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Should I Own My Florida Homestead Property In My Revocable Living Trust?

A commonly asked question is, "Should I own my homestead in my trust?" Generally, the answer is, "No." This is not because of your ad valorem homestead exemption or even your Constitutional protection from the claims of creditors. It is not because we don't want you to avoid probate. Instead, it is because Florida law dictates who can receive your Florida homestead property.

Florida has very unique and strict laws regarding the distribution of your primary homestead residence after you die. Specifically, if you die owning your homestead property in your individual name and you are survived by a spouse or a minor child, Florida law dictates to whom you can leave your property. If you are survived by a spouse and no minor child, you can only leave your property to your spouse. If you are survived by both a spouse and a minor child, the spouse automatically receives a life estate and your lineal heirs (all your children) receive the remainder interest. If you violate the law by directing a different result, the law will prevent your intended distribution and substitute its statutory rule, as outlined above.

Florida homestead rules can particularly be an issue for married couples who create revocable living trusts and title their homestead to their trusts. If a husband and wife title their homestead property such that 50% is in the name of the Husband's trust and 50% is in the name of the Wife's trust – there can be an unexpected and undesirable result. If the Husband dies, survived by the spouse and no minor child, the law requires him to leave the home only to his spouse. However, unless his trust specifically directs a distribution of the homestead to the spouse (which would be the exception in our experience, not the rule), then the surviving spouse receives a life estate, and the remainder interest is distributed to his lineal heirs (children). This could be a good or a bad result, depending on the family circumstances. Are his children also her children? Do any of them have special needs and are they receiving government benefits? Did he intend to benefit his children in this way?

If there is a minor child, there will be a similar result, only now there will also need to be a guardianship established for the interest of the minor child. We have seen this situation arise time after time, with unexpected and unfavorable consequences. Bottom line, if you are a married person you should only own your home as husband and wife – also known as tenants by the entirety. That way, when one spouse dies, the survivor becomes the sole owner. If this is not the result you want at the time of your death, a more in depth discussion with your estate planning attorney is required.

If your planning directs an improper distribution of your homestead property and the directive ultimately fails because you have a spouse and/or minor child, the law directs that your spouse will receive a life estate and the remainder interest will go to your children. What are some of the potential problems that can arise in this scenario? What if the surviving spouse wants to sell or mortgage the home (including a mortgage refinance)? He or she will need permission from the children to do so. This could present a problem, particularly in a second or third marriage where the children are the deceased spouse's children and not the children of the surviving spouse. Additionally, the surviving spouse will be stuck footing the bill for all of the ordinary upkeep on the house, all of the real estate taxes, all of the insurance and all condo or homeowner association fees. This is true, even if the home expenses become unwieldy - the survivor cannot force a sale or refinance of the mortgage. One possible solution is a provision under Florida law that allows the spouse and children to share the property as 50/50 owners – only this election must be made within six (6) months of the date of death and generally by the time a problem arises, the time period has expired. The only way to avoid the possible negative effects of the Florida homestead rules is with a valid pre or post nuptial agreement that includes a waiver of homestead. This requires planning and the counsel of a qualified legal professional.

Florida homestead law is complex with lots of twists and turns. It can even have unexpected results for non-resident married couples who own a second home in Florida. They may be exempt from the Florida homestead restrictions on devise when they are not Florida residents. But, if they may later move to Florida permanently, become residents, and apply for the Florida homestead exemption, now, their home is subject to all of these same rules.

The Law Offices of Hoyt & Bryan assists families in the protection of their loved ones by focusing their practice in the areas of Estate Planning, Probate and Trust Administration, Elder Law including Medicaid and VA Planning and Special Needs Planning, Pet Planning, Business Succession Planning and Real Estate. The founders, Peggy Hoyt and Randy Bryan, are both dual board certified by the Florida Bar in Wills, Trusts and Estates as well as Elder Law. Hoyt & Bryan is the only law firm in Florida with the distinction of two attorneys with these certifications. We offer many complimentary educational workshops each week in our Learning Center at The Law Offices of Hoyt & Bryan and monthly workshops in the Auditorium of One Senior Place in Altamonte Springs. For more information please contact our office at 407-977-8080 or visit our website HoytBryan.com.