



*Transferring
wealth & wisdom
from generation
to generation*



Edward E. Wollman, JD, LL.M. / Adam M. Gross, JD
WOLLMAN, GEHRKE & SOLOMON, P.A.

“YOUR HOME(STEAD) IS YOUR CASTLE - SO, WHY DOES YOUR SPOUSE CONTROL ITS DISPOSITION?”

Florida Statute and the Florida Constitution protect your spouse from being disinherited. In theory this is an excellent idea. However, if you own your home in your sole name and you wish to give your home to someone other than your spouse, you cannot do so without your spouse's consent. If you are in a second marriage with or without children from a prior marriage, then you may very likely want to leave your homestead to someone other than (outright) to your spouse.

Under FL Statute if the decedent is survived by a spouse and one or more descendants, the surviving spouse is automatically entitled to use, occupy, and possess the homestead property for the rest of his or her life (a “life estate”), the remainder interest going to the lineal descendants of the decedent who were then alive at the time of the first spouse's death. The Florida Constitution further restricts the disposition of homestead property by providing that the homestead shall not be subject to devise in accordance with the decedent's will if he or she is survived by a spouse or minor child, except that if there is no minor child, the decedent may transfer the homestead completely to the surviving spouse. In other words, under Florida law, you must leave a roof over your spouse's head.

As estate planning attorneys, we agree with the statutory intent to leave a spouse with financial security and a roof over their head. However, in Florida, if you are the sole owner of an interest in your homestead and you desire to ultimately leave your property to someone other than your surviving spouse, this may only be accomplished through estate planning, not by relying on a State default provision.

In order to accomplish this estate planning, both spouses must consent to allow the plan to move forward. This consent is in the form of a **pre or post marital agreement** referred to as a homestead waiver. The waiver effectively states that the spouse may do as they please with their respective interest in the homestead. It states that the spouse is not restricted by the above-referenced statute or state constitutional provision prohibiting a person from leaving the homestead to a third party. In most cases, after obtaining this homestead waiver, we deed the property to a trust designed to take care of the surviving spouse for life with the remainder upon the spouse's death passing to the Donor's heirs instead of the surviving spouse's heirs.

New Florida Homestead Law

In October of 2010, the Florida homestead statute was modified to provide the surviving spouse with an alternative to receiving a life estate upon the death of his or her spouse. Under the new law, the surviving spouse has a choice to keep the life estate OR to become a 50% owner of the homestead property as “tenants in common” with the decedent's children owning the other 50%. The surviving spouse has up to six months to elect to receive a one half ownership share of the homestead instead of the default life estate.

The election of a 50% ownership interest comes with benefits as well as drawbacks. For one, the surviving spouse is now entitled to receive 50% of the proceeds in the event the homestead property is sold. However, because the spouse no longer has a life estate in the property, the homestead may be subject to forced sale if either the deceased spouse's children or the surviving spouse so chooses.

In Florida, homestead law plays an integral role in the ultimate transfer of one's property upon death. If you do not have an estate plan in place, or if you have a plan that may be affected by the new homestead laws, you should have one created or reviewed to best affect your desired goals in transferring your property.

Go to www.probate-florida.com to read more about this subject.

Learn how you can have your cake and eat it too.

Ed Wollman is a FL Bar board certified wills, trusts and estates attorney with 26 years experience practicing in the state of FL.

Adam Gross is a recent graduate from Emory University School of Law



2235 VENETIAN CT #5, NAPLES, FL 34109

(239) 435.1533

(239) 435.1433 FAX