

**Florida Homestead Laws:  
What Real Estate Agents Should Know  
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**I. BACKGROUND**

Homestead is a term that has multiple characteristics depending upon the current topic of discussion. The most common are: 1. real estate tax exemptions; 2. protection from creditors; and 3. the effect on Probate upon the demise of an owner and the potential impact of the way in which the property is titled. This article will discuss the basics of these concepts in relation to what knowledgeable agents should know to ensure a smooth listing and ultimately a transaction.

The Florida Constitution defines Homestead as “real property that is owned by a natural person who is a Florida resident.” The owner must “have made or intend to make the real property his or her permanent residence or that of his family.” Essentially, Homestead is the dwelling and surrounding land where an individual or their family reside as their primary home.

The Florida homestead Tax Exemption reduces the amount that an individual who has met the homestead requirements can deduct from their Ad Valorem Taxes each year and caps the rate at which property assessments may be increased annually.

Another benefit provided by Florida Homestead laws are protection from creditors. If an individual has met the Homestead requirements, creditors cannot force the sale of the property to satisfy the owner’s debts, nor can they touch the proceeds of a recent sale, within limits, if the homeowner intends to use the proceeds to purchase another Homestead in Florida within a reasonable period of time. There are, however, four exceptions to this protection. They are:

- The State of Florida may collect past due property taxes;
- Mortgages;
- Liens for work performed in repairing or improving the property;
- Any creditor with a lien that pre-dates the establishment of homestead; and
- IRS Liens.

Homestead property is not necessarily Real Property. Homestead property can also be House boats, Mobile homes, Rental Property, and Leasehold interests. For the purposes of this article we will consider only the sale or devise of Homestead property and not the creditor protections, or tax implications.

**II. RESTRICTIONS ON SALE OR DEVISE**

Homestead protections and exemptions protect an owner during their lifetime, as well as the owner’s surviving spouse and heirs after the owner dies. There are significant and complex restrictions on what an owner may do with the Homestead property on devise and how this may inure to ownership in a revocable trust. These restrictions are aimed solely to protect the surviving spouse and heirs. These restrictions are set out in Article X, Section 4(c) of the Florida

Constitution which states: “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. “

Of the protections provided to Homestead Property by Florida law, the most important to Real Estate Agents are those that restrict the sale or devise of Homestead property. These restrictions apply if the spouse is living or upon devise after the death of a spouse. A married owner can only mortgage, gift or sell the Homestead to themselves or their spouse or to themselves and the spouse, unless the spouse also signs the deed or mortgage or signs a waiver. A waiver is most commonly seen in the context of a pre-nuptial or post-nuptial agreement. The restriction may conceptually apply to transferring real property to a revocable trust. This is true even if the spouse doesn’t have an ownership interest in the property. In the state of Florida, beneficial or equitable interests in property, undivided interests in property, or the present right to possession of the property have also been found to qualify as Homesteads. This is of special interest to Real Estate Agents because a spouse’s equitable interest in property, titled in the other spouse’s name, is enough to qualify a property as a Homestead. In other words: a spouse who does not hold legal title to the property must still be a party to the sale or transfer of the property if it is Homestead property. If an Owner is not married; or has obtained a waiver from the spouse; or the spouse has disclaimed their interest in the Homestead property and does not have minor children; or the property does not constitute the Homestead of the married Owner; the Owner is free to transfer and devise the property however they wish without joinder of the spouse.

According to Florida Statute §732.4015 the term “owner” includes the grantor of a Trust and the term “devise” also includes the alienation of a Homestead through a trust. This means that if a Property passes through a testamentary devise or a revocable trust, the effect of the restrictions on alienation of the Homestead will essentially be the same.

Other characteristics of Homestead Property:

1. Unlimited protection from creditors (some limitations in a bankruptcy and other exclusions such as the IRS).
2. Real Estate Tax reduction of \$50,000 from assessed value.
3. Three percent cap on annual assessment increases commonly known as "Save Our Homes" (SOH) was a constitutional revision that took effect January 1, 1995 which annually limits the increase in the assessment of homesteaded properties at 3% or the Consumer Price Index (CPI) whichever is less. This can accumulate and be ‘ported’ to a different Homestead Property.
4. There are other real estate tax exemptions available such as a Disability Exemption, Widow/Widower Exemption, Blind Exemption, Military Service-Connected Total and Permanent Disability Exemptions.

### **III. RESTRICTIONS IN A NUTSHELL**

- Married owners cannot alienate (sell) Homestead property without the spouse's approval or a waiver regardless of the spouse's ownership interest in the Homestead property.
- If there are minor children that survive the owner, the Homestead cannot be transferred to anyone other than the minor children, not even a spouse.
- If only the spouse survives the owner and there are no minor children, ownership of the Homestead can only be devised to the spouse in fee simple.

Absent any of these restrictions, Homestead property is considered to have passed "in the twinkling of an eye" to its rightful owner. If the Homestead is not devised as authorized by law and the constitution, Florida Statute 732.401 provides the surviving spouse, if any, with a life estate in the property and a vested remainder to the descendant or in the alternative, the surviving spouse may elect to receive a one-half interest in the property as a tenant in common with the descendants. However, the aforementioned election of a one-half interest in the property as tenant in common must be made within six months of the death of the decedent. Because Homestead passes outside the estate, this includes all possible descendants regardless of whether or not an existing estate plan for the estate exists. Even though Homestead Property technically passes outside the Probate Estate, a judicial proceeding will likely be necessary to accomplish this.

The only avenue by which a person can freely devise their solely owned Homestead when they are married is a spousal waiver, or if the spouse disclaims the property after the owner's death. Florida Statute 732.702 controls how waivers by a spouse of the elective share, intestate share, Homestead, and exempt property, are controlled. A waiver must be signed, in the presence of two witnesses and Fair disclosure is required if signed after marriage. No disclosure is required if signed before marriage.

#### **IV. What should Real Estate Agents be Aware of?**

As a Listing Agent, what you know or do not know about a Seller could potentially save or destroy a transaction. The above restrictions can make or break a sale depending on the Seller's current family situation, and marriage status. Experienced Agents know that among the first things in preparation for a new listing appointment, is researching the Seller. In Florida, adding a few questions about potential minor children or marital status to that initial list of To Do's can save you a lot of headache down the road.

1. The property appraiser's site will indicate whether the property has homestead status for real estate tax purposes. This is a good indication of whether the property is homestead but is **NOT DISPOSITIVE** as circumstances may have changed since the tax record was created. This site will also indicate the identity of the assessed owners and where the real estate tax bill is sent. If the bill is sent other than to the property address it is more likely (but not definitely) that the property is not homestead. The agent must account for all assessed owners who would be required to sign the listing agreement failing which a discussion would occur as to who was not able to and the circumstances behind such failure. The

existence of deceased individuals on the title should provoke a discussion concerning the existence and necessity of a Probate. If uncertain as to how to proceed, an attorney should be consulted.

2. If the owner is married and the property does not appear to be homestead, then the spouse may not be needed. However, if the Property **could** be homestead, it would be most prudent to have the spouse sign the listing agreement and the Sales Contract. This may provoke a discussion but it would be better to learn of potential problems at listing time rather than closing time when the settlement agent requires the spouse to join the deed and the spouse refuses and has not signed the Sales Contract. If a spouse has died, you will need a death certificate, and possibly other documentation to clear the title for a sale.

- a. If there are deceased owners, another issue the agent may want to inquire concerning is the applicability and completion of the filing of Federal and Florida Estate Tax Returns.

- b. On the purchasing side, should you have a client with an estranged spouse who is not divorced who wishes to buy a home, proper estate planning with an attorney is essential to ensure that the home does not become subject to the Homestead traps as discussed above.

## V. CONCLUSIONS

The experienced Sales Agent that encounters a deceased owner will generally consult with an experienced and knowledgeable attorney concerning the steps that will be necessary to list and close a transaction instead of waiting until closing to learn that a Probate proceeding will be necessary. The necessity of such a proceeding can significantly delay or depending on external factors, family cooperation etc., prevent the transaction from closing in its entirety.

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