TN 19.03.05 Leasehold as Homestead (Rev. 12/22)

A. Non-Cooperative Leasehold as Homestead

1. Joinder of Spouse
   For purposes of issuing a leasehold policy on residential property, any assignment or mortgage of the leasehold interest by a married lessee should have spousal joinder. Spousal joinder can be waived if the property is reliably determined to be nonhomestead. In the absence of a nonhomestead recital or joinder of spouse, the assignor/mortgagor must be identified as unmarried. Florida courts have held that homestead protection will extend to any right or interest the claimant holds in the land. *Bessemer Properties, Inc. v. Gamble*, 27 So.2d 832 (Fla. 1946). Bankruptcy courts in Florida have ruled that although a year-to-year residential lease was not homestead, a residential lease for 99 years did qualify as homestead. *In Re Tenorio*, 107 B.R. 787 (Bkrtcy. S.D. Fla. 1989); *In re McAtee*, 154 B.R. 346 (Bkrtcy. N.D. Fla. 1993). See also Op. Att'y Gen. Fla. 2007-33 (2007). See **TN 19.03.05B** for a discussion of cooperative units as homestead.
2. Descent and Devise
   The analyses of Florida courts when dealing with the real and personal property nature of leaseholds have been inconsistent in the past; however, legislation has clarified this issue for cooperatives, as discussed in TN 19.03.02. Generally, a long-term leasehold interest is deemed homestead for protection from creditor claims but not for the purposes of devise and descent. See *Gerarci v. Sunstar EMS*, 93 So.3d 384 (Fla. 2d DCA 2012) (A condominium that is subject to a long-term leasehold may qualify as a homestead to be protected from forced sale to pay the creditors of a deceased owner). For insuring purposes, a non-cooperative leasehold interest will be treated as both a homestead real property interest and as a personal property interest. Upon the lessee's death, probate proceedings will be required, along with conveyances or assignments of the leasehold interest from the personal representative and devisees who are included in Sec. 732.103, F.S. in a testate estate, or from the decedent's heirs in an intestate estate. Also, conveyances or assignments of the leasehold will be required from those entitled to the homestead under Secs. 732.401 and 732.4015, F.S. If the leasehold is conveyed, assigned, or mortgaged after the probate proceedings have been closed, then those entitled to the leasehold interest as personal property and as real property would have to execute the instrument to be insured.

B. Cooperative Unit as Homestead
In 2021, The Florida legislature settled the question of whether a cooperative unit is real property for homestead devise and descent purposes by amending the definition of a cooperative “Unit” in Sec.

719.103(26), F.S. (2021), which now clearly states that "[a]n interest in a [cooperative] unit is an interest in real property." Therefore, a cooperative unit qualifying as homestead is both protected from creditors and treated as homestead for purpose of devise and descent.

TN 19.03.06 Witnesses Not Required (Rev. 12/22)

Witnesses are no longer required for leases of more than one year or any instrument related to them, such as assignments or terminations. Sec. 689.01(1), F.S., effective July 1, 2020, provides that "no estate or interest… for a term of more than one year … shall be assigned or surrendered unless it be by instrument signed in the presence of two subscribing witnesses by the party so assigning or surrendering… provided, however, that no subscribing witness shall be required for a lease of real property or any such instrument pertaining to a lease of real property." For insuring an assignee's leasehold interest, see **TN 19.02.02C**.

SC 19.04 Merger

TN 19.04.01 Where Lessee Becomes Fee Owner and Conveys Fee Without Exception (Rev. 12/22)

Merger occurs when the lessor and the lessee become the same party. Once this occurs, the interests of the two parties have merged. As an example, the fee owner of certain property leased it to A. Later, the fee owner conveyed fee title to A, and thereafter A conveyed the property to B by warranty deed, which did not mention the lease. The lease was for a long term which had not expired at the time of the conveyance from A to B. Must a release of the lease be obtained from A before insuring B's title?

Although a release is always desirable to eliminate the possibility of question by a subsequent title examiner, The Fund regards the title as sufficient without a release. The acquisition by the lessee of fee title and the later conveyance by warranty deed, executed without a reservation or exception as to the lease, constituted conclusive proof of merger, and the lessee would be estopped to assert the continued existence of the lease.

The case of *Vliet v. Anthony*, 164 So. 138 (Fla. 1935), although not directly on point, appears to dispose of the question. It presents an analogous situation involving a mortgage, instead of a lease, in which the court held that a mortgagee, who had joined in the warranty deed, was estopped to assert the continued existence of the mortgage after the conveyance in which he joined. *Vilet* is also discussed in **TN 22.05.10**.

The *Vliet* case was followed by the court in *Taylor v. Fed. Farm Mortg. Corp.*, 193