleasure in seeing the survivor financially squeezed. Even if they do like the survivor, the remaindermen are enjoying a "free ride" — often substantial property taxes and insurance costs are being paid by someone else, while their property values are increasing. There is little incentive to give that up.

Further, if they do agree to sell the property, what happens? There does not appear to be a clear answer on how to proceed if the property is sold. It appears the life tenant and remainder beneficiaries could agree to one of two outcomes: 1) split the proceeds from the sale based on actuarial values of life and remainder interests or 2) hold the proceeds in a trust that pays all the income to the surviving spouse.

What happens if the surviving spouse and the remainder beneficiaries cannot agree on a sale of the homestead? Can the life tenant force a sale? Unfortunately for the surviving spouse, the law does not currently permit life tenants to force a partition of the property. Unlike tenants in common or joint tenants who have a legal right to a partition, there is no similar remedy for a life tenant.

Partition is described in F.S. §64.031 and is only permitted for tenants in common, joint tenants, and coparceners. Two leading Florida cases on the subject both held that a partition action is not available to a life tenant against the remaindermen.⁶

Indeed, for a surviving spouse wishing to escape this homestead trap, the law appears to offer no remedies or solutions. If the surviving spouse no longer wants to stay in the homestead or can no longer

afford it, but the remainder beneficiaries refuse to agree to a sale and split of the proceeds (or an income trust), then the surviving spouse is trapped in the homestead.

Abandonment of the Life Estate — Waste?

What if the surviving spouse simply abandons the homestead? In that case, it appears the remainder beneficiaries can sue the life tenant to contribute, and for waste of the property.

In *Chapman v. Chapman*, 526 So. 2d 131 (Fla. 3d DCA 1988), the court held that the duty owed by a life tenant to the remaindermen was "comparable to that of a trustee ... because the life tenant cannot injure the property to the detriment of the rights of the remaindermen Ordinary life tenants may not permanently diminish or alter the value of the remaindermen's future estate, a limitation which places on ordinary life tenants the responsibility for all waste of whatever character." Therefore, if a life tenant fails to pay the expenses required to be borne by him/her by statute, then the remaindermen may properly bring an action for waste.

Interestingly, in *Chapman*, the remaindermen asked the court to accelerate their remainder as the remedy for the life tenant's failure to pay property tax. The court declined to extend the doctrine of acceleration to the situation of a life estate created by operation of the homestead laws. However, the court did allow the appointment of a receiver to rent the property and collect the rents and pay the taxes and account to the life tenant and remaindermen. Thus, while not accelerating the remainder, the court appeared to allow a forfeiture of the right to use the property.

Florida Needs Some Reform to Protect Surviving Spouses

The situation for many surviving spouses with life estates is becoming untenable. The public policy in favor of providing homestead protection to surviving spouses is turning into a noose around their necks. Before matters get worse, we should consider finding a solution to this situation. If a surviving spouse with a life estate no longer wants to live in the property (or can no longer afford to), there should be a legal remedy.

One option would be a modification of the principal and income act under F.S. §738. A change to benefit life tenants could be accomplished in several ways; however, none of them seem particularly fair. For example, should the remainder beneficiaries (who cannot even enter on the property) be forced to pay some of the tax and insurance costs just because they have sky rocketed? While such would help life tenants, it does not seem fair. Further, would forcing the remainder beneficiaries to pay more of the repair costs make sense? That may be logical, as unexpected, major repairs (like from hurricane damage) seem more "permanent" than small repairs;

however, the statutes already contemplate this. F.S. §§738.702(h) and 738.801 discuss this issue and basically recognize that remaindermen should pay for expenses that are improvements to the property that are likely to survive the life of the income beneficiary. For example, if a condo association has a special assessment to improve the building, but the improvement is likely to last 25 years, and the income beneficiary has a 40-year life expectancy, the statutes indicate that the remaindermen shouldn't be responsible for that cost. And that seems like a reasoned and logical position. Thus, changing the principal and income act does not seem to offer the type of relief life tenants really need.

Instead, the Bar ought to consider a new law providing a right to trigger a sale or a buy-out. For example, we could craft a new statute that affords the surviving spouse a special homestead election/option. This new law could offer a right of election for any surviving spouse with a homestead life estate to trigger an optional buy-out. By a written designation sent to the remainder beneficiaries, the life tenant could be afforded an option to require that the homestead either be sold to a third party or the remainder beneficiaries must buy out the life tenant at an appraised value. The statute would have to permit for court oversight where the parties cannot agree. Further, it would have to provide an appraisal process by which the parties can reach an agreed value if they choose not to sell to a third party. Finally, it should have some right of refusal for the remainder beneficiaries if there is in fact an offer the life tenant wants to accept and they are not satisfied with the price. That way they either must buy it themselves or they must let the property be sold to the third party.

Finally, the statute should describe what happens with the proceeds from the sale. Perhaps it should direct that the proceeds will be held in trust with the life tenant and one of the remaindermen serving as co-trustees. The income would be paid to the life tenant for life and upon death, the principal would pass to the remaindermen. Alternatively, a total return unitrust could be established as described in F.S. §738.1041. Indeed, a unitrust seems like a better alternative to an "income only" trust as it encourages cooperation between the income beneficiary and remainder beneficiary in investing for total return instead of strict income and principal accounting. Indeed, adopting a unitrust approach might avoid a great deal of fighting over the investment mix of the portfolio.

Something needs to be done. Trapping surviving spouses in homesteads they don't want or can't afford is a poor public policy. □

1 **Fla. Const.** art. VII, §4(c) provides the terms of Florida's so called "save our homes" cap. Those provisions read as follows:
"(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of

January 1st of the year following the effective date of this amendment. This assessment shall change only as provided herein.

"(1) Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

"a. Three percent (3%) of the assessment for the prior year.

"b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

"(2) No assessment shall exceed just value.

"(3) After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

"(4) New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

"(5) Changes, additions, reductions, or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided herein.

"(6) In the event of a termination of homestead status, the property shall be assessed as provided by general law.

"(7) The provisions of this amendment are severable. If any of the provisions of this amendment shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any remaining provisions of this amendment."

2 Fla. Stat. §738.701(3).

3 *Id.*

4 Fla. Stat. §738.701(4).

5 Fla. Stat. §738.801(2).

6 *Garcia-Tunon v. Garcia-Tunon*, 472 So. 2d 1378 (Fla. 2d D.C.A. 1985); *Barden v. Pappas*, 532 So. 2d 707 (Fla. 5th D.C.A. 1988).

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