



Will Power

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BEWARE OF HOMESTEAD DEVISE RULES

Who and how you leave your home in your will or trust might be overruled by Florida law if your primary residence is in Florida and if you have a spouse or minor child at the time of your death. In Florida, your primary residence is deemed to be your homestead whether or not you claim your homestead tax exemption. As your homestead, your primary residence cannot be left to anyone you choose, or in any way that you choose.

This is due to the Florida “descent and devise” laws that are intended to protect a spouse or minor child from being evicted from a home. Florida “public policy” states that if you are survived by a spouse or by a minor child, and if you do not leave your home to your spouse or minor child, then those individuals are entitled to a “life estate” in your home, regardless who you have named as the beneficiary of your home.

This is actually a lot more complicated than it sounds. Review a few examples with me and you’ll see why I say that:

Example #1: Victor claims homestead on his primary residence located in Captiva. Victor places his residence into his revocable living trust that creates a “credit shelter” and a “marital trust” for his wife, Susan, upon his death. Even if Susan is the primary beneficiary of the credit shelter trust or the marital trust, this is deemed to be an “invalid devise” under Florida law. Susan gets a life estate in the residence, and Victor’s children receive a remainder interest.

Example #2: Danny claims homestead on his primary residence located on Sanibel. Danny is single but has a minor child, Todd. Because Danny has a minor child, it does not matter that he leaves his home to his brother

Douglas, even if Douglas is the guardian of Todd. This is an invalid devise under Florida law.

Example #3: Helen is in a second marriage with Joe. Helen owns her homestead on Sanibel. She does not have a nuptial agreement with Joe, and Helen leaves her residence to her daughters, Theresa and Wilma, in her will. Helen also has a son, Robert, who is not mentioned as a beneficiary of the residence in Helen’s will. Upon Helen’s death, since she is survived by Joe, her devise is invalid. Joe receives a life estate and all of Helen’s children, including Robert, receive the remainder interest.

Life estates and remainder interests are difficult on the family. The spouse with the life estate is responsible for taxes, maintenance, insurance and association fees. The spouse might also be liable for mortgage payments. But the spouse can’t sell the house, because no one would purchase a life estate by itself. When the spouse dies, the interest in the residence dies with him or her.

Similarly, the remainder interest to the children poses difficulties. They don’t receive title until the spouse dies, but the spouse might not be maintaining the property. What happens if the spouse abandons the property before he or she dies? What if taxes aren’t paid in a timely manner?

You should double check with competent estate planning counsel that you have planned properly for the devise of your residence.

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