

Love & Marriage

Homestead Rules and Tenants by Entirety

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I. Homestead: Article X, Section 4(c), The Florida Constitution (1968, as amended)

A. Restraint on Devise:

1. The constitutional language: "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."
2. Planning around the rule when married owner of homestead property is survived by a spouse, but not a minor child
 - a) *Aronson held that testamentary provisions in a revocable trust are deemed a devise and if violative of the restraint, property passes by intestacy (TN 31.06.10)*
 - b) *Sec. 732.7025, F.S. Waiver of homestead rights through deed (TN 16.04.14)*
 - (1) Inapplicable if survived by a minor child
 - (2) Applies only to the devise restriction; not creditor protections or requirement for joinder of spouse on deeds/mortgages
 - (3) When applicable may be relied on without a judicial determination of validity
 - c) *Spousal Waivers TN 16.04.14*
 - (1) Premarital Agreements under Sec. 61.079, F.S.
 - (2) Waiver of Spousal Rights under Sec. 732.702, F.S.
 - (3) Judicial determination of the validity of either waiver is required for insuring purposes.
3. Planning around the rule when married owner of homestead property is survived by a minor child: Completed gifts do not involve any devise
 - a) *Irrevocable Trust*
 - b) *Tenants by the Entireties (TBE)*
 - c) *Complete divestiture of the planning parent*
 - d) *Cotenants with survivorship rights*
 - e) *Life estates with vested remainders (not enhanced life estate deeds)*
4. Planning with an Enhanced life estate Deed does not avoid the constitutional restraint on devise.
 - a) *Vested remainder subject to defeasance or contingent remainder?*
 - b) *Conflicting schools of thought; no statute on point; very little relevant caselaw*

c) *FL Bar RPPTL Section adopted new Uniform Title Standards on the subject*

d) *The Fund's underwriting positions are consistent with UTS*

(1) During the life tenant's life,

(a) remainderman not required to sign deed

(b) remainderman's liens divested by life tenant's conveyance

(c) life tenant's liens must be cleared.

(2) After the life tenant has died

(a) Evaluate for possible invalid devise

(b) Life Tenant's creditors must claim through estate

(c) Remainderman's liens must be cleared

B. Restraint on Mortgage, Sale or Gift

1. The constitutional language: "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."

2. For insuring purposes, a married owner of homestead property cannot encumber the property by mortgage nor give a deed (with or without consideration) without spousal joinder

3. Spousal joinder on mortgage

a) *no exception to the rule*

b) *Pitts v. Pastore, 561 So.2d 279 (Fla. 2nd DCA 1990): absence of spousal joinder makes mortgage voidable (not void)*

4. Spousal joinder on deed (with or without consideration) — one exception to the rule

a) *Constitutional language regarding the exception: ". . . may by deed transfer the title to an estate by the entirety with the spouse."*

b) *Sec. 689.11, F.S., language regarding the exception: "A conveyance of real estate, including homestead, made by one spouse to the other shall convey the legal title to the grantee spouse in all cases in which it would be effectual if the parties were not married, and the grantee need not execute the conveyance."*

c) *Pitts v. Pastore, supra, in dicta suggests deed lacking spousal joinder likely void (as compared to a mortgage being voidable)*

C. Creditor Protection

1. Constitutional language

a) *Subsection (a) of Article X, Section 4*

b) *“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”*

II. Tenancy by entirety (TBE)

A. Various terminology; one meaning

1. Tenancy by Entireties = Tenancy by The Entireties = Estate by Entireties = Estate by The Entireties (the type of interest in the land)

2. Tenants by Entireties = Tenants by The Entireties. (the holders of that type of interest)

3. Entireties property (the property held in this manner)

B. Characteristics of the Tenancy by The Entireties

1. Creditors Shield (TN 18.03.05)

a) *Lien against one spouse does not attach to entirety property*

b) *Fraudulent transfer into TBE could be unwound*

c) *Federal liens not barred (also TN 18.06.13)*

2. Survivorship Rights

a) *Upon death of one spouse, title vests solely in the surviving spouse even if deceased spouse is survived by a minor child*

b) *Arm's length transfer by surviving spouse to BFP divests lien of estate taxes*

c) *Continuous Marriage Affidavit recommended in current transaction*

3. No Unilateral Severance

a) *One spouse alone cannot convey to a third party and sever the TBE (TN 20.01.06)*

(1) *Separate deeds to same grantee should not be insured*

(2) *Execution in counterparts is acceptable*

b) *Both spouses must be identified as Grantors, signature of both with only one named is not proper (TN 20.01.02)*

- C. Creating an Estate by The Entireties
1. Common Law – Five Unities of Title
 - a) *Time – take at the same time*
 - b) *Title – receive title from same grantor*
 - c) *Interest – each owns an undivided share in the property*
 - d) *Possession – each has the right of possession of every part of the whole property*
 - e) *Marriage – no longer limited to “husband and wife”*
 2. Statutory provisions regarding TBE in absence of unities (TN 20.01.06)
 - a) *Sec. 689.11(1), F.S.*
 - b) *One spouse can convey to the other (lacks unity of time)*
 - (1) Grantor to grantee spouse alone with a clear expression of intent to create the TBE
 - (2) Grantor to grantor and grantee together
 3. Bright Line Rules
 - a) *Grantees must actually be married*
 - (1) Identifying grantees as married in deed (TN 20.02.03)
 - (2) If not identified as married on the vesting deed (TN 20.01.15); affidavit of marital status may be relied on for insuring (TN 20.02.05)
 - (3) Same-sex marriage is recognized in FL
 - (4) Erroneously identified as married (TN 20.01.14)
 - (5) Common Law Marriage not recognized (TN 20.02.01)
 - b) *There must not be any contrary intent expressed in the deed.*
 - (1) Deed to married individuals with no contrary intent vests title in them as tenants by the entireties (TN 20.01.10)
 - (2) The conjunction between married persons names is not an expression of any intent and will not prevent the creation of a TBE (TN 20.01.05)
 - c) *Rules of Construction*
 - (1) Given names of both spouses should appear in the deed (TN 20.02.04 & 20.02.07)
 - (2) Married couple and third person (TN 20.01.03)
 - (3) Two married couples in title (TN 20.01.04)

D. Severing the Estate by Entireties

1. Divorce

- a) *If both remain in title, default is that they become tenants in common (TN 14.02.01)*
- b) *Final Judgment of Dissolution (FJD) (TN 14.03.02) or Marital Settlement Agreement (MSA) could establish otherwise (TN 14.03.03)*
- c) *Operative language could be in either the FJD, the incorporated MSA or a FJD from a foreign jurisdiction given effect by a Florida court.*
- d) *Compliance with terms of the MSA incorporated by reference into the FJD is required*

(1) Fund Member is not required to personally review the MSA

- (a) May rely on another attorney who has reviewed the MSA
- (b) May rely on a deed from divested spouse with clear language that no right or interest is reserved
- (c) May rely on a deed from both spouse

(2) Examining the MSA

- (a) must be based on fair and full disclosure of each parties' financial position
- (b) should acknowledge all real property owned by either spouse or both together
- (c) By agreement, non-marital assets can be transferred between the parties in the name of equitable distribution
- (d) Often orders transfer of property to one party with an obligation for the grantee spouse to sell or refinance and pay cash to the divested spouse

(3) Foreign FJD (FFJD) (TN 14.03.01)

(a) Jurisdiction

(i) *Full Faith and Credit*

- (a) FFJD is definitive as to termination of marriage
- (b) FFJD is enforceable as to an order requiring party to act

(ii) *State Law governs Florida real property*

- (a) FFJD that has operative language transferring property

- (b) Must be submitted to FL court to have effect.
 - (4) Remarriage does not reinstate the TBE (TN 14.02.01)
- 2. Death
 - a) *Upon the death of one spouse*
 - (1) That interest evaporates
 - (a) There is no devise
 - (b) There is no interest to which a lien could attach
 - (2) The survivor may convey alone
 - (a) Proof of death and continuous marriage affidavit recommended (TN 20.01.10)
 - (b) Grantor's marital status should be described with reference to the deceased spouse (TN 20.01.10, 20.02.02 and 20.02.08)
 - (c) Surviving spouse may satisfy mortgage held by entireties after death of first spouse (TN 20.01.09)
 - (3) Slayer Statute
 - (a) Surviving spouse cannot benefit from intentional unlawful killing – deceased spouse's interest passes as if no survivorship interest. See Sec. 732.802, F.S.
 - (b) For insuring, if not guilty in criminal court require civil determination not responsible before insuring based on TBE (TN 20.01.08)
- 3. Transfer from one spouse to the other (TN 20.01.13)
 - a) *Sec. 689.11, F.S.*
 - b) *Hunt v. Covington, 200 So. 76 (Fla. 1941)*

III. Liens Against Divested Spouse

- A. Liens against spouse divested incident to divorce (TN 14.02.02)
 - 1. Eliminated if debtor spouse is divested prior to termination of TBE
 - a) *FJD or MSA operates to vest property in non-debtor spouse*
 - b) *Debtor spouse deeds to non-debtor spouse during the marriage*
 - c) *Debtor spouse deeds to non-debtor spouse as confirmation of terms of FJD or MSA awarding sole ownership to the non-debtor spouse (see Sharp v. Hamilton, 520 So.2d 9, (Fla. 1988))*

2. Not eliminated if parties become tenants in common or lien was already attached
 - a) *TBE is terminated before spouse is divested*
 - (1) The FJD and MSA are silent
 - (2) The FJD or MSA simply directs one spouse to deed to the other and that doesn't happen until after entry of the FJD
 - b) *The lien was not previously barred*
 - (1) A federal lien is not barred by TBE
 - (2) See US v. Craft, 122 S. Ct. 1414 (2002)
3. Support Liens (TN 18.06.10)
 - a) *Order establishing installments is not a lien*
 - b) *Lien for arrearages*
 - (1) Attach when certified copy is recorded
 - (2) Should be considered to have a 20-year duration
 - (3) Should not be ignored on the basis of homestead without a judicial determination (do not rely on a homestead affidavit or the Sec. 222.01, F.S., procedure)
4. Remarriage does not reinstate TBE (14.02.01)

B. Liens against deceased spouse

1. Claims — Judgments — Decedent's Estates — Limitation of Action (TN 2.02.03)
2. Limitation — United States and State of Florida (TN 2.02.04)
3. Liens and Interests that Survive Probate (TN 2.02.05)

IV. Presumption of Continuous Marriage Relied (TN 20.01.01)

- A. conveyances from the surviving spouse with satisfactory evidence of death of the deceased spouse
- B. conveyances by both spouses when there is a judgment against one spouse (excluding Federal liens)
- C. foreclosures against entirety property where a judgment creditor with a lien against one spouse was not named
- D. Satisfactions of mortgages (so long as the married mortgagors were Florida residents) (TN 20.01.09)