

**BOSONETTO AND THE PROS AND CONS OF HOMESTEAD IN REVOCABLE TRUSTS\***  
**October 16, 2002**

**Presented By:**  
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I. Remembering the basics

A. The Florida Constitution, Section 4(a) of Article X, provides the basic physical limits of homestead property and describes the exemption from forced sale:

*Section 4. Homestead - Exemptions.*

*(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:*

*(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;*

*(2) personal property to the value of one thousand dollars.*

*(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. Statutory language under Fla. Stat. §732.401 codifies the homestead exemption and makes clear the permissible descent of homestead real property under Article 10, §4(a)(2)(c) of the Florida Constitution.

Fla. Stat. §732.401 (2002). *Descent of homestead.*

(1) *If not devised as permitted by law and the Florida Constitution, then the homestead shall descend in the same manner as other intestate property but if the decedent is survived by a spouse and lineal descendants, then 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.*

(2) *Subsection (1) shall not apply to property that the decedent and the surviving spouse owned as tenants by the entirety.*

C. Establishing homestead. For real property to achieve homestead status it must meet the following four requirements:

(1) The real property must be owned by a “natural” person.

(2) The individual must be a Florida resident.

(3) The property must be the residence of the owner or his or her family.

(4) The property must meet the size and contiguity requirements.

D. Florida Probate Code, §732.4015(2)(a). “Owners” can include Grantors of revocable trusts.

Fla. Stat. §732.4015 (2002). *Devise 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 §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.*

## II. Case law permitting homestead status for homestead held in revocable trusts

A. In HCA Gulf Hospital v. Estate of Downing, 594 So.2d 774 (Fla. App. 1 Dist. 1991), the court found:

(1) The decedent’s estate consisted entirely of real property with her husband designated as personal representative.

(2) Husband petitioned to administer decedent’s estate and to declare the real property which had been devised in trust for their daughter as homestead.

(3) HCA Gulf Coast Hospital (HCA), which had obtained a judgment against the estate, objected to the property being declared as homestead because the property had been devised not to the daughter but to a non-heir, the trustee and the former husband, and thus homestead protection had been extinguished.

(4) The court concluded that because the obvious intent of the decedent was that her homestead would inure for the benefit of her daughter, the technical form in which title to the property was held, which was in the form of a spendthrift trust, would not deprive the daughter of the exemption protection.

(5) The exemption from forced sale applied to homestead devised to the trustee of a spendthrift trust.

(6) Also see Estate of Johnson, *infra*, and Estate of Donovan, *infra*.

### III. Advantages of placing the homestead in a revocable trust

(A) Lower probate costs.

(B) Probate avoidance.

(C) Guardianship avoidance.

(D) In Estate of Johnson, 397 So.2d 970 (Fla. App. 4 Dist. 1981), homestead is still homestead if placed in trust.

(1) Homestead status could not be avoided by putting property into trust.

(2) Grantor survived by minor child.

(3) Grantor, in his trust, conveyed homestead to daughter.

(4) Because of retention of beneficial estate during Grantor's life, the trust was an attempted disposition.

(5) The property was homestead regardless of legal title in trust.

(6) See Johns v. Bowden, 155 So.2d 6 (Fla. App. 2 Dist. 1914).

(E) In Estate of Donovan, 550 So.2d 37 (Fla. App. 2 Dist. 1989), homestead is still homestead if devised to spouse in trust.

(1) Grantor conveyed homestead to trust.

(2) Will provided all assets pour over into trust and trust provided all assets in trust to wife.

(3) Adult daughter argued that the disposition was not in accordance with laws of descent and distribution because the disposition was not a direct devise to wife. Therefore, wife received a life estate, with the remainder to daughter.

(4) Grantor only owned one-half interest but court found all of Grantor's fee simple went to spouse under trust.

(5) Homestead to trust was valid.

(F) In Havoco of America, Ltd., 790 So.2d 1018 (Fla. 2001), homestead is still homestead if purchased by non-exempt funds with intent of hindering, delaying or defrauding creditors.

(1) Hill filed bankruptcy claiming certain real property was homestead.

- (2) Havoco, the claimant, objected because Hill converted non-exempt assets into homestead with intention to hinder, delay or defraud his creditors.
- (3) Transfer of non-exempt assets into exempt homestead is not exception to homestead constitutional protection. "The legislature is powerless to affect the rights provided under the homestead exemption through statutory enactments." *Id* at 1030.
- (G) In Estate of Hamel vs. Parker, 821 So.2d 1276 (Fla. App. 2 Dist. 2002), homestead is homestead even in absence of court order.
  - (1) Decedent died owning homestead.
  - (2) Will disposed of homestead to adult daughters through residual clause that allowed property to be distributed in kind.
  - (3) Daughter sold property without order determining homestead.
  - (4) Title company required house deeds from personal representative and daughters.
  - (5) Claims were filed against estate.
  - (6) Personal representative then filed petition to determine homestead.
  - (7) Creditor filed motion in opposition of homestead.
  - (8) Trial court denied the petition to determine homestead as the property was sold and converted before a formal determination was made and thus proceeds were not exempt.
  - (9) Appellate court concluded that property rights passing because of death are vested at time of death.
  - (10) Homestead rights exist and continue even in absence of court order.
  - (11) Still exemption if personal representative is given option to distribute property either in kind or through proceeds of sale.
  - (12) Homestead can be part of estate and subject to creditors if the will specifically orders that the property be sold and the proceeds be divided among the heirs.
- (H) Due on sale clauses not triggered on transfers to trusts.
  - (1) Garn-St. Germain Act of 1982.
  - (2) 12 CF.R. §591.5, 12 U.S.C. ¶1701-j3 (1998).  
*"With respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on the stock allocated to a dwelling unit in a cooperative housing corporation, or on a residential manufactured home, a lender may not exercise its option pursuant to a due on sale clause upon..."*  
*"(8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a*

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(I) Real estate homestead tax exemption.

(1) Fla. Stat. §196.031(2002) of the Florida Statutes provides the following in part:

*“(1) Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of...”*

(2) See Exhibit “A” and “B” for sample language provided, in part, by Robert M. Arlen, Esquire from the outline “Transfers of Real Property to and from Trustees” from Florida Bar seminar presentation, “Title Issues and Answers in Estate Planning and Probate,” November 21, 1996.

(3) Chapter 2002-52- Laws of Florida. Fla. Stat. §196.075 permits an additional \$25,000 homestead exemption to persons 65 and over with income not exceeding \$20,000.

(J) Documentary stamp tax exemption.

(1) Fla. Adm. Code §12B-4.013. Conveyances subject to tax:

*“(33) <Trusts>. Pursuant to Chapter 689, F.S.: A deed to or from a trustee conveying real property is taxable to the extent that the deed transfers the beneficial ownership of the real property and to the extent that there is consideration for the transfer. The following are examples of taxable and exempt conveyances to or from a trustee.*

*(a) No change in Beneficial Ownership: A deed from X to a trustee is exempt from the stamp tax to the extent of X’s beneficial ownership interest as a <trust> beneficiary, whether or not the real property is encumbered by a mortgage. For example, if X owns encumbered or unencumbered real property and conveys it to the trustee of a <trust> of which X is the sole beneficiary, the conveyance is exempt from the stamp tax.”*

(2) Applies even if mortgage on property.

(K) Possible use of “Lady Bird Deeds.” (Taken in part from outline “Transfers into Trusts and Related Issues” by Patricia P. Jones, V.P., Underwriting, Attorneys Title Insurance Fund, Inc., May 17, 2002).

- (1) Transfer into life estate and remainder interest, with life tenant able to divest remainder interest.
- (2) Example:  
*"Sam Jones, for life, without any liability for waste, and with full power and authority in said life tenant to sell convey, mortgage, lease or otherwise manage and dispose of the property described herein, in fee simple, with or without consideration, without joinder of the remainderman, and with full power and authority to retain any and all proceeds generated thereby, and upon his death to Melinda Jones as Trustee of the Sam Jones Revocable Trust dated \_\_\_\_\_."*
- (3) Avoids probate of real property.
- (4) Preserves homestead protection.
- (5) Have to record in public records.
- (6) Does not avoid joinder for homestead.
- (7) Still elective share issues.

IV. Disadvantages of homestead transfers to revocable trusts

A. In Bosonetto, 271 B.R. 403, (M.D. Fla. 2001):

- (1) Debtor, Bosonetto, a former resident of Michigan, was sued by a third party in 1994 for personal injuries sustained on her property in Michigan.
- (2) After receiving a judgment in favor of the third party, Bosonetto appealed the judgment and at the same time sold her home for a cash sum and received a contract for the remaining balance.
- (3) In 1997 Bosonetto established a revocable trust and conveyed all her tangible and intangible property to it.
- (4) Language in the trust stated that "even though record ownership or title, in some instances, may presently or in the future, be registered in my individual name, in which event such record ownership shall hereafter be deemed held in trust even though such trusteeship remains undisclosed."
- (5) Bosonetto specifically assigned the contract for deed from the sale of property to the trust.
- (6) The proceeds from the sale of the home in Michigan were used to buy a house in Florida, titled in Bosonetto's name with her daughter as joint tenants.
- (7) After losing the appeal Bosonetto filed for bankruptcy seeking to exempt her home as homestead property.
- (8) The trustee in bankruptcy sought to avoid the exemption for the property.
- (9) The Florida bankruptcy court found that despite the fact that the real estate was titled in the woman's personal name, because she had signed a revocable trust instrument before acquiring the property which

recited that it owned all her assets, the court held the trust constructively owned the home.

(10) The court found the homestead protection was lost because the revocable trust was not a “natural person.”

(11) This case would likely first be appealed to Federal District Court then to the 11th Circuit, and the 11th Circuit would likely certify the question to the Florida Supreme Court. A timely resolution of the matter is not expected.

(12) Bosonetto stands only for proposition that if you are in bankruptcy, and the homestead is in your revocable trust, then it is not exempt from creditors’ claims. Consider a transfer out of the trust such as in Havoco, supra.

B. In Elmowitz v. Estate of Zimmerman, 647 So.2d 1064 (Fla. App. 3 Dist. 1994), the court found that after homestead transferred into trust that homestead property lost its homestead status.

(1) Gloria Zimmerman died in 1985 and her will devised homestead into trust.

(2) Beneficiaries of trust were sister and sons (50% to sister and 50% in trust to sons).

(3) Sons waived all rights and quit claimed deeds to sister.

(4) Originally, personal representative filed petition to determine that property was not homestead. Court found that property was homestead but as decedent was not survived by spouse or minor child, the property lost its homestead status. Court also noted that the property was not specifically devised to sister and that the sister was only entitled to equivalent in value from trust assets.

(5) Elmowitz filed claim.

(6) Estate reopened to determine that property was homestead and the court determined sister was sole heir and that devise was homestead.

(7) Court concluded that because decedent was not survived by spouse or minor child, and because property was transferred into trust, property lost its homestead status.

(8) Court pointed out that sister had already petitioned the court and that “she will not be permitted to gather fruit out of season in a garden of equity.” Id at 1065.

(9) Court further noted that even if the earlier order determining the property was not homestead was in error (which the court did not opine on), then the error was induced and the sister could not now argue differently.

C. In Estate of Morrow, 611 So.2d 80 (Fla. App. 2 Dist. 1992), the court determined petitioner has no standing to determine homestead.

(1) Mrs. Morrow transferred her home into her revocable trust before she died May 11, 1988.

- (2) Mrs. Morrow had no spouse and no heirs.
- (3) Personal representative petitioned the court to determine whether home was an estate or trust asset.
- (4) Probate court found property was decedent's homestead and petitioner could not alienate it; and, therefore, home was in estate.
- (5) Trustee argued transfer was permissible because there was no spouse or heirs, and, therefore, was a gift to the trust making the alienation valid under the Florida Constitution.
- (6) Appellate court found that the personal representative had no basis to contest validity of transfer when there was no spouse or heirs.

D. Title insurance.

- (1) Transfer into revocable trust may not preserve title insurance. (Taken in part from outline "Transfers into Trusts and Related Issues" by Patricia P. Jones, V.P.-Underwriting Attorneys Title Insurance Fund, Inc., May 17, 2002.)
- (2) In Covalt v. First American Title Insurance Co., 105 F.3d 669 (10th Cir. 1997) (unpublished), the court found no protection.
  - (a) The Settlor, Maytag, purchased a ranch in 1969 and received a title insurance policy insuring access.
  - (b) In 1988 Maytag conveyed the ranch by a quit claim deed to the Maytag trust.
  - (c) Maytag died in 1990.
  - (d) Covalt, as trustee of the trust, discovered an access problem when he tried to sell the ranch in 1993.
  - (e) Because Covalt could not provide the buyers with an insured right of access the buyers refused to pay more than seventy percent of the ranch's original purchase price.
  - (f) Covalt sued the insurer for breach of contract and lost when the insurer successfully argued that the policy insured only the original insured and his "heirs, devisees and personal representative of such insured."
- (3) Solutions:
  - (a) Trustee can purchase a new title policy.
    - (i) High costs.
    - (ii) Insures the validity and priority of the deed into the trust.
    - (iii) Affords full protection against title defects.
    - (iv) Insurance can be increased to cover appreciation since the date of the original policy.
  - (b) Insured can convey to the trustee by warranty deed.
    - (i) Policy provision continues coverage to the insured "so long as the insured shall have liability by reason of the covenant of warranty made by the insured in any transfer or



conveyance of the estate or interest.”

(ii) Disadvantage is that in order to trigger coverage, the Grantee must make a claim against the Grantor.

(iii) If Grantor dies, then warranties die with Grantor.

(iv) Measure of damages is limited to the consideration paid.

(c) Limited coverage may result for the trustee as long as the named insured is alive, whether or not a transfer is by warranty or quit claim deed.

(d) The Fund will recognize the person named in the policy as its insured after the insured has transferred title to the trustee of his or her revocable trust provided the insured has retained an interest under the trust.

E. Summary Probate - Order of Homestead.

(1) Homestead is technically not a probate asset (see Fla. Stat. §§733.607 and 733.608), but can be determined via a summary administration. Under Ford v. Ford, 581 So.2d 203 (Fla. App. 5 Dist. 1991), however, the court found:

(a) Ford died after transferring homestead into trust.

(b) Wife was sole beneficiary.

(c) Wife petitioned court for summary administration and to determine homestead status with no assets in estate.

(d) Because there was no real property in estate, there was no authority to determine homestead.

(2) In Burns v. Estate of Cobb, 589 So.2d 413 (Fla. App. 5 Dist. 1991), the court found:

(a) Mr. Cobb died in 1988 owning a homestead while living with an unrelated party, Ms. Burns.

(b) Mr. Cobb's sons filed a petition for homestead and received a ruling that property was homestead.

(c) Ms. Burns filed petition to reopen estate alleging she had ownership interest because she provided funds for improvements in homestead.

(d) Probate court denied petition because an estate was never opened to be reopened.

(e) Because Ms. Burns was not a party when homestead was determined, and because she was not noticed, she was not legally bound by the determination of homestead.

(f) Appellate court found that Ms. Burns could place an equitable lien on the homestead for the improvements and she should be allowed to pursue a remedy in the ejectment action previously brought by the sons in another forum.



### Homestead References

- Mary A. Robinson, Michael W. Fisher, *Florida Homestead, A Difficult Post-mortem Estate Tax Planning Property*, 76 Fla. B.J. 18 (Jan. 2002).
- Jules S. Cohen, *The Use of the Florida Homestead to Defraud Creditors*, 72 Fla. B.J. 35 (Dec. 1998).
- Rohan Kelley, *Homestead Made Easy: Trail Map #1*, 19 Fla. B.J. 18 (June 1996).
- R. Craig Harrison, *Homestead - The Post-Death Spousal Disclaimer: A Cure for a Constitutionally Prohibited Disease?*, 70 Fla. B.J. 42 (April 1996).
- Rohan Kelley, Tae Tanya Kelley, *Homestead Made Easy: Part 3a: How to Find the Courthouse and What to Do Next*, 69 Fla. B.J. 56 (August 1995).
- Rohan Kelley, Tae Tanya Kelley, *Homestead Made Easy: Part 3: How to Find the Courthouse and What to Do Next*, 69 Fla. B.J. 105 (June 1995).
- David E. Peterson, Robert F. Higgins, Matthew E. Beal, *Is the Homestead Subject to the Statute on Fraudulent Assets Conversions?*, Fla. B.J. 12 (Dec. 1994).
- Greta K. Kolcon, *Common Law Equity Defeats Florida's Homestead Exemption*, Fla. B.J. 54 (Nov. 1994).
- James Edward Cheek, Nancy S. Freeman, *Judgment Liens on Homestead Which Are Not Avoidable in Bankruptcy, Timing is Everything*, Fla. B.J. 30 (April 1994).
- Rohan Kelley, *Homestead Made Easy, Part II: Homestead in the Real World*, 65 Fla. B.J. 19 (April 1991).
- Rohan Kelley, *Homestead Made Easy, Part I: Understanding the Basics*, 65 Fla. B.J. 17 (March 1991).

**EXHIBIT "A"**  
**TRUST HOMESTEAD CLAUSE**

**Reservation of Possessory Rights in Homestead for Exemption Purposes**  
**Confirmation of Expressed Agency**

The Grantor, \_\_\_\_\_, shall have the right to possess, use and occupy any real property or cooperative apartment held by this Trust as the Grantor's homestead and no provisions of this Trust shall be construed to convert this right into intangible personal property. The Trustee shall have the power and authority to protect, conserve, sell, lease or encumber, or to otherwise manage and dispose of the Grantor's homestead or any rights or interests in the Grantor's homestead on behalf of this Trust and the Grantor individual, and this power shall not be affected by the disability of the Grantor.

**EXHIBIT "B"**  
**PINELLAS COUNTY HOMESTEAD CERTIFICATE**

Prepared by and return to:  
Linda S. Griffin  
Linda Suzzanne Griffin, P.A.  
1455 Court Street  
Clearwater, FL 33756  
727.449.9800

**CERTIFICATE OF TRUST**

It is hereby certified that \_\_\_\_\_ is entitled to the use and occupancy as to an equitable life estate in real property under the terms of the \_\_\_\_\_ Revocable Trust dated \_\_\_\_\_; therefore, having sufficient title to claim the homestead exemption in compliance with the Rules of the State of Florida, Department of Revenue, Division of Ad Valorem Tax, Chapter 12D-7.11 (AGO 94-55 and AGO 90-70).

**LEGAL DESCRIPTION**

SS Number:

**EXECUTED** this \_\_\_\_ day of \_\_\_\_\_ .

\_\_\_\_\_  
, Grantor

STATE OF FLORIDA  
COUNTY OF PINELLAS

The foregoing certificate of trust was sworn to and acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, by \_\_\_\_\_, who has produced \_\_\_\_\_ as identification and who did not take an oath.

Notary Public:  
Signature \_\_\_\_\_  
Print Name Linda S. Griffin  
My Commission Expires:

N.B. This deed has been prepared at the Grantor's request without examination or legal opinion of title.