

What Every Georgia Trusts and Estates Practitioner Needs to Know About Florida Law

June 15, 2006

Bruce Stone

Goldman Felcoski & Stone, P.A.

Coral Gables, Florida

www.gfsestatelaw.com

Homestead Descent Examples

In each case, assume that the decedent is a Florida resident and that there has been no waiver of homestead rights unless otherwise noted.

Examples With Spouses and No Minor Children

Example 1. A husband and wife have three adult children and no minor children. The marital residence is titled in the wife's name alone. The wife dies survived by her husband and their three children. Her will specifically devises the residence to a credit shelter trust, which provides for discretionary distributions to her husband and her descendants. Upon the husband's death, the credit shelter trust assets are to be distributed outright to the wife's then living descendants.

The devise of the residence fails. The husband receives a life estate, and the three children receive the remainder interest subject to the husband's life estate. Each child's remainder interest is a vested interest in property that is subject to claims of the child's creditors and rights of the child's spouse, and which will descend as part of that child's estate when the child dies, whether during the husband's lifetime or after his death.

Example 2. The facts are the same as in Example 1, except that the wife's will devises full fee simple title to the residence to her husband alone.

The devise of the residence to the husband is valid.

Example 3. The facts are the same as in Example 1, except that the wife's will devises a life estate to her husband and the remainder interest equally to two of the three children. The third child is specifically disinherited.

The devise of the residence fails. The husband receives a life estate, and the three children receive the remainder interest subject to the husband's life estate.

Example 4. The facts are the same as in Example 1, except that the wife's will devises a conditional life estate to her husband and the remainder interest to the three children. The wife's will provides that the husband's life estate will terminate if he remarries after her death.

The devise of the residence fails. The husband receives an unconditional life estate, and the three children receive the remainder interest subject to the husband's life estate.

Examples With Minor Children

Example 5. A single father dies, survived by his three children, one of whom is a minor. The father's residence is titled in his name. His will devises his entire estate to one testamentary sprinkling trust for the benefit of his three children, providing for termination of the trust and outright distribution of the remaining assets when his youngest child reaches age 25.

Title to the residence passes by operation of law upon the father's death directly to the three children free of trust. Each child inherits an undivided one-third fee simple interest in the residence as a tenant in common with the other two children. A guardianship of the property must be established for the minor child if it is necessary to deal with the minor child's interest in the residence.

Example 6. The facts are the same as in Example 5, except that instead of creating one sprinkling trust, the father's will directs that his estate be divided into three separate shares of equal value, one for each child. The shares of the two adult children are to be distributed to them outright. The minor child has Down syndrome, and that child's share is to be held in a support trust for that child's lifetime.

Just as in Example 5, title to the residence passes by operation of law upon the father's death directly to the three children free of trust. Each child inherits an undivided one-third fee simple interest in the residence as a tenant in common with the other two children. A guardianship of the property must be established for the minor child if it is necessary to deal with the minor child's interest in the residence.

Example 7. A husband and wife have one minor child. The husband has two minor children from a prior marriage. The husband and wife entered into a prenuptial agreement in which each spouse waived "all rights" to the other spouse's estate upon death. The marital residence is titled in the husband's name as sole trustee of his revocable trust. The husband's revocable trust directs that the marital residence be held in trust upon the husband's death so that his wife and their one minor child can occupy the residence rent free for a period of five years. Upon expiration of the five-year period the house is to be sold, and the proceeds are to be divided equally among his wife and his three children, and held in further trust for each of them separately.

The attempted disposition of the residence fails. The wife's waiver of "all rights" in her husband's estate waived her homestead rights, and title to the residence descends by operation of law directly to the husband's three children. Each child inherits an undivided one-third fee simple interest in the residence as a tenant in common with the other two children. A guardianship of the property must be established for each minor child if it is necessary to deal with that minor child's interest in the residence. The husband's wife likely will be appointed as the guardian of the property for her child, and the husband's former wife likely will be appointed as guardian of the property for her two children. Each tenant in common is entitled to use and possession of the property. Full fee title to the property cannot be conveyed without joinder of the guardians for all of the children.

Example 8. A husband and wife have one minor child. The marital residence is titled in the names of the husband and wife as tenants by the entirety. The husband dies intestate survived by his wife and their minor child.

Title to the residence passes by operation of law to the wife as the surviving tenant by the entirety.

Examples Without A Spouse or Minor Child

Example 9. A single mother dies survived by her four adult children. Her residence is titled in her name. Her will devises her homestead to one of the four children.

The devise of the homestead is valid.

Example 10. A single man without any descendants dies. His will devises \$150,000 to his nephew, and devises his residuary estate to his four half-brothers. His estate consists of assets worth \$10,000, and his residence which was sold for \$141,000 during administration of the estate. The residence was not specifically devised in the will.

The proceeds from sale of the residence pass to the four half-brothers, not the nephew. The homestead was subject to devise because the decedent was not survived by a spouse or minor child. In the absence of a specific devise, homestead property passes under the residuary clause, which is a sufficiently precise indicator of testamentary intent to pass protected homestead property. Where a decedent is not survived by a spouse or minor children, the decedent's homestead property passes to the residuary devisees, not to general devisees, unless there is a specific testamentary disposition ordering the property to be sold and the proceeds made a part of the general estate. The abatement provisions of section 733.805 do not apply because homestead property that passes to heirs is not an asset subject to administration.