POINT-COUNTER-POINT

PROCEED WITH CAUTION: Waiver of Spousal Homestead Devise Restriction by Deed

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As of July 1, 2018, new Fla. Stat. § 732.7025 became effective, adopting a statutory rule for waiver of homestead rights by deed. As a result of the new statute, it has become very easy for a spouse to waive her or his rights as a surviving spouse with respect to the devise restrictions under Article X, Section 4(c) of the Florida Constitution.

Now, a spouse only needs to sign a deed that includes specific language – which language is enumerated in the statute – in order to waive the spousal homestead devise restrictions. If the statutory language is included in a deed and the waiving spouse joins in the deed, then the spouse who waived the homestead protections will be treated as predeceased for purposes of determining and applying the homestead devise restrictions – but only the devise restrictions (not the alienation restriction or creditor protections). As a result of the waiving spouse being treated as predeceased, the homestead-owner spouse may freely devise the homestead property after death without limitation as to a spouse (although still subject to the limitations as to any minor children).

While a spouse's ability to waive homestead rights is not new, the new Fla. Stat. § 732.7025 (2018) seemingly makes it much easier to waive the homestead devise restrictions. However, the waiver-by-deed statute does little to ensure that the homestead waiver is made knowingly, intelligently, and voluntarily - except for the fact that the waiver must appear in a deed.[1] Therefore, the authors caution against reflexive use of the waiver-by-deed statute and caution against its over-use as well. There are sound public policies surrounding the unique Florida homestead devise restrictions (dating back to the 1860s) which should give planners pause before recommending it or reflexively using it.

Background on Homestead Devise Restrictions and Waivers

The spousal devise restriction under Article X §4(c) of the Florida Constitution provides that an owner of homestead property cannot devise the homestead property if survived by a spouse or minor child, except the owner can devise the homestead to the owner's surviving spouse if there is no minor child. Unless there are no minor children and the other spouse waives homestead rights, all other devises are invalid.

Prior to Fla. Stat. § 732.7025 (2018), the homestead spousal devise restriction could be waived as provided in Fla. Stat. § 732.702 (2018), which requires such waiver to be in a written contract and each spouse to make a fair disclosure of assets if the waiver occurs after marriage.

In addition, recent case law has developed allowing a deed from a spouse to constitute a waiver of the homestead spousal devise restriction, even though there was no express wavier language in the deed at all.[2] The *Stone v. Stone* case, however, was founded on a unique fact pattern where a husband and wife were engaged in complex and sophisticated estate planning (severing a tenancy by the entireties into two tenant in common interests which were then deeded – including spousal joinders – to two separate Qualified Personal Residence Trusts). The planning they were engaged in may have included consideration of waiving the devise restrictions. It is not clear under present case law if such in-depth consideration or complex planning is a requisite to the validity of a waiver via a deed or not.

Another case – albeit one without precedential value, because it was withdrawn – is the *Habeeb v. Linder* case in Miami.[3] The court in Habeeb similarly found a waiver occurred by joinder in a deed which expressly included the words "hereditaments" in the transfer. In fact, the same term (hereditaments) was present in the deed in question in the *Stone* case. Again, it is not clear under present case law if that exact word or concept is a requisite to the validity of a waiver via a deed or not.

In light of recent case law, Fla. Stat. § 732.7025 (2018) was enacted not to resolve all possible disputes and not to overturn the prior case law, but instead to create a safe harbor so that a waiver-by-deed is conclusive where the statutory magic language is expressly included. A deed waives the homestead spousal devise restriction if the deed contains the following or similar waiver language:

> By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.

Recall that a waiver-by-deed does not waive homestead restrictions against the owner's alienation of the homestead during the owner's lifetime without joinder of the owner's spouse, or homestead protection against claims of the owner's

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creditors. Moreover, it cannot waive the devise restrictions where there are minor children. The magic statutory language only impacts the spousal devise restrictions.

Conclusion: Proceed with Caution

The authors are concerned, however, that some Florida attorneys (it could be estate planners, real estate attorneys or others, as well) will see this new statute as the answer to many dreams and include it in virtually all the deeds they create. However, waiving the devise restrictions could have seriously adverse consequences, which may have been unknown and unintended by the spouse waiving via deed.

For example, if the magic language is included in a planner's deeds to fund revocable trusts, imagine this scenario. Clients are creating revocable trusts as part of their plan and they have mirror-image plans leaving the entire estate outright to the surviving spouse after the first death and then equally to their adult children on the second death. Imagine the spouses agree to fund the homestead into the Husband's revocable trust and the planner (or a real estate lawyer engaged for this purpose) includes the magic language in the deed. Suppose some time later the Husband changes his estate plan (maybe without the attorney or maybe even using online forms) to disinherit the surviving spouse, and then he dies. Yes, the homestead will count in the elective share, but the Wife will have to move out of her home; whereas, the law (for over 150 years in Florida) would otherwise have protected that Wife and allowed her to live in that home for life.

Take this one step further. What if the Wife sues the planner for preparing the deed with the homestead waiver in it claiming she didn't understand it and never would have signed it if she knew she might be thrown out of her home on her husband's death. That does not sound like a lawsuit one would like to defend.

The problem is that reflexive use of the waiver by deed statute will likely cause many unknowing waivers and certainly waivers that are not fully understood. Because the waiver by deed can be done without any understanding and without any safeguards (no separate counsel, not in the context of a complicated tax-driven estate plan, not in a post-marital agreement, etc), mistakes are bound to happen unless the waiver is used sparingly and only when it is desired and clearly understood. Moreover, for the planner's protection there should be some written record of this knowing and understood waiver and perhaps a written acknowledgement that it was done with both clients' clear understanding. Query: Should that document require separate representation?

The bottom line is Florida spouses have been presented with a new, potentially powerful and potentially dangerous weapon, and planners must exercise caution implementing these waivers – for the sake of the clients and for their own sake. Without separate counsel (or an attorney at all), and without fair disclosure of each spouse's assets (arguably),[4] a spouse can now waive the spousal homestead devise restriction, by unwittingly signing a deed with the statute's express wavier language in the deed.[5]

While some planners may view the new law as clarifying existing case law; other planners are concerned overuse of the waiver by deed may open the door for abuse, unintended consequences and litigation. The Florida Constitution has protected surviving spouses via the homestead devise restriction since the 1860s, and there is a strong public policy behind the protection. Everyone should proceed with caution regarding spousal homestead devise restriction waivers-by-deed. Such waivers should only be made reluctantly and with great thought for the ramifications. Moreover, in some situations, maybe waivers by deed should only be used in connection with a post-marital agreement that locks the estate plan in place so as to protect the waiving spouse from being disinherited by the non-waiving spouse.

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Endnotes

1 See *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007) (individuals may waive their constitutional rights *if* the waiver is made knowingly, intelligently and voluntarily).

2 See *Stone v. Stone*, 157 So.3d 295 (4th DCA 2014).

3 *Habeeb v. Linder*, 36 Fla.L.Weekly D300c (Fla. 3d DCA 2011).

4 It is unclear what constitutes "fair disclosure" under Fla. Stat. §732.702. Some practitioners believe that in the context of waiving homestead rights, the rights to and value of the homestead property is sufficient. The *Stone* case (see endnote 3) might be used to support that position, although it did not address fair disclosure requirements under Fla. Stat. § 732.702.

5 It remains possible for a spouse to waive spousal homestead inheritance rights without the express waiver language of Fla. Stat § 732.7025 (2018), and with only the general "hereditaments" language (or maybe even without such). It appears future litigation will be required for a resolution to those issues.