by Jeffrey S. Goethe and Jeffrey A. Baskies

Homestead Planning Under Florida's New "Safe Harbor" Statute

F.S. §732.702 provides a statutory procedure for waiving spousal rights, including homestead rights, under written contracts, agreements, or waivers. New F.S. §732.7025 provides a simplified method for a spouse to waive his or her homestead rights in a deed. It is intended to provide a "safe harbor" for the waiver of spousal homestead rights through a deed (with specially drafted language included in the deed). The new statute relates solely to the waiver of a spouse's inheritance rights as to homestead property and does not result in the waiver of homestead asset protection rights, restrictions on lifetime alienation or other spousal inheritance rights, such as elective share. The legislation is the product of study and analysis of the Homestead Issues Study Committee of the Real Property, Probate and Trust Law Section of The Florida Bar.

The safe harbor language in §732.7025(1) is simple and straightforward: "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."

The new statute also confirms that a waiver of one homestead right is not a waiver of other protections:

(2) The waiver language in subsection (1) may not be considered a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death. Such language may not be considered a waiver of the restrictions against alienation by mortgage, sale, gift or deed without the joinder of the owner's spouse.

The new legislation became effective July 1, 2018.[1] The history of homestead waivers and the ramifications of a waiver of constitutional rights are not simple. This article attempts to preserve the high level of caution and respect that should be present in any transaction involving constitutional homestead rights.

Homestead Rights for Surviving Spouses

Fla. Const. §4(c), art. X, is the source of the protection for surviving spouses:

The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Statutory Implementation of Devise Restrictions

While the Florida Constitution states when a homestead cannot be devised, F.S. §732.401 determines the descent of devise-restricted homestead when it is not devised in a manner authorized by the Florida Constitution or when it is not subject to devise. Devise-restricted homestead that is not validly devised or is not devisable descends as other intestate property, unless the decedent is survived by a spouse and one or more descendants, in which case the surviving spouse receives a life estate with a vested remainder in the then living descendants, per stirpes. However, a surviving spouse has six months from the date of the other spouse's death to elect a 50 percent tenant-in-common share instead of the default life estate.[2]

Definition of "Devise"

F.S. §731.201(10) defines a "devise" as follows:

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will or trust. The term includes "gift," "give," "bequeath," "bequest," and "legacy." A devise is subject to charges for debts, expenses, and taxes as provided in this code, the will, or the trust.

F.S. §732.4015 provides further clarification for the devise of homestead property by extending the definition of "owner" to the settlor or grantor of a revocable trust and the definition of "devise" to include a "disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead." Thus, for homestead in a decedent's name or for homestead in a revocable trust, the devise restrictions apply.

Public Policy and Constitutional Homestead Rights

Although real estate attorneys, probate and trust practitioners, and estate planners are often frustrated by the complications resulting from the homestead devise restrictions, they are nonetheless an important constitutional right for Floridians and their families. It is a protection for not only the home, but a protection against financial misfortune for the homeowner and the homeowner's family.[3]

In *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007), the Florida Supreme Court distinguished the constitutional homestead protection from other constitutional protections in the context of waiving one's constitutional rights.

It is true that we recently noted that "most personal constitutional rights may be waived." *In re Rule 4-1.5(f)(4)(B)*, 939 So. 2d at 1038; *see also In re Shamburo's Estate*, 153 Fla. 762,

15 So. 2d 837, 837 (1943) ("It is fundamental that constitutional rights which are personal may be waived."). However, an individual cannot waive a right designed to protect both the individual and the public. *See, e.g., Coastal Caisson Drill Co. v. Am. Cas. Co. of Reading, Pa.*, 523 So. 2d 791, 793 (Fla. 2d DCA 1988), *approved*, 542 So. 2d 957 (Fla. 1989); *Asbury Arms Dev. Corp. v. Fla. Dep't of Bus. Regulations*, 456 So. 2d 1291, 1293 (Fla. 2d DCA 1984). We have repeatedly recognized that the homestead exemption protects not only the debtor, but also the debtor's family and the [s]tate. *See Havoco*, 790 So. 2d at 1020; *Snyder*, 699 So. 2d at 1002; *Caggiano*, 605 So. 2d at 60; *Lopez*, 531 So. 2d at 948; *Slatcoff*, 76 So. 2d at 794; *Hill*, 84 So. at 192. Therefore, the right to the homestead exemption is not purely personal as some others are.

In 1988, the Florida Supreme Court explained the policy as it applies to the protection from forced sale, which is also included in art. X, §4.

For the reasons advanced by the personal representatives, we reject the creditors' position. For over a century, Florida has by constitutional provision made the homeplace exempt from the claims of creditors. As a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.[4]

Statutory Provisions for Waiver of Homestead Rights

F.S. §732.702 provides a statutory procedure for waiving spousal rights, including homestead rights, under written contracts, agreements, or waivers. Generally, a waiver of "all rights" is sufficient to waive all spousal rights in an agreement under the statute. Section 732.702 provides that if the agreement, contract, or waiver is executed after marriage, then each spouse must make a fair disclosure to the other of that spouse's estate. No disclosure is required prior to marriage. Section 732.702(3) provides that no consideration is required for the agreement, contract, or waiver to be valid.

Can Executing Deed Constitute a Valid Waiver of Constitutional Rights?

A few recent cases have highlighted the issue of whether joining in a deed (without any more formal agreement or acknowledgement) constitutes a waiver of homestead rights. The purpose of new F.S. §732.7025 is to provide "safe harbor" language which can be included in a deed when a spouse intends to waive the constitutional homestead protections. However, the statute does not resolve the question if entry of a deed without such express language may nevertheless still constitute a waiver of the constitutional homestead protections.

The first published case on the issue of whether joining in a deed might constitute a homestead waiver was *Habeeb v. Linder*, 36 Fla. L. Weekly D300 (Fla. 3d DCA Feb. 9, 2011). The Third District Court of Appeal initially published an opinion holding that by joining in a deed from one's spouse to that spouse's revocable trust, the joining spouse waived her constitutional homestead rights relating to the devise of her husband's homestead on his death. The court reasoned that the inclusion of the word "hereditaments" in the deed constituted a waiver of homestead devise restrictions. The court's opinion noted that by transferring all of her hereditaments (which was translated to include and mean one's inheritance rights), the surviving spouse had given away and, thus, waived her inheritance rights in the homestead property, including those constitutionally protected inheritance rights. Subsequently, however, on May 17, 2011, in a sua sponte order, the Third District Court of Appeal withdrew the *Habeeb* decision.[5] Thus, because of the withdrawal (and as a result of a settlement of that case which meant a final decision was not pursued), *Habeeb* is not citable precedent.

However, subsequently, Florida's Fourth District Court of Appeal, in *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014), held that a spouse waived her homestead rights by joining in the execution of a series of deeds, conveying her husband's one-half interest in a homestead property to a qualified personal residence trust (QPRT). In that case, Mr. and Mrs. Stone owned a property as tenants by the entireties, which they both joined in deeding to the two of them as tenants in common and then each of them, joined by their spouse, deeded their half to a separate QPRT. The *Stone* decision is consistent with the withdrawn opinion in *Habeeb*, holding

that joining in the deeds constituted a waiver of the constitutional homestead rights, even if the deed contained no special waiver language, although like *Habeeb*, the deeds in the *Stone* case included a transfer of "hereditaments."[6]

Neither the *Habeeb* decision, nor the *Stone* decision, addressed or discussed the financial disclosure requirements in F.S. §732.702. Thus, it was unclear if the courts were just assuming the spouses had financial knowledge or found such but did not express it in the opinions.

After the *Stone* decision, the Fourth District Court of Appeal, in *Lyons v. Lyons*, 155 So. 3d 1179 (Fla. 4th DCA 2014), considered a situation where Lyons owned the Florida homestead residence and signed a deed conveying the homestead residence to a QPRT (you may be sensing a theme in the caselaw). In that case, Lyons did not join in the conveyance as required by art. X, §4(c). After his death, Lyons filed suit claiming to own the homestead property, asserting she was still in title as the deed she signed without her husband's joinder was void. Without holding on the issue of whether the deed was void or voidable, the court held that the wife did not have standing to subsequently challenge the transfer, noting that the lifetime protection for the conveyance or alienation of homestead benefited Lyons at the time of the transfer. The court held that only the husband (or his estate) had standing and could challenge the transfer.[7]

Although not expressly addressed in *Habeeb*, *Stone*, or *Lyons*, Florida courts have consistently held that waivers of constitutional rights must be made knowingly and intelligently.[8] Thus, with potentially conflicting caselaw, future litigation on the issue of whether a deed may constitute a waiver of homestead protections seems likely. Confusion on this issue may impair efficacious planning and may also impair the process of transferring title to real estate after the owner has died.

Is the Safe Harbor Absolute?

A statute creating an irrebuttable or conclusive presumption for the waiver of a constitutional right would render the statute unconstitutional. In *Estate of Roberts*, 388 So. 2d 216, 217 (Fla. 1980), the decedent's wife argued that the existing spousal waiver statute, §732.702, created an unconstitutional, irrebuttable presumption, depriving her of her constitutional right to challenge the waiver in court. The Florida Supreme Court upheld the constitutionality of the statute, finding that a waiver under §732.702 results in a rebuttable presumption, so the wife was not denied access to the courts to challenge the validity of the waiver. The text of F.S. §732.702 does not include the word "presumption." New F.S. §732.7025 also does not include the word "presumption."

It appears likely that in some situations, the facts might warrant a finding that a conveyance by one spouse to the other (or by joining in a conveyance to a trust) includes a waiver of all spousal rights to the homestead residence. In other situations, the facts might warrant a finding that executing a deed, in and of itself, might not be considered a knowing and intelligent waiver. Some Florida attorneys, as well as nonattorneys and out-of-state attorneys preparing deeds, may construe the *Lyons* and *Stone* decisions as applicable to all situations in which one spouse conveys to the other spouse. Because those cases were judicial determinations involving specific facts, they cannot be relied upon to find that a deed from one spouse to the other is always a waiver of the alienation and devise restrictions. Given the constitutional protections at stake, and the interests of the public associated with the constitutional homestead protections, judicial review should be available to surviving spouses who challenge the validity of the waiver. However, the safe harbor waiver language contained in a deed will make it difficult for a spouse to argue that the waiver was not knowingly made.

Title Insurance Guidelines

In the fast-paced world of real estate closings, homestead issues can cause unwelcome delays. Title Note 16.04.14, The Fund Title Notes, provides that a prenuptial or post-nuptial agreement should not be relied upon without judicial approval to determine a waiver of the restrictions on the conveyance or devise of homestead. Real estate practitioners cannot rely upon the *Lyons* and *Stone* rulings because they illustrate the need for judicial approval of any purported waiver. The *Stone* and *Lyons* decisions further illustrate the need for a judicial determination of both the homestead status at the time of the owner's death and the validity of any purported waiver.

Having adopted a statutory "safe harbor" defining the statutory requirements for a waiver of constitutional homestead protections within a deed will hopefully provide more certainty for real estate practitioners and title companies. However, a closing agent should still adhere to the existing policies of title underwriters and examine the facts of each transaction involving a homestead waiver and obtain approval from underwriting counsel. Failure to adhere to underwriting guidelines could result in personal liability for the attorney or title company handling the transaction.

Estate Planning and Homestead

Because ownership interests conveyed by a deed, interests devised by a will or trust, and the owner's personal circumstances can vary significantly at any point in time, Florida's "legal chameleon" (homestead) presents substantial and real difficulties in examining a waiver via deed. Although there is an argument that warranty and quitclaim deeds constitute a conveyance of "all rights," it is not clear if there is or should be a distinction between the two types of deeds. Both warranty deeds and quitclaim deeds are often used in estate planning and other circumstances. While it is assumed that sometimes spouses signing such deeds intend to waive their homestead rights, in some, if not many situations, spouses signing such deeds believe they will continue to enjoy the spousal rights (post-death devise restrictions and conveyance restrictions) associated with the homestead property owned by the other spouse. In still other cases, the waiver of constitutional homestead protections is not considered at all.[9]

Therefore, the adoption of a safe harbor rule and express deed waiver language should increase the chances that waivers within a deed are knowing and voluntary and reduce the chances that waivers are made by mistake or due to lack of understanding. The procedures set forth in F.S. §732.702 will continue to be available as a means for a spouse to waive constitutional

homestead protections via post-nuptial agreements. Moreover, in many circumstances, waivers of homestead rights (even if via deed) should likely be accompanied by post-nuptial agreements. To ensure a knowing and intelligent waiver, an estate planning attorney should consider a waiver that complies with the requirements of §732.702 as further evidence of a valid, knowing, and intelligent waiver, and also as a means to protect the waiving spouse from potential future homelessness.

For example, spouses may agree to execute a deed to the trustee of the revocable trust of the husband, anticipating the use of the homestead residence as an asset to fund a credit shelter trust for the benefit of the wife — assuming she's the surviving spouse. In order to facilitate direct funding of the credit shelter trust (assuming there are no minor children), the statutory homestead waiver in §732.7025 may be included. However, if not accompanied by a postnuptial agreement under §732.702, then there is potential for the nightmare scenario that one spouse changes his or her revocable trust plan and disinherits the ther spouse, who is left unprotected by the constitutional homestead provisions. No practitioner wants to be the drafter of the deed in this scenario.

In order to avoid that potential nightmare situation, practitioners are urged to use caution when adding the waiver language into the deeds they draft. Moreover, practitioners who will include such waivers are urged to advise clients that before waiving their homestead protections, they should seek separate representation and perhaps need to enter into a postnuptial agreement to protect them. An agreement to maintain wills or obligating the husband to fund the homestead into a credit shelter trust can be incorporated within a postnuptial agreement.

Further, F.S. §732.701 recognizes that individuals can agree to maintain provisions within their wills or trusts. An agreement to maintain wills could give certainty to a plan that both spouses agree upon and maintain that plan after the first spouse's death. For example, an agreement could be used to ensure the surviving spouse inherits the homestead residence but agrees to devise the homestead in a particular way upon his or her death. This could also protect the surviving spouse who has conveyed his or her interest to the other spouse.

Homestead Waiver Examples

Each of the following examples show how the intended protection for surviving spouses in the Florida Constitution can lead to unexpected results. The new safe harbor legislation will allow Floridians to benefit from the homestead protections in the Florida Constitution, but still allow them the freedom to control the distribution of their estate.

• *Example 1* — In order to facilitate estate tax planning, the husband transfers his home to his revocable trust. The husband and wife sign a deed transferring their home to the husband's trust. On the husband's death, the trust gives the wife lifetime use of the home. The husband and wife want the ownership of the home to pass to the wife's children from a previous marriage upon her death.

Prior Law. If the deed to the trust is not considered a waiver of the wife's homestead rights, F.S. §732.401 negates the gift under the trust and forces ownership out of the trust and to the wife for her lifetime, followed by a remainder interest to only the husband's children. The wife's children receive nothing. The husband's and wife's wishes are disregarded, and probate is required.

New Law. If the deed to the trust contains the proper waiver language, ownership passes as intended under the husband's trust. The wife receives ownership for her lifetime and then ownership passes to the wife's children. The new legislation would create a presumption that a deed with waiver language prevents the application of F.S. §732.401, avoids the need for probate, and reduces the potential for litigation.

• *Example 2* — Reverse mortgage requirements can conflict with the constitutional homestead protections. Assume a situation in which a husband applies for a reverse mortgage to allow him to stay in his home, but the wife is not old enough to qualify. The husband is advised that the wife must sign a quitclaim deed to the husband to qualify for the mortgage. The wife signs the deed and the mortgage. The lender makes the loan, and the husband later dies. The husband's will leaves the home to the wife for her lifetime and then to his oldest child.

Prior Law. If the deed is not considered a waiver of the wife's rights, §732.401 negates the will and forces ownership to the wife for her lifetime, and then to all of the husband's children. The husband's wishes would be disregarded, and probate would be required.

Current Law. If the deed is considered a waiver, ownership passes according to the husband's will, so the wife receives ownership for her lifetime and then ownership passes to the husband's oldest son. The new legislation would create a presumption that a deed with waiver language prevents the application of F.S. §732.401 and the husband's wishes would be honored.

• *Example 3* — Improper estate planning can result in a situation where homestead rights are not properly addressed. Consider a situation where the wife suffers from a progressive, disabling condition. The husband deeds his home to his revocable trust, and the wife joins in the deed. The trust leaves the home to the husband's children upon his death. He thinks that he is protecting his wife by making sure she owns no assets after his death. The husband dies and the children try to force the widow out of the home.

Prior Law. At least one court has held that a deed is a waiver of the rights of a surviving spouse. The wife would face costly litigation to protect her right to stay in the home.

Current Law. If the deed does not contain the waiver language, there is no presumption that the wife waived her rights and she, or someone acting on her behalf, would be in a better position to invoke her rights as a surviving spouse.

• *Example 4* — If a married person tries to plan for the management of a homestead residence for the benefit of an incapacitated spouse with a disability, homestead protections can actually defeat the plan. In some cases, a husband may transfer his home (either in his name alone or jointly owned) to his revocable trust to manage the home for his wife after his death. On the husband's death, the trust gives the wife the lifetime use of the home, and then passes ownership to three of their four children. A fourth child is intentionally excluded because he has had no contact

with his parents for many years.

Prior Law. If the deed is not considered a waiver of the wife's rights, F.S. §732.401 negates the trust and forces ownership out of the trust to the wife for her lifetime, and then to all of the couple's children. Probate is required to confirm the ownership after the husband's death. The husband's wishes are disregarded.

Current Law. If the deed is considered a waiver, ownership passes according to the husband's trust, so the wife receives ownership for her lifetime, and then ownership passes to the three children named in the trust. The new legislation would create a presumption that a deed with waiver language prevents the application of F.S. §732.401 and avoids the need for probate. The husband's wishes would be honored.

Ethical Issues

Preparing a deed and inserting statutory language may seem like a routine matter that can be left to nonattorney staff. However, careful consideration should be given to the same issues that relate to the representation of any client. A representation agreement should be considered even if the representation is limited to the preparation of a deed. The agreement could cover the following issues:

• *Identification of the Client* — Is the client the grantor or grantee? Caselaw shows that the lawyer can still have duties to the grantee, even if the deed is prepared for the grantor.[10] If the deed is prepared for a married couple in estate planning, has the potential for a conflict of interest inherent in a joint representation been discussed?

• *Scope of the Representation* — The client should be advised if the representation is limited. The client may assume that the lawyer has reviewed the title to the real property conveyed, and that the lawyer has considered the tax consequences, including gift, estate, and income taxes. The client may assume that the lawyer considered owner's association requirements, marital law, creditor rights, and estate planning considerations, even though the attorney was engaged for the limited purpose of preparing a deed. The client may also assume that the lawyer is guaranteeing the work and will defend the client in the event of an audit by the Florida Department of Revenue or the Internal Revenue Service or a challenge to the transfer based upon fraudulent conveyance claims.

• *Fees* — The fees for the work should be disclosed in advance, including an estimate for any out-of-pocket expenses, such as recording fees and documentary stamp taxes. An attorney takes on a heavy responsibility when preparing a deed.[11] Fees should be set accordingly.

Relatedly, before creating deeds with waivers under §732.7025, please consider the ethical duties of the practitioner in asking a married couple in a joint/mutual representation to sign a deed where one of them waives homestead rights in a deed to the other (or her or his revocable trust). Is there any less of an ethical duty to advise both clients to seek separate representation on this matter? Isn't it quite possible a waiving spouse will one day regret the waiver (*e.g.*, in the nightmare scenario expressed above where the nonwaiving spouse frustrates the plan by disinheriting the now unprotected waiving spouse)? In that event will the waiving spouse sue the drafter of the deed with the waiver language or file a grievance with the Bar? Moreover, wouldn't the ethical rules require the drafter to have outlined this conflict and received an express waiver?[12] The point being: Use the new waivers by deed carefully, cautiously, and only when absolutely appropriate. And before doing so, practitioners should consider if additional protections (such as separate representation or a post-nuptial agreement, as described herein) are necessary for the waiving spouse.

Conclusion

The new homestead safe harbor language for waivers is a tool to be used selectively. Homestead waivers involve constitutional rights and should be respected as such. The safe harbor language is not intended to be an "easy button" to eliminate all problems and risks. Instead, it is a tool to be used after careful consideration by a licensed, Florida attorney advising his or her clients.❑

[1] Ch. 2018-22, §2, LAWS OF FLA.

[2] FLA. STAT. §732.401. It is important to note that the tenant-in-common election must be filed in the land records for the county where the property is located within six months of the date of the owner's death. An open probate proceeding is not required.

[3] *Pub. Health Tr. v. Lopez*, 531 So. 2d 946, 948 (Fla. 1988).

[4] *Id.* (citations omitted).

[5] *Habeeb v. Linder*, 64 So. 3d 1275 (Fla. 3d DCA 2011).

[6] The *Stone* court did not address the requirement of financial disclosure in FLA. STAT. §732.702. Author Jeffrey Baskies prepared two deeds and QPRTs for Joe and Alma Stone, but did not represent a litigant in the substantive case.

[7] *Lyons v. Lyons*, 155 So. 3d at 1179. Author Jeffrey Baskies was engaged as a potential testifying expert in this case; however, he did not testify and did not represent any of the litigants in the substantive case.

[8] *See Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007).

[9] For example, consider a warranty deed to one spouse's revocable trust by married Michigan residents. The property later becomes the primary residence of the couple. Is it reasonable to assume that the nonowner spouse understood that the home could be sold without his or her consent, leaving them homeless? Is it reasonable to assume that the nonowner spouse understood the constitutional devise restrictions would not apply at the owner's death? The result is clearly against public policy, unless there was a knowing and intelligent waiver.

[10] *Dingle v. Dellinger*, 134 So. 3d 484 (Fla. 5th DCA 2014).

[11] *See* Robert A. Hoonhout, *Taking the "Quick" Out of Quitclaim Deeds*, 91 FLA. BAR. J. 47 (Dec. 2017).

[12] *See* Hollis F. Russell and Peter A. Bicks, *Joint Representation of Spouses in Estate Planning: The Saga of Advisory Opinion 95-4*, 72 FLA. B. J. 39 (Mar. 1988); and FLA. BAR REG. R. 4-1.7.

JEFFREY S. GOETHE *is board certified in wills, trusts, and estates law, and is a partner in the Bradenton law firm, Barnes Walker, Goethe, Hoonhout, Perron & Shea, PLLC.*

JEFFREY A. BASKIES *is board certified in wills, trusts, and estates law, and is a partner in the Boca Raton boutique trust and estates, tax, and business law firm, Katz Baskies & Wolf, PLLC.*