Florida Homestead:
The Legal Chameleon That Grew Into a Dragon

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I. Florida Homestead Law

Florida law provides for protection from claims of creditors and for relief from annual real property taxes for Florida homestead real property. Those protections are coupled, however, with constitutional and statutory prohibitions and restrictions on devising homestead property at death. The provisions can be quite complex in their operation, and can be a real trap in estate planning for Florida residents. For example, titling the Florida primary residence in the name of one spouse alone (or in the name of the trustee of that spouse's revocable trust) is generally inconsistent with usual estate planning objectives if the owner is survived by a spouse and any descendant, or if the owner is survived by a minor child regardless whether there is a surviving spouse or an adult descendant. It is generally inappropriate to consider using Florida homestead real property as the corpus of a credit shelter trust or a marital deduction trust, although there are exceptions where this might be appropriate planning.

A. Constitutional Rules and Prohibitions on Devise.

Article X of the Florida constitution sets forth rules governing the exemption from forced sale and prohibitions on devise of homestead property:

> Section 4. Homestead; exemptions.--
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> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
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> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;
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> (2) personal property to the value of one thousand dollars.
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> (b) These exemptions shall inure to the surviving spouse or heirs of the owner.

> (c) 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.

B. Statutes Governing Descent.

Although the Florida constitution prohibits devise of homestead property under proscribed circumstances, it does not specify how the property will descend under those circumstances. The descent of homestead property is controlled by the Florida Probate Code. The basic rule for descent is set forth in Florida Statutes section 732.401. Prior to amendment in 2010, the rule was as follows:

> (1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death per stirpes.
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> . . . .

Under the statute prior to its amendment in 2010, if there was an attempted but invalid devise of homestead property, or if the homestead owner died intestate, when the decedent was survived by a spouse and one or more descendants, the spouse would take a life estate in the homestead property, and the descendants would take a vested remainder interest. This created many potential difficulties, particularly when the decedent's descendants were not also descendants of the surviving spouse. Absent agreement among the surviving spouse and the decedent's surviving descendants about management and disposition of the homestead property during the surviving spouse's lifetime, title to the homestead property was essentially unmarketable, because partition is not available as a form of relief between a life tenant and remaindermen. In addition, difficulties would arise with respect to maintenance of the homestead property during the lifetime of the surviving spouse. Responsibility for payment of expenses such as annual real property taxes, mortgage payments, repairs, capital improvements, casualty insurance, and so forth are allocated between the surviving spouse and the descendants under the Florida Uniform Principal and Income Act (Florida Statutes chapter 738, and in particular section 738.801) and the common law. Those allocations can be inconvenient and in some cases anomalous (for example, as life tenant the surviving spouse is responsible for the interest portion and the remainder owners are responsible for the principal portion of payments of mortgage indebtedness secured by the homestead property).

Section 732.401 was significantly revised in 2010 to provide an option for the surviving spouse to elect out of a life estate and instead to receive an undivided one-half fee interest as a

tenant in common with the deceased homestead owner's descendants. The statute as it now reads in its entirety is set forth below.

> (1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.
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> (2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.
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> (a) The right of election may be exercised:
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> 1. By the surviving spouse; or
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> 2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.
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> (b) The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).
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> (c) A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election.
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> (d) Once made, the election is irrevocable.
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> (e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:
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> ELECTION OF SURVIVING SPOUSE
> TO TAKE A ONE-HALF INTEREST OF
> DECEDENT'S INTEREST IN
> HOMESTEAD PROPERTY

STATE OF
COUNTY OF

1. The decedent, , died on . On the date of the decedent's death, The decedent was married to , who survived the decedent.

2. At the time of the decedent's death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, which real property being in County, Florida, and described as: (description of homestead property) .

3. Affiant elects to take one-half of decedent's interest in the homestead as a tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse's attorney in fact or guardian of the property, and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

(Affiant)

Sworn to (or affirmed) and subscribed before me this day of (month) , (year), by (affiant)

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

(Type of Identification Produced)

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

(5) This section does not apply to property that the decedent owned in tenancy by the entireties or in joint tenancy with rights of survivorship.

Section 732.4015 deals with permissible and impermissible devises of homestead:

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there is no minor child.

(2) For the purposes of subsection (1), the term:

(a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.

(b) "Devise" includes 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.

(3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

As provided in section 732.4015 above, disposition of homestead property upon death by means of certain types of inter vivos trusts will be treated as a devise, and will be subject to the same rules as if the homestead property were passing under the deceased homestead owner's last will and testament. The type of trust that will not avoid the homestead restrictions is any trust over which the decedent has a "right of revocation," which is defined in section 733.707.

733.707 Order of payment of expenses and obligations.—

(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in s. 733.607(2).

. . . .

(e) For purposes of this subsection, a "right of revocation" is a power retained by the decedent, held in any capacity, to:

1. Amend or revoke the trust and revest the principal of the trust in the decedent; or

2. Withdraw or appoint the principal of the trust to or for the decedent's benefit.

Thus the typical revocable inter vivos trust used for probate avoidance purposes will not avoid the prohibition on devise of homestead property if the deceased grantor is survived by a spouse or minor child, even if title to the homestead property has been conveyed during the grantor's lifetime to a third person as trustee. Note, however, that if the surviving spouse joins in the execution of a deed during the lifetime of the deceased homestead owner conveying the deceased homestead owner's homestead property to the trustee of the deceased homestead owner's revocable trust (as typically would be required in any lifetime conveyance of homestead property), the surviving spouse may have waived homestead rights. *See Stone v. Stone*, 157 So.3d 295 (Fla. 4th DCA 2014).

C. Statutes Governing Real Property Taxes.

In addition to the constitutional protection from forced sale to satisfy claims of creditors, homestead property is given favorable tax treatment by means of an exemption of a certain amount from taxation, but more importantly, by limits on increases in annual assessments of taxable value. Article VII section 4(d), which is better known as the Save Our Homes amendment, caps increases in annual assessments to homestead property.

> (d) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided in this subsection.
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> (1) Assessments subject to this subsection shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:
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> a. Three percent (3%) of the assessment for the prior year.
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> 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.
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> (2) No assessment shall exceed just value.
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> (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, unless the provisions of paragraph (8) apply. Thereafter, the homestead shall be assessed as provided in this subsection.

The provisions of the Save Our Homes cap are implemented by statutes, which also exempt homestead property from reassessment upon a transfer of title for certain types of changes of ownership.

193.155 Homestead assessments.--Homestead property shall be assessed at just value as of January 1, 1994. Property receiving the homestead exemption after January 1, 1994, shall be assessed at just value as of January 1 of the year in which the property receives the exemption unless the provisions of subsection (8) apply.

(1) Beginning in 1995, or the year following the year the property receives homestead exemption, whichever is later, the property shall be reassessed annually on January 1. Any change resulting from such reassessment shall not exceed the lower of the following:

(a) Three percent of the assessed value of the property for the prior year; or

(b) The percentage 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) If the assessed value of the property as calculated under subsection (1) exceeds the just value, the assessed value of the property shall be lowered to the just value of the property.

(3)(a) Except as provided in this subsection or subsection (8), property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change of ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except if:

1. Subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled and:

a. The transfer of title is to correct an error;

b. The transfer is between legal and equitable title or equitable and equitable title and no additional person applies for a homestead exemption on the property;

c. The change or transfer is by means of an instrument in which the owner is listed as both grantor and grantee of the real property and one or more other individuals are additionally named as grantee. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application is considered a change of ownership; or

d. The person is a lessee entitled to the homestead exemption under s. 196.041(1).

2. Legal or equitable title is changed or transferred between husband and wife, including a change or transfer to a surviving spouse or a transfer due to a dissolution of marriage;

3. The transfer occurs by operation of law to the surviving spouse or minor child or children under s. 732.401; or

4. Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and who is legally or naturally dependent upon the owner.

(b) For purposes of this subsection, a leasehold interest that qualifies for the homestead exemption under s. 196.031 or s. 196.041 shall be treated as an equitable interest in the property.

. . . .

Because the protections and exemptions afforded to homestead property inure only to the benefit of natural persons, if homestead property is held in trust it is essential that the terms of the trust create a possessory right in an individual that will qualify as equitable title to real estate.

196.031 Exemption of homesteads.

(1)(a) A person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who in good faith makes the property his or her permanent residence or the permanent residence of another or others legally or naturally dependent upon him or her, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of $25,000 on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. Such title may be held by the entireties, jointly, or in common with others, and the exemption may be apportioned among such of the owners as reside thereon, as their respective interests appear. If only one of the owners of an estate held by the entireties or held jointly with the right of survivorship resides on the property, that owner is allowed an exemption of up to the assessed valuation of $25,000 on the residence and contiguous real property. However, an exemption of more than $25,000 is not allowed to any one person or on any one dwelling house, except that an exemption up to the assessed valuation of $25,000 may be allowed on each apartment or mobile home occupied by a tenant-stockholder or member of a cooperative corporation and on each condominium parcel occupied by its owner. Except for owners of an estate held by the entireties or held jointly with the right of survivorship, the amount of the exemption may not exceed the proportionate assessed valuation of all owners who reside on the property. Before such exemption may be granted, the deed or

> instrument shall be recorded in the official records of the county in which the property is located. The property appraiser may request the applicant to provide additional ownership documents to establish title.
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> 196.041 Extent of homestead exemptions.
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> (2) A person who otherwise qualifies by the required residence for the homestead tax exemption provided in s. 196.031 shall be entitled to such exemption where the person's possessory right in such real property is based upon an instrument granting to him or her a beneficial interest for life, such interest being hereby declared to be "equitable title to real estate," as that term is employed in s. 6, Art. VII of the State Constitution; and such person shall be entitled to the homestead tax exemption irrespective of whether such interest was created prior or subsequent to the effective date of this act.

II. Homestead Descent Examples

The following examples illustrate how the restrictions on devise of Florida homestead interact with normal estate planning objectives, and create traps for unwary practitioners. In each case, assume that the decedent is a Florida resident, the residence is homestead property, and that there has been no waiver of homestead rights by marital agreement unless otherwise noted.

A. Examples With Spouse and No Minor Children.

Example 1. A husband and wife have three adult children and no minor children. The marital residence is titled in the wife's name alone. The wife dies survived by her husband and their three children. Her will specifically devises the residence to a credit shelter trust, which provides for discretionary distributions to her husband and her descendants. Upon the husband's death, the credit shelter trust assets are to be distributed outright to the wife's then living descendants.

Result: The devise of the residence fails. Article X, section 4(c) of the Florida constitution permitted the wife only to devise the residence to her husband, and any other attempted devise fails. A devise to the husband of anything less than full fee simple title in the wife's interest fails. *In re Finch's Estate,* 401 So.2d 1308 (Fla. 1981). The husband receives a life estate, and the three children receive the remainder interest subject to the husband's life estate. Each child's remainder interest is a vested interest in property that is subject to claims of the child's creditors and rights of the child's spouse, and will descend as part of that child's estate when the child dies, whether during the husband's lifetime or after his death. If, however, the husband makes a timely election under section 732.401(2), the husband will receive an

undivided one-half interest in the residence as a tenant in common, and the three children will each receive an undivided one-sixth interest in the residence as tenants in common.

Example 2. The facts are the same as in Example 1, except that the wife's will devises full fee simple title to the residence to her husband alone.

Result: The devise of the residence to the husband is valid.

Example 3. The facts are the same as in Example 1, except that the wife's will devises a life estate to her husband and the remainder interest equally to two of the three children. The third child is specifically disinherited.

Result: The devise of the residence fails. The husband receives a life estate, and the three children (including the disinherited child) receive the remainder interest subject to the husband's life estate. The wife was only permitted to devise full fee simple title to her husband, and it does not matter that she attempted to devise him the very interest which he would receive by statute in the absence of a devise of fee simple title. *In re Finch's Estate,* supra. If the husband makes a timely election under section 732.401(2), the husband will receive an undivided one-half interest in the residence as a tenant in common, and the three children (including the disinherited child) will each receive an undivided one-sixth interest in the residence as tenants in common.

Example 4. The facts are the same as in Example 1, except that the wife's will devises a conditional life estate to her husband and the remainder interest to the three children. The wife's will provides that the husband's life estate will terminate if he remarries after her death.

Result: The devise of the residence fails. The husband receives an unconditional life estate, and the three children receive the remainder interest subject to the husband's life estate. If the husband makes a timely election under section 732.401(2), the husband will receive an undivided one-half interest in the residence as a tenant in common, and the three children will each receive an undivided one-sixth interest in the residence as tenants in common.

Example 5. A husband and wife live in a marital residence titled in the wife's name alone. Prior to the marriage the couple entered into a marital agreement in which each spouse waived "all rights" to the other spouse's estate upon death. The wife dies survived by her husband and her only child, an adult daughter who was born of a prior marriage. The wife's will devises her tangible personal property to her daughter, and devises her residuary estate to a trust which provides for discretionary distributions to her husband. Upon the husband's death, the remaining trust assets are to be distributed outright to the wife's then living descendants.

Result: The husband's waiver of "all rights" in his wife's estate waived his homestead rights, and the residuary article of the wife's will is effective to devise title to the residence to the trust. The marital residence will be held as an asset of the trust and can be sold by the trustee if authorized by the terms of the trust. When a decedent is survived by no minor children and the surviving spouse has waived homestead rights, there is no constitutional restriction on devising homestead property. The husband's antenuptial waiver of rights in the homestead is the legal equivalent of predeceasing his wife, and thus the wife died with no one entitled to the protection

of article X, section 4(c), and the property could pass by devise under the residuary clause of her will. *See City Nat. Bank v. Tescher,* 578 So.2d 701 (Fla. 1991).

Example 6. A single man conveys title to his residence to himself and his sister as joint tenants with rights of survivorship. He marries after making the conveyance. He dies intestate survived by his wife and his sister.

Result: Title to the residence passes to his sister. *See Ostyn v. Olympic,* 455 So.2d 1137 (Fla. 2nd DCA 1984).

Example 7. Two persons of the same gender married each other while domiciled in a jurisdiction that recognized same sex marriages before the Supreme Court's decision in *Obergefell v. Hodges.* There was no marital agreement waiving homestead rights. They moved to Florida after the *Obergefell* decision. Neither of them had children. One of them acquired sole title to the couple's Florida residence, and died with a will leaving the residence in trust for the survivor for life and upon the survivor's death to charities designated in the will.

Result: If the couple's marriage is required to be recognized as valid in Florida, the devise of the residence fails, and the survivor takes fee simple title to the residence. If the marriage is not required to be recognized as valid, the devise is valid.

B. Examples With Minor Children.

Example 8. A single father dies, survived by his three children, one of whom is a minor. The father's residence is titled in his name. His will devises his entire estate to a testamentary sprinkling trust for the benefit of his three children, providing for termination of the trust and outright distribution of the remaining assets when his youngest child reaches age 25.

Result: Title to the residence passes by operation of law upon the father's death directly to the three children free of trust. Each child inherits an undivided one-third fee simple interest in the residence as a tenant in common with the other two children. A guardianship of the property must be established for the minor child if it is necessary to deal with the minor child's interest in the residence.

Example 9. The facts are the same as in Example 8, except that instead of creating one sprinkling trust, the father's will directs that his estate be divided into three separate shares of equal value, one for each child. The shares of the two adult children are to be distributed to them outright. The minor child has Down syndrome, and that child's share is to be held in a support trust for that child's lifetime.

Result: Just as in Example 8, title to the residence passes by operation of law upon the father's death directly to the three children free of trust. Each child inherits an undivided one-third fee simple interest in the residence as a tenant in common with the other two children. A guardianship of the property must be established for the child with Down syndrome if it is necessary to deal with that child's interest in the residence.

Example 10. A husband and wife have one minor child. The husband has two minor children from a prior marriage who are in the primary custody of the husband's former wife. The husband and wife entered into a prenuptial agreement in which each spouse waived "all rights" to the other spouse's estate upon death. The marital residence is titled in the husband's name as sole trustee of his revocable trust. The husband's revocable trust directs that the marital residence be held in trust upon the husband's death so that his wife and their one minor child can occupy the residence rent free for a period of five years. Upon expiration of the five-year period the house is to be sold, and the proceeds are to be divided equally among his wife and his three children, and held in further trust for each of them separately.

Result: The attempted disposition of the residence fails. The wife's waiver of "all rights" in her husband's estate waived her homestead rights and is the legal equivalent of predeceasing her husband. Title to the residence descends by operation of law directly to the husband's three children. Each child inherits an undivided one-third fee simple interest in the residence as a tenant in common with the other two children. A guardianship of the property must be established for each minor child if it is necessary to deal with that minor child's interest in the residence. The husband's wife likely will be appointed as the guardian of the property for her child, and the husband's former wife likely will be appointed as guardian of the property for her two children. Each tenant in common is entitled to use and possession of the property. Full fee title to the property cannot be conveyed without court approval and joinder of the guardians for all of the children.

Example 11. A husband and wife have one minor child. The marital residence is titled in the names of the husband and wife as tenants by the entirety. The husband dies intestate survived by his wife and their minor child.

Result: Title to the residence passes by operation of law to the wife as the surviving tenant by the entirety. *See Denham v. Sexton,* 48 So.2d 416 (Fla. 1950).

Example 12. The facts are the same as in example 11, except that the wife dies ten years later just before the child's eighteenth birthday. The wife's will leaves her estate in trust for the benefit of their minor child until reaching age 25.

Result: The marital residence passes by operation of law upon the wife's death directly to the minor child free of trust. A guardianship of the property must be established for the minor child if it is necessary to deal with the minor child's interest in the residence. The guardianship will terminate when the child turns 18.

Example 13. The facts are the same as in example 11, except that the husband and wife both die in a common accident, and it is impossible to establish the order of death. Each spouse's will leaves his or her estate outright to the surviving spouse, or in trust for the benefit of their minor child until reaching age 25 if there is no surviving spouse.

Result: Each spouse is deemed to have survived the other spouse with respect to an undivided one-half interest in the marital residence under Florida Statutes section 732.601. Because each spouse is survived by a minor child, each spouse's one-half interest in the marital

residence passes by operation of law upon that spouse's death directly to the minor child free of trust. A guardianship of the property must be established for the minor child if it is necessary to deal with the minor child's interest in the residence.

Example 14. A divorced father with one minor child conveys title to his residence to himself and his sister as joint tenants with rights of survivorship. He dies intestate survived by his minor child and his sister.

Result: Title to the residence passes to his sister. *See Ostyn v. Olympic,* 455 So.2d 1137 (Fla. 2nd DCA 1984).

C. Examples Without A Spouse or Minor Child.

Example 15. A divorced mother dies survived by her four adult children. Her residence is titled in her name. Her will devises her homestead to one of the four children.

Result: The devise of the homestead is valid.

Example 16. A single man without any descendants dies. His will devises $150,000 to his nephew, and devises his residuary estate to his four half-brothers. His estate consists of assets worth $10,000, and his residence which was sold for $141,000 during administration of the estate. The residence was not specifically devised in the will.

Result: The proceeds from sale of the residence pass to the four half-brothers, not the nephew. The homestead was subject to devise because the decedent was not survived by a spouse or minor child. In the absence of a specific devise, homestead property passes under the residuary clause, which is a sufficiently precise indicator of testamentary intent to pass protected homestead property. Where a decedent is not survived by a spouse or minor children, the decedent's homestead property passes to the residuary devisees, not to general devisees, unless there is a specific testamentary disposition ordering the property to be sold and the proceeds made a part of the general estate. The abatement provisions of section 733.805 do not apply because homestead property that passes to heirs is not an asset subject to administration. *See McKean v. Warburton,* 919 So.2d 341 (Fla. 2005).

III. Planning for Homestead

A. Joint Ownership.

As noted in example 11 above, and as provided in Florida Statutes section 732.401, homestead property held by spouses as tenants by the entirety is not subject to restrictions on devise, and will pass by survivorship to the surviving owner even if the deceased owner is survived by minor children. *See Denham v. Sexton,* supra. But as shown in examples 12 and 13, the homestead property then becomes subject to restrictions on devise if the surviving tenant has a minor child or remarries.

Holding title to homestead property as joint tenants with right of survivorship will avoid the restrictions on devise. In *Ostyn v. Olympic*, 455 So.2d 1137 (Fla. 2nd DCA 1984), a single man deeded his property to himself, his sister, his sister's husband, and his sister's daughter as joint tenants with right of survivorship. His sister and her husband died. He married, and he and his new wife lived on the property as their homestead. He then died, survived by his wife and by his niece (the last survivor of the four joint tenants with right of survivorship). His wife asserted that an interest in the property passed to her as homestead property, and the trial court agreed, ruling that the surviving joint owner's interest was subject to a life estate for the wife in the property. The appellate court ruled that the same reasoning that governs homestead property held as tenants by the entireties also governs homestead property held as joint tenants with right of survivorship, and thus the entire interest in the decedent's homestead property passed to his niece without any interest passing to his wife. The holding of the *Ostyn* case was codified by the legislature in the 2010 amendment to section 732.401(5) discussed earlier and in a 2012 amendment to section 731.201(33).

Conveying homestead property into joint ownership with someone other than the homestead owner's spouse could have immediate gift tax consequences. In addition, if the residence is not the homestead of the joint owner, there could be adverse consequences for homestead property tax exemption purposes. The joint owner could sever the joint ownership arrangement during lifetime as well, and the joint owner's interest could be reached by creditors or other parties adverse to the joint owner.

B. Planning With Marital Waivers.

In *City Nat. Bank v. Tescher, supra*, a couple entered into an agreement prior to their marriage in which the husband waived all of his rights in his wife's estate, including her homestead. They resided in a residence owned by the wife. The wife died survived by her husband and adult children. The Florida Supreme Court held that when a decedent is survived by no minor children and by a spouse who has waived homestead rights, there is no constitutional restriction on devising homestead property. The waiver should be a knowing relinquishment of homestead rights, as general equitable principles might not operate to nullify a spouse's interest in homestead property. *See Rutherford v. Gascon*, 679 So.2d 329 (Fla. 2nd DCA 1996). Even with a valid waiver of a spouse's homestead rights, however, the homestead rights of minor children would remain intact, and thus a simple waiver of homestead rights by a spouse could cause fee title to the homestead to pass immediately to the homestead owner's descendants.

C. Planning With Disclaimers.

Until 2010, it was uncertain whether a postdeath disclaimer by the surviving spouse could be used to cause homestead property to descend pursuant to the homestead owner's testamentary instruments in situations where the decedent is survived by a spouse and one or more adult descendants (but no minor child). If the decedent fails to devise full fee simple title to the surviving spouse in that instance, as noted earlier the surviving spouse inherits a life estate and the descendants inherit the remainder interest (subject to the surviving spouse's right to elect to take an undivided one-half fee interest). If the surviving spouse disclaims his or her homestead

interest, does the homestead property then pass pursuant to the decedent's testamentary planning, or do the descendants still have a vested interest in the homestead which causes them to inherit full fee title because of the spouse's disclaimer? As was noted in two articles in The Florida Bar Journal, there were two different lines of thought: that the surviving spouse's disclaimer of his or her interest in the homestead property allows the property to pass by devise even if there are adult descendants, because there are no minor children and because the spouse is deemed to have predeceased the homestead owner by virtue of the disclaimer; or that the surviving spouse's disclaimer is effective only with respect to his or her interest in the homestead property, the interest that vests in the homestead owner's descendants at death is not affected by the spouse's disclaimer, and therefore the spouse's disclaimer extinguishes only the spouse's interest. *See Harrison, The Post-Death Disclaimer: A Cure for Constitutionally Prohibited Devise?*, The Florida Bar Journal, April 1996, p. 42; *Robison and Fisher, Florida Homestead: A Difficult Post-Mortem Estate Tax Planning Property*, The Florida Bar Journal, January 2002, p. 18.

Two 2010 legislative amendments eliminated the uncertainty. As noted earlier, subsection 732.401(4) was created to read:

> If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

At the same time subsection 732.4015(3) was created to read:

> If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

Thus it is now clear that if the deceased homestead owner makes an invalid devise of the homestead property (assuming that there are no minor children of the deceased owner, as the homestead could not be devised at all if there were), the property will descend by operation of law to the deceased owner's descendants if the surviving spouse disclaims his or her homestead interests. It is also clear now that if the deceased owner validly devises full fee simple title to the homestead property to the surviving spouse (which can only happen if the homestead owner is not survived by any minor descendants), and if the surviving spouse then disclaims the devise, the homestead property will pass to the deceased owner's alternate beneficiaries just as any other disclaimed property would pass, and not by operation of law to the deceased owner's surviving adult descendants.

Of course, even if the homestead owner devises less than full fee simple title to the surviving spouse, if the homestead owner's spouse and all of the homestead owner's descendants (including all living descendants in younger generations) disclaim all interests in the homestead property, the homestead property will then descend as provided in the homestead owner's testamentary instruments. Often, however, it will not be possible to obtain disclaimers from minor or incapacitated descendants within the 9-month deadline allowed under federal law for a qualified disclaimer. Even if it is possible to obtain disclaimers from all descendants, great care must be taken in the planning because a person other than the surviving spouse will not be able

to make a qualified disclaimer for federal gift tax purposes if that person receives another interest in the homestead property (such as a beneficial interest in a trust) as a result of the disclaimer. The potential adverse consequences relate to federal gift and estate tax effects, however, and it should be possible to re-route the disposition of homestead property if disclaimers valid under Florida law are obtained from all descendants, even if the disclaimers are not qualified disclaimers for federal tax purposes.

As noted above, homestead property that is held by spouses as tenants by the entirety is not subject to the constitutional restrictions on devise, even if there are minor children upon the death of the first spouse to die. But what happens if the surviving spouse disclaims the interest of the deceased spouse in homestead property that is jointly owned by the spouses? What is the nature and extent of the decedent's interest in the jointly owned homestead? Does the disclaimer of the deceased spouse's interest in the homestead property cause the decedent's interest to pass to the decedent's descendants (whether adults or minors)? Further, does the decedent's interest become subject to the homestead restrictions if the decedent is survived by minor children? The 2010 statutes set forth above do not address these questions, but an already existing section of the disclaimer statutes in chapter 739 addresses it. Section 739.203 (enacted in 2005) states:

> 739.203 Disclaimer of property held as tenancy by the entirety.—
> (1) The survivorship interest in property held as a tenancy by the entirety to which the survivor succeeds by operation of law upon the death of the cotenant may be disclaimed as provided in this chapter. For purposes of this chapter only, the deceased tenant's interest in property held as a tenancy by the entirety shall be deemed to be an undivided one-half interest.
> (2) A disclaimer under subsection (1) takes effect as of the death of the deceased tenant to whose death the disclaimer relates.
> (3) The survivorship interest in property held as a tenancy by the entirety disclaimed by the surviving tenant passes as if the disclaimant had predeceased the tenant to whose death the disclaimer relates.
> (4) A disclaimer of an interest in real property held as tenants by the entirety does not cause the disclaimed interest to be homestead property for purposes of descent and distribution under ss. 732.401 and 732.4015.

Thus, upon a disclaimer by the surviving spouse of the deceased spouse's interest in homestead property owned as tenants by the entirety (which is deemed to be an undivided one-half interest), the disclaimed interest passes pursuant to the deceased spouse's testamentary plan. The devisee or devisees of the deceased spouse's undivided one-half interest own that interest as tenants in common with the surviving spouse, who would continue to own the surviving spouse's undivided one-half interest in the homestead property. The surviving spouse's undivided one-half interest would be subject to any applicable restrictions on devise.

D. Inter Vivos Conveyance In Trust.

The Florida constitution permits the owner of homestead property, joined by his or her spouse if married, to alienate the homestead property by gift during lifetime. Irrevocable alienation of homestead property is fraught with potential problems, however.

First, the homestead owner presumably will want to preserve his or her right to live in the residence. This mandates the retention of some level of interest in the homestead property, whether legal (such as a life estate) or equitable (such as a beneficial interest in trust). This means, of course, that the residence will be included in the homestead owner's gross estate for estate tax purposes at death, but estate tax reduction is not necessarily an objective of this type of planning (unless planning with a qualified personal residence trust, for example). Instead, the objective more often will simply be to avoid the forced scheme for disposition of homestead in favor of the homestead owner's desired disposition of his or her homestead after death. It is possible to do planning with homestead property to reduce or avoid estate taxes and at the same time retain homestead benefits, but that is not the focus of this discussion.

Second, the homestead owner presumably will want to preserve the lifetime benefits associated with homestead property in the form of exemption from forced sale and relief from real property taxes. Any conveyance to another person (whether outright or to a trustee in trust) could jeopardize those benefits.

Third, the homestead owner will want to avoid unacceptable federal income or gift tax consequences with respect to any inter vivos conveyance of homestead property (such as losing the limited exclusion from capital gains taxes, or incurring gift taxes). For example, if a homestead owner conveys the homestead into an irrevocable trust which makes the desired provisions for the owner's family members, and in which the owner has no beneficial interest or powers of appointment, and the owner retains a life estate in the residence by the terms of the deed of conveyance, for property law purposes the owner will have made a gift of the remainder interest in the residence.

Under federal gift tax law, however, that gift will be subject to gift tax on the full fair market value of the residence at the time of the conveyance, without any reduction for the value of the owner's retained life estate, because of Internal Revenue Code section 2702. Under Section 2702 the value of the owner's retained life estate must be valued at zero. The value of the gift can be reduced by the value of the owner's retained interest only if the retained interest is (i) the right to receive fixed amounts payable not less frequently than annually (an annuity), (ii) the right to receive amounts which are payable not less frequently than annually and are a fixed percentage of the fair market value of the property in the trust determined annually (a unitrust amount), or (iii) a noncontingent remainder interest if all of the other interests in the trust consist of an annuity or a unitrust amount. A retained life estate in homestead property is none of those.

Furthermore, not only will the full value of the owner's residence be subject to current gift tax (using the owner's lifetime unified credit), but the full value of the residence will still be included in the owner's gross estate upon the owner's death because of the owner's retained life estate. (The owner's unified credit consumed by the inter vivos gift would be restored, however, and the owner's estate would receive credit for any federal gift tax actually paid.) Thus, unless the values of the owner's residence and the owner's estate are so small that federal gift and estate taxes are of no concern to the owner, any planning involving the owner's residence will have to incorporate features that will avoid making a completed gift by virtue of the conveyance of an interest in the homestead property. With careful planning, that can be accomplished by use of

the rules under Internal Revenue Code section 2511 governing incomplete gifts, principally through reservation of a power of appointment.

1. Florida Constitutional Restrictions.

Two Florida appellate cases have dealt with the attempted inter vivos alienation of homestead real property, and have invalidated those transfers on the ground that in reality they were merely an attempted testamentary devise of homestead real property.

In *Johns v. Bowden*, 66 So. 155 (Fla. 1914), a husband and wife resided on their homestead property. The wife died survived by her husband who continued to reside on the homestead property. The ultimate facts such as ownership of title were not clear to the court from the pleadings filed in the case, but after his wife's death the husband had executed a deed in trust conveying his homestead to a third party trustee. The terms of the trust deed specified that the husband reserved the right to occupy and use the property, and to receive and use all rents and profits from the property for his life. The deed of trust further stated that the husband would have the power to direct the trustee to convey title to the property to any person named by the husband. The deed provided that if the grantor failed to direct the trustee to convey the property during the grantor's lifetime, the trustee would hold the property for the use and benefit of one of the grantor's children, and ultimately to be distributed to one of the grantor's grandchildren upon the death of that child. The deed in trust was challenged by one of the husband's heirs upon his death as being an invalid attempt to alienate homestead property contrary to the provisions of the Florida constitution.

The trial court dismissed the action and ruled in favor of the trustee, upholding the validity of the deed. The Florida Supreme Court reversed and ruled that the matter stated a cause of action, and remanded the case for further proceedings. In its opinion the court noted the following:

> Under the Constitution and statute, the property upon which the law imposes the homestead exemptions and limitations is not subject to testamentary disposition when the testator is the 'holder' of the homestead and leaves a wife or a child. That which the law forbids to be done directly cannot lawfully be done by indirection. If an attempted conveyance of homestead real estate is, in legal and practical effect, and operation a will, it may not be effective when the owner of the homestead leaves a wife or child.
>
> The interest attempted to be conveyed was not a vested right in the property to any of the beneficiaries named in the trust deed, but a contingent interest subject to the right of the grantor to direct a conveyance of the entire property to others at any time during the grantor's life. In effect, the entire beneficial interest and right in the specific property remained in the grantor, and could not pass at all, without his consent, till after his death, thus making the trust deed not an absolute conveyance of a vested right in praesenti, of the property alleged to be a homestead. *[Citations omitted]* Because of the retention of the entire beneficial estate in the grantor during his life, the instrument, in practical effect, is in the

> nature of a testamentary disposition of property alleged to be a homestead, and a testamentary disposition of homestead property is forbidden by law when the testator leaves a wife or a child.
>
> If the property was, and continued to be, in fact and in law, a homestead, the alleged trust deed, not being an absolute conveyance of any vested estate in the land to take effect during the grantor's lifetime, is apparently ineffectual for the purpose designed.

66 So. at 159.

In *Estate of Johnson*, 397 So.2d 970 (Fla. 4th DCA 1981), a decedent was survived by five children, one of whom was a minor. The decedent had executed a revocable inter vivos trust in which he was the trustee and lifetime beneficiary. The decedent executed and recorded a deed conveying title to his residence to himself as trustee. The trust provided for distribution of the decedent's residence to one of his adult children upon his death. After his death, the mother of the decedent's minor child sought to invalidate the attempted disposition of the decedent's residence as an invalid attempt to alienate homestead property contrary to the provisions of the Florida constitution. The trial court agreed and ruled that the decedent's residence descended by operation of law as homestead property. The Fourth District Court of Appeal affirmed and ruled that placing homestead property in a revocable inter vivos trust will not avoid the homestead restrictions on devise. Its opinion discussed the *Johns v. Bowden* opinion at length, and further discussed Florida Statutes section 689.075.

> This section provides that a trust which is otherwise valid, including a trust the principal of which is composed of real property and which has been created by a written instrument, shall not be held invalid or an attempted testamentary disposition for any one or more of seven specified powers retained by the settlor, two of them being the power to revoke or amend the trust and the power of the settlor to retain the right to receive all or part of the income of the trust during his life or for any part thereof. Try as we may, we do not believe we can construe this statute to avoid the effect of the Supreme Court's decision in Johns v. Bowden, supra.
>
> Just as in the Johns case, it is obvious that the decedent here, as the settlor, was retaining all equitable right, title, possession and interest in the property until his death. If Section 689.075 was construed to authorize the devise of homestead property in the manner involved herein, it would contravene the homestead provisions of the Florida Constitution, as interpreted by the Florida Supreme Court in Johns, supra. We hold only that Section 689.075 does not authorize a disposition of homestead property that is prohibited by the Florida Constitution.

397 So.2d at 973.

In both the *Johns* and *Estate of Johnson* cases, the settlor retained the right during lifetime to direct a conveyance of the title and the entire beneficial interest to other persons

(including the settlor) at the settlor's pleasure. The interest that was conveyed was not a vested right in the homestead property to any of the beneficiaries named in the trust instrument, but was a contingent interest subject to the right of the settlor to direct the trustee to convey the property to others during the settlor's lifetime. Because of the retention of the entire beneficial estate in the settlor during life, in each case the trust instrument was in effect an attempted testamentary disposition of homestead property in contravention of the restrictions set forth in the Florida constitution. Under the rationale of these cases, an inter vivos conveyance of homestead property will not be considered a "devise" and will not be subject to the restrictions on devise of homestead property upon death, provided that certain conditions are met.

To avoid the constitutional restrictions, there must be a valid inter vivos conveyance of a vested interest to one or more persons other than the homestead owner, and the homestead owner cannot have the power to revoke the interest that is conveyed, or to revest the interest in the owner. For example, an unmarried father could create an irrevocable trust for the benefit of his minor child and convey title to his residence to the trustee, with reservation of a life estate to ensure his own occupancy rights and preservation of his homestead benefits. Such a conveyance clearly would not involve a devise for purposes of the constitutional prohibition, because a vested future interest is irrevocably created in the trustee, which will be held for the use and benefit of the father's daughter and which will become a present possessory interest in fee simple upon the termination of the preceding estate (the father's retained life estate).

The father probably would not want to convey permanent and irrevocable interests in his residence simply to avoid a problem that won't exist if he doesn't have a minor child surviving him when he dies. If the father's child has reached age 18 before he dies, there will no longer be any restrictions on devise, and the father can devise his homestead as he wishes by will or by disposition in a revocable trust (assuming that he has not remarried and does not have another minor child, of course). But the father doesn't have to choose between making an irrevocable conveyance of his fee simple absolute interest in his residence in order to do proper estate planning, versus doing nothing and hoping that he will be alive to do proper estate planning when his child becomes an adult. There is a middle ground: the father can convey a vested interest now which will provide for his child in the manner he wishes if he should die while the child is a minor, and also retain a reversionary interest in the property which will cause full fee title to revest in him and allow him to do planning in the future when the constitutional prohibitions have expired – automatically, and without any retained rights to revoke the transfer to the trustee (which would invalidate the transfer as an ineffectual devise under the *Johns* case).

The father can accomplish this result by conveying a vested remainder interest in his homestead to the trustee (the interest is a remainder interest because it follows the life estate that the father needs to retain, and it is vested because there is no condition precedent to its becoming a present possessory interest other than the natural termination of the father's preceding life estate). The trustee's interest can be created as a vested remainder in fee simple determinable, or as a vested remainder in fee simple subject to a condition subsequent, either of which will cause fee simple title to revert to the father if he is alive on his child's eighteenth birthday. The exact nature of the interest conveyed to the trustee and the interest retained by the father (fee simple determinable and a possibility of reverter, or fee simple subject to a condition subsequent and a right of entry) will depend on the precise wording used in the conveyance. The resulting

consequence either way, however, is that the father will have made an irrevocable inter vivos transfer of a vested interest in his homestead property. The father will not retain any power to revoke the vested interest that he has conveyed to the trustee; he cannot direct the trustee to reconvey the property back to himself; and he cannot sell the interest in the property conveyed to the trustee and distribute the proceeds to himself. If the father should die before occurrence of the event that would cause fee simple title to revert to him, the conditional limitation on the trustee's fee simple title will disappear, and the trustee's title will become an estate in fee simple absolute.

The father could set forth the terms of the conditional limitation on the trustee's fee simple interest in the deed of conveyance to the trustee, but it is unnecessary to do so and would seem to be better planning to set those terms forth in the trust instrument. For example, the trust instrument might direct the trustee to convey title to the homestead property to the father if he is alive on a date certain (such as the date of his child's eighteenth birthday).

Of course, once a vested interest in the homestead property has been conveyed to a third person such as a trustee, the homestead owner can no longer sell or convey full fee title to the homestead property without joinder of that third person. In our hypothetical situation, the father at most can only convey or sell his retained life estate and his possibility of reverter (or right of entry) in his homestead, and it will be necessary for the trustee to join in with the father and convey the trustee's vested remainder interest if title in fee simple absolute is to be sold to a third party while title is split in this manner. For that reason, if homestead property is conveyed into trust, selection of the trustee will be very important. An unlimited lifetime power to remove and replace trustees (outside the safe harbor set forth in Internal Revenue Service Revenue Ruling 95-58) is usually avoided in careful estate planning because it could cause the trust estate of an irrevocable inter vivos trust to be included in the gross estate of the grantor upon death (unless there are other safeguards in the trust instrument, such as restricting the trustee's authority to make distributions to the ascertainable standards set forth in Internal Revenue Code section 2041). As noted earlier, because of the homestead owner's retained interests, the residence will normally be included in the homestead owner's gross estate for estate tax purposes at death anyway, and thus there would be no concerns with the homestead owner retaining broad powers to remove and replace trustees under the terms of the trust instrument. Nevertheless, it might be better for the homestead owner not to retain a totally unlimited and absolute power to remove and appoint trustees, in order to eliminate an argument that the homestead owner has retained such total control over the homestead through the unlimited power that the arrangement is an illusory arrangement tantamount to a prohibited devise.

2. Federal Gift Tax Concerns.

As discussed above, an irrevocable conveyance of an interest in property will subject the transfer to federal gift tax if the transfer is not made for adequate and full consideration in money or money's worth. If it is important to avoid those consequences, the trust instrument must be drafted to include provisions that will cause the gift (which must be irrevocable for purposes of Florida law in order not to be tantamount to a devise) to be an irrevocable but incomplete gift for federal gift tax purposes. This can be accomplished by having the owner of the homestead property retain a power in the trust instrument to alter the beneficial use and enjoyment of the

interest that is conveyed among any one or more of the beneficiaries of the trust, as long as the power cannot be exercised in favor of the owner. See Treasury Reg. section 25.2511-2(c):

> A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

For example, the homestead owner could retain the power to direct the trustee to exclude any one or more persons initially included in the class of beneficiaries from enjoying future benefits from the trust, or to increase the interest of a beneficiary at the expense of other beneficiaries.

To avoid an argument that a retained power of appointment can be indirectly exercised in favor of the grantor (and thus be characterized as a revocable transfer that will not avoid the constitutional restrictions on devise), the trust instrument should also prohibit exercise of the power in favor of the grantor's creditors, the grantor's estate, or the creditors of the grantor's estate, or in a manner that would discharge a legal obligation of the grantor. Those classes follow the terminology used in section` 2041 of the Internal Revenue Code, which provides that certain limited powers of appointment will not cause property subject to the power to be included in the gross estate of the holder of the power. As already noted, use of that terminology is not needed for estate tax reasons. Rather, the terminology of section 2041 sets forth a clear demarcation line between the types of powers in which the holder of the power has a personal economic interest and those in which the holder of the power has no direct or indirect personal economic interest. In both the *Johns* and *Estate of Johnson* cases, the homestead owner had retained the entire beneficial interest and right in the property, such that no interest could pass to other persons until the owner's death. The types of retained powers in those cases were so broad and unlimited that by their very nature the settlor of the trust had retained the entire beneficial estate in the homestead property.

With these safeguards, and because the homestead owner will have irrevocably conveyed a vested interest in the homestead property to the trustee, such a limited power of appointment should not be regarded by the courts as a retained power of revocation. Nevertheless, it would be prudent to limit the scope of the class of permissible appointees to persons who are included in the class of beneficiaries identified in the trust instrument, and not allow exercise of the power in favor of persons not included in the class of beneficiaries identified in the trust instrument. For example, if the trust is a discretionary trust exclusively for the benefit of the owner's descendants living from time to time, the owner could exercise a power of appointment to exclude a child of the owner as a beneficiary, or to increase the share passing to one child and decreasing the shares passing to other children, but the owner could not direct that distributions be made to the owner's spouse or to anyone else not a descendant of the owner. To further eliminate arguments that the arrangement "is, in legal and practical effect, and operation a will," (*Johns, supra*), the power of appointment should be restricted so that it can only be exercised during the owner's lifetime, and thus cannot be exercised by will or by any other instrument effective upon the owner's death.

Great care should be exercised before transferring homestead property owned by a married couple as tenants by the entirety into such a trust arrangement. The federal estate tax marital deduction could be lost because of the nondeductible terminable interest rules under Internal Revenue Code section 2056. Those rules provide that if an interest in property passes or has passed to someone other than the surviving spouse for less than adequate and full consideration in money or money's worth, a terminable interest in the same property passing to the surviving spouse cannot qualify for the marital deduction if the spouse's interest will terminate and that other person will enjoy any part of the property after the spouse's interest has terminated. See example 5, Treasury Reg. section 20.2056(b)(1)(g):

> H transferred real property to A by gift (reserving the right to the rentals of the property for a term of 20 years. H died within the 20-year term, bequeathing the right to the remaining rentals to a trust for the benefit of W. The terms of the trust satisfy the five conditions stated in §20.2056(b)–5, so that the property interest which passed in trust is considered to have passed from H to W. However, the interest is a nondeductible interest since it will terminate upon the expiration of the term and A will thereafter possess or enjoy the property.

This rule might not be violated if it is clear that the vested interest passing to the trustee from the first spouse to die terminates upon the death of that spouse, and therefore no portion of the deceased spouse's interest passes to anyone other than the surviving spouse. The rules are complicated, the concepts are intricate, and the potential adverse consequences are draconian in a potentially taxable estate. Violation of the rule would result in no marital deduction for the decedent's interest in the residence even though the entire interest retained by the deceased spouse passes to the surviving spouse. Prudence would dictate that this type of planning not be conducted for spouses who own homestead as tenants by the entirety without great care and perhaps only if guidance in the form of a binding ruling is obtained in advance.

If the nonqualifying terminable interest rules are implicated, the trustee of the irrevocable trust would have to purchase the remainder interest from the spouses for fair market value. That would require an appraisal and actuarial analysis, and it would be highly advisable to file a gift tax return to disclose the transaction to avoid any surprises in the future. Given the difficulties and complexities involved, it is highly unlikely that many married couples would want to go to the trouble and expense to do such planning, and would instead be willing to assume the risk that at least one spouse would survive until all of the couple's children reach the age of 18.

E. Florida Statutes section 732.4017.

With all of these considerations in mind, in 2010 the Florida legislature created section 732.4017. The statute was a proposal of the Real Property, Probate and Trust Law Section of The Florida Bar. It refers to common law property concepts from the law of future interests, and identifies how various interests in homestead property can be separated so that vested future interests can be conveyed inter vivos and held in trust while a present possessory interest is retained, allowing the current enjoyment of homestead status (real property tax benefits and protection from creditors) and accomplishing effective post mortem planning without violating the constitutional restrictions on devise. The statute does not create new law. It does not attempt to interpret or vary the meaning of the provisions of Article X, section 4 of the Florida constitution. Instead it illustrates how well-settled property law concepts can be used to plan for homestead property without the use of testamentary planning, which would invoke the constitutional restrictions on devise. The statute identifies several safe harbor planning techniques which can be used to preserve flexibility to adapt to changing facts and circumstances and also to avoid federal gift tax problems, without running afoul of the necessity that an irrevocable transfer of an interest in property be made inter vivos.

Because the statute does not create new law, but only illustrates how well-settled property law concepts can be used to plan for the post mortem disposition of homestead property, the statute states that the legislative intent is to clarify existing law. Accordingly the statute also applies to transfers of property that were made before its enactment. *See Stone v. Stone,* 157 So.3d 295 (Fla. 4th DCA 2014) ("The statute expressly states that it was intended to clarify existing law.").

The statute is set forth below.

> (1) If the owner of homestead property transfers an interest in that property, including a transfer in trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred does not descend as provided in s. 732.401 if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.
>
> (2) As used in this section, the term "transfer in trust" refers to a trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor's lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate or exercised to discharge the transferor's legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.

(3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:

(a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or

(c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.

(4) It is the intent of the Legislature that this section clarify existing law.