FAI Fund Affiliate Assembly

Love & Marriage Homestead Rules and Tenants by Entirety

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The Florida Constitution (1968, as amended)



Article X, Section 4 (c); Restraints on Alienation

Article X, Section 4 (c)

Restraint on devise

"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."



Validly planning around the devise restriction (survived by a spouse)



The Aronson Upheaval

Aronson v. Aronson,

81 So. 3d 515 (Fla. 3d DCA 2012)

Legal title to homestead property vested in settlor as trustee of revocable trust.

Trust settlor dies, survived by a spouse

Testamentary provisions of trust devised property to wife for life, remainder to settlor's adult sons from a prior marriage

Held: invalid devise – property passes by intestacy; not an asset of the trust with legal title in sons as trustees

Aronson Response

Sec. 732.7025, F.S.

eff. July 1, 2018

732.7025 Waiver of homestead rights through deed

"By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."



Validly planning

Survived by spouse (no minor child)

Sec. 61.079, F.S., Premarital Agreements

Sec. 732.702, F.S., Waiver of Spousal Rights

Sec. 732.7025, F.S., Waiver by Deed



Validly planning around the devise restriction (survived by minor child)



Planning with Completed gifts



Completed gifts

No devise

Irrevocable Trusts

Tenants by the Entireties

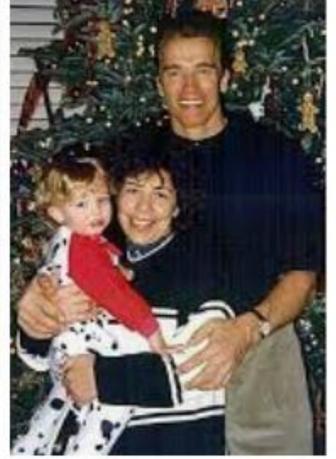
Outright transfers of title

Co-tenants with survivorship rights

Life estates with vested remainders not subject to defeasance









Enhanced Life Estate Deeds

Newly Adopted Uniform Title Standards

Vested remainder subject to defeasance

Creditor rights do not exceed remainderman's rights

Consider possible violation of restraint on devise of homestead property

Conflicting schools of thought

No statute on point

Very little case law



The Florida Constitution (1968, as amended)



Article X, Section 4 (c); Restraints on Alienation

Article X, Section 4 (c)

Restraint on mortgage, sale or gift

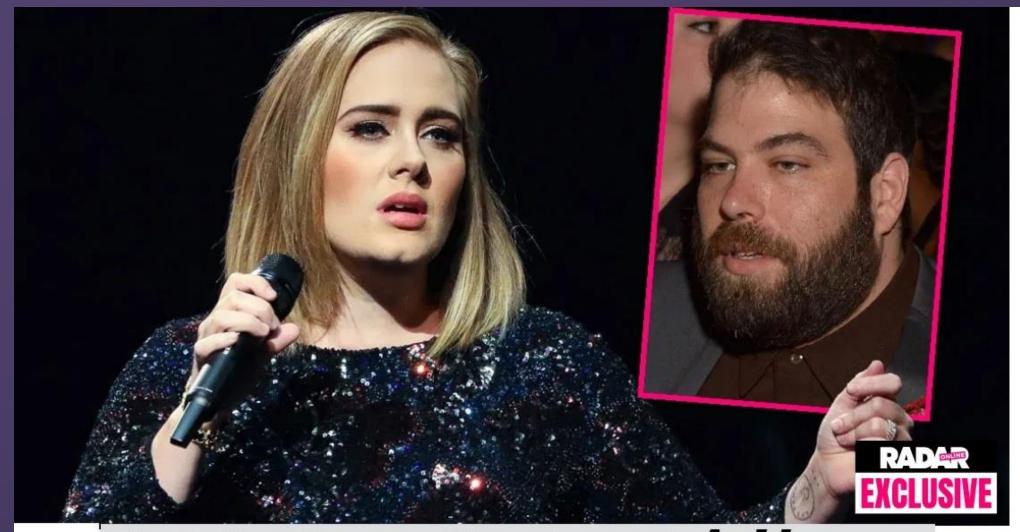
"The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse."



Joinder on Mortgage



Joinder on Deeds



Adele Gave Husband A House

Sale or gift

The constitutional exception

"... may by deed transfer the title to an estate by the entirety with the spouse."

*compare to Sec. 689.11, F.S.



Sale or gift – Statutory Exception

Sec. 689.11, F.S.

Conveyances between husband and wife direct; homestead.—

(1) 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.

. . .

(2) All deeds heretofore made by a husband direct to his wife or by a wife direct to her husband are hereby validated and made as effectual to convey the title as they would have been were the parties not married.



Spousal Joinder

Deeds and Mortgages

For insuring purposes, in a current transaction, The Fund recommends spousal joinder on all transactions involving residential property.

Pitts v. Pastore, 561 So.2d 297 (Fla. 2d DCA 1990)



The Florida Constitution (1968, as amended)







Homestead Rules

Creditor protection

- (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, ...



Tenancy by Entirety

TBE

Tenancy by the entireties

Estate by entireties or Estate by the entireties

Entireties property

Tenants by entireties or tenants by the entireties

Characteristics of the Tenancy by the Entireties



Characteristics of the TBE

Creditor's shield

It is well settled in Florida that a judgment lien against property owned by one spouse is not enforceable against property owned by the entirety.

A transfer from one to both spouses for the purposes of evading creditors could be set aside as a fraudulent transfer.

Federal liens are not barred by the tenancy by entireties



Characteristics of the TBE

Survivorship rights

Upon the death of one spouse, the surviving spouse can convey insurable title without need for probating the estate of the deceased spouse (*true even if the first spouse is survived by a minor child*).

Surviving spouse's arms' length sale divests the lien of estate taxes.

Proof of death & continuous marriage affidavit recommended.



Characteristics of the TBE

No unilateral severance

Because a married couple is treated as being one person, the tenancy by entireties cannot be severed unilaterally.

Do not insure separate deeds even if to the same grantee (counterpart signatures are not prohibited)

Though treated as one person, both spouses must be identified as grantors.

the signature of both spouses is not sufficient to cure a deed identifying only one as the grantor



Creating a Tenancy by the Entireties

Common Law

Five Unities of Title

- 1. Time take at the same time
- 2. Title receive title from same grantor
- 3. Interest each owns an undivided share in the property
- 4. Possession each has the right of possession of every part of the whole property
- 5. Marriage no longer limited to "husband and wife"



Conveyances between spouses

the grantee need not execute the conveyance.

Sec. 689.11(1), F.S.

689.11 Conveyances between husband and wife direct; homestead.—
(1) 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

An estate by the entirety may be created by the action of the spouse holding title:

- (a) Conveying to the other by a deed in which the purpose to create the estate is stated; or
- (b) Conveying to both spouses.



Bright Line Rules

Do and Don't

DO: the grantees must actually be married

DON'T: there must not be any contrary intent expressed in

the deed



Drafting



Contrary Intent

Drafting Considerations

A clear expression of contrary intent:

- Susan Sarandon and Tim Robbins, tenants in common
- Susan Sarandon and Tim Robbins, joint tenants with rights of survivorship



Contrary Intent

Drafting Considerations

A clear expression of contrary intent:

- Susan Sarandon and Tim Robbins, tenants in common
- Susan Sarandon and Tim Robbins, joint tenants with rights of survivorship

Not an expression of contrary intent:

- Kris Smith and Francis Smith, tenants by the entireties with rights of survivorship
- Kris Smith or Francis Smith, a married couple



Rules of Construction – multiple grantees

Interest taken

A legally married couple is regarded as a single entity or person. Thus, a conveyance to A and B, a married couple, and C, the married couple would take an undivided one-half interest and C, the third person, would take the other one-half interest. Aderhold v. Aderhold, 983 So.2d 43 (Fla. 1st DCA 2008); Winchester v. Wells, 265 F.2d 405, at 407 (5th Cir. 1959), Roberts-Dude v. JP Morgan Chase, 498 B.R. 348 (Bkrtcy. S.D. Fla. 2013).





Same-sex Marriage

Legal in Florida since June 2015

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

The Supreme Court, Justice Kennedy, held that:

- 1) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.
- 2) States must recognize lawful same-sex marriages performed in other States.



Drafting consideration

Gender neutral designations

Bruce Jenner and Kris Jenner, married to each other

Caitlyn Jenner and Kris Kardashian, tenants by entirety

Caitlyn Jenner and Kris Jenner, a married couple

Kris Kardashian and spouse Bruce Jenner





Severing the Gating

Tenancy by the Entireties



How is a Tenancy by Entirety destroyed

Divorce

Operative language may appear . . .

- in a final judgment of dissolution (FJD) of marriage
- in the parties' marital settlement agreement (MSA) that is incorporated by reference into the FJD
- in a FJD from a jurisdiction outside of Florida



Final Judgment of Dissolution

no reference to any MSA

- Silent as to property
 treat title as remaining in both as tenants in common
- Operates to transfer the title to one spouse
 treat title as vested in the one spouse

no inquiry into the terms of the MSA required



Final Judgment of Dissolution

Incorporates the MSA by reference

- Reliably determine terms (personal review/recording not required)
- Comply with relevant terms
- Indicate to future examiner that terms were complied with



Insuring solutions

Compliance with MSA

- Deed from divested spouse to grantee spouse with language clearly indicating that
 - it is given incident to and in acknowledge of full satisfaction of all terms of the MSA, or
 - it is an absolute conveyance without reservation of any rights or liens
- Warranty Deed from both spouses to the proposed-insured



Marital Settlement Agreements

Marital Settlement Agreements

- must be based on fair and full disclosure of each parties' financial position
- should acknowledge all real property owned by either spouse or both together
- Non-marital assets can be transferred between the parties in the name of equitable distribution under mutual agreement
- 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



FJD From a Court Outside of Florida

FJD from a foreign jurisdiction

Full faith and credit – limited

The foreign FJD is conclusive as to the parties' divorced status, and an order compelling the spouses to act (by giving a deed or mortgage) is enforceable under the full faith and credit act.

Because state law applies to real property, before relying on operative language in a foreign FJD awarding Florida property outright to one spouse, a Florida court must enter an order giving the foreign FJD effect as to the transfer of title.





How is a Tenancy by Entirety destroyed

Death

The tenancy by entireties cannot exist in the absence of the marriage unity, so immediately upon the death of one spouse, that interest evaporates and the surviving spouse becomes the sole owner of the subject property, including homestead.



Conveyance by surviving spouse

Previously recorded – in the absence of contrary indicators, assume continuous marriage

Current transaction –

record a continuous marriage affidavit

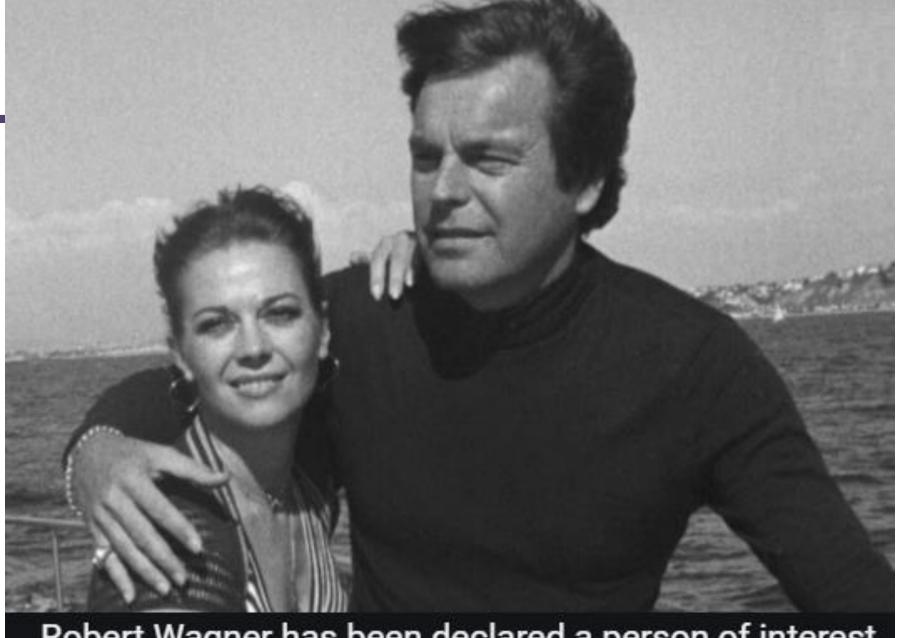
identify grantor as the unremarried surviving spouse of the decedent



Conveyance by surviving spouse

Arm's length transfer to a bona fide purchaser for value – divests the lien of estate taxes of the deceased spouse's estate

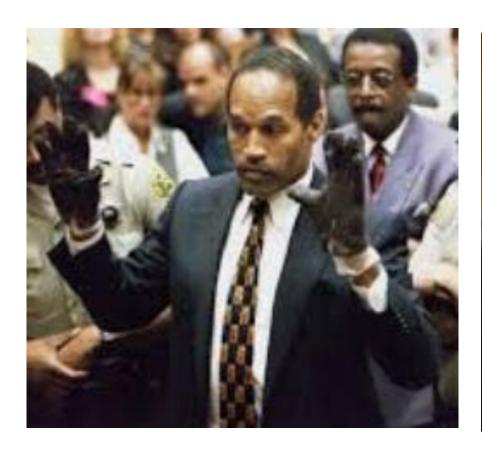




Robert Wagner has been declared a person of interest in the mysterious death of his wife. Natalie Wood.



Slayer Statute (Sec. 732.802, F.S.)







Interspousal Conveyances



Liens Against Divested Spouse



Liens against divested spouse - eliminated if

FJD acts as the instrument of conveyance

- expressly or by incorporation of the MSA awarding the property outright
- · Deed from divested spouse to grantee spouse given
 - before entry of the FJD dissolving the TBE, or
 - incident to the FJD awarding the sole ownership of the property to the grantee spouse and requiring the divested spouse to give the deed.

Sharp v. Hamilton, 520 So. 2d 9 (Fla. 1988)



Liens against divested spouse – not eliminated if

The lien was not previously barred

- a federal lien is not barred by the TBE,
- see United States v. Craft, 122 S. Ct. 1414 (2002))

The spouses become tenants in common incident to dissolution

- Neither FJD nor MSA contain any operative language but merely direct one spouse to convey to the other and
- that conveyance is not given until after the entry of the FJD



Support Liens

- Order establishing installment obligation not a lien
- Lien for arrearages
 - attaches when the certified copy is recorded
 - should be considered to have a 20-year duration
 - should not be ignored on the basis of homestead without a judicial determination



Remarriage



Same parties' subsequent remarriage

Remarriage does not recreate the TBE – a deed complying with Sec. 698.11, F.S., is required

Any lien that attached upon dissolution of marriage remains attached even if the TBE is recreated





Creditor's shield ends

Decedent's interest evaporates

Claims of creditors must be handled through the estate

Liens against the surviving spouse would attach to any non-homestead property



Presumption of Continuous Marriage TN 20.01.01

In the absence of evidence to the contrary, for insuring, one may presume that a tenancy by the entirety continues from the date of the creation of the estate through the date of its termination by death or dissolution of marriage. The presumption applies to:

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





