

## **WHITE PAPER**

### **PROPOSED AMENDMENTS TO §§ 732.401 and 732.4015, FLA. STAT.**

#### **I. SUMMARY**

The proposed changes are submitted to clarify post-death disclaimers of homestead interests and provide for a defined result upon such a disclaimers. F.S. § 732.401 provides that homestead which has not been devised in accordance with the constitutional restrictions descends to the surviving spouse for life, with a remainder interest to the lineal descendants then living, per stirpes. This creates a difficult situation when the surviving spouse has certain economic duties (such as property taxes, insurance, ordinary maintenance, and mortgage interest) which the surviving spouse cannot afford. As a result, some practitioners have attempted to use disclaimers as a way to cure an invalid devise of homestead and avoid the application of section 732.401. In applying the law in these situations, courts have reached inconsistent results under similar facts leaving confusion and uncertainty in this important area. An issue also arises when a surviving spouse receives a valid devise of homestead property but still wishes to disclaim the property for purposes of tax planning. An example would be a decedent devising the homestead in fee simple to the surviving spouse when there are no minor children. This is a permissible devise under Article X, Section 4 of the Florida Constitution but the surviving spouse may wish to disclaim the property for purposes of using the decedent's estate tax exemption. While there are no restrictions on the disclaimer of the homestead property in this situation, the result upon a disclaimer of this type needs to be clarified.

The proposed changes to sections 732.401 and 732.4015 of the Florida Statutes are intended to uphold the language and intent of Article X, Section 4 of the Florida Constitution while providing for a consistent result upon the disclaimer of homestead interests.

#### **II. CURRENT SITUATION**

##### **A. Section 732.401**

Disclaimer of Homestead Property. The Florida Constitution provides for restrictions on the devise of homestead, designed to protect surviving spouses and minor children. Article X, section 4 provides:

(c) The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there be no minor child....

While the devise restrictions on the homestead property are contained in Article X, Section 4 of the Florida Constitution, the Florida Constitution does not address how that property descends upon the death of the owner of the homestead. The descent of devise restricted homestead property is controlled by F.S. 732.401. Specifically, if the owner of homestead real property attempts to devise homestead in a manner not permitted by the constitution, or fails to make a devise of the homestead, ownership descends as provided in section 732.401, Florida Statutes, which provides:

... the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

When homestead cannot be devised, or is improperly devised so the devise is ineffective, the surviving spouse takes a life estate with a vested remainder in the decedent's descendants, per stirpes. This arrangement can create great burdens on the surviving spouse and the lineal descendants regarding the expenses and upkeep of the property which can actually result in the life estate / remainder ownership becoming a burden on the very people the law is designed to protect.<sup>1</sup> As a result, some practitioners have attempted to use disclaimers as a way to cure an invalid devise of homestead and avoid the application of section 732.401.

In reviewing the effect of a spouse's disclaimer of his or her homestead interest, circuit courts have reached conflicting results. See *In Re: Estate of Joseph T. Ryerson, Jr.*, No. 93-307 (Fla. 15<sup>th</sup> Cir. Ct., June 17, 1993), *aff'd*, per curiam, No. 93-2074 (Fla. 4<sup>th</sup> DCA July 20, 1994) and *In re: Estate of Frances N. Janien*, 12 Fla. L. Weekly Supp. 221 (February 28, 2005), Case No. 502004CP000973 (Fla. 15<sup>th</sup> Cir. Ct., (December 6, 2004), in which the courts held that where homestead was invalidly devised, a post death disclaimer of the surviving spouse's life estate in homestead did not divest the decedent's descendants of their vested remainder interests. At least one other circuit court has reached an opposite result under similar facts and held that the spouse's disclaimer would divest the decedent's descendants of their interests and give effect to

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<sup>1</sup> Jeffrey A. Baskies, *The New Homestead Trap: Surviving Spouses are Trapped by Life Estates They No Longer Want or Can Afford*, 81 Fla. Bar J. 69 (June 2007).

the otherwise invalid devise. See *In Re: Estate of Harry Sudakoff*, No. 91-87 (Fla. 12<sup>th</sup> Cir. Ct. March 25, 1994), *aff'd*, per curiam, No. 94-02102 (Fla. 2d DCA, March 10, 1995). The *Ryerson* and *Janien* decisions are correct under the constitution. This issue needs to be resolved in order that the citizens of the State of Florida can engage in proper post-mortem estate planning. At the present time, estate planning attorneys are unable to advise surviving family members in this area with any degree of certainty.

## **B. Section 732.4015**

Different considerations apply when a decedent makes a devise permitted by Article X, Section 4 of the Florida Constitution and Section 732.4015, Florida Statutes. Florida law provides that if the owner of homestead real property is survived by a spouse but no minor children, the homestead may be devised to the surviving spouse. When the devise to the surviving spouse is valid, no vested remainder passes to the decedent's descendants at death, in contrast to the situation with an invalid devise.

A spouse's disclaimer of a valid devise of homestead real property has the effect of treating the interest in homestead as if the surviving spouse predeceased the decedent. The disclaimer statute, section 739.201, provides that the interest then passes according to the decedent's will or trust, as if the surviving spouse died immediately before the decedent. (As noted in the *Ryerson* decision, a disclaimer does not cure an *invalid* devise of homestead.)

The use of a disclaimer under Chapter 739 of the Florida Statutes and Section 2518 of the Internal Revenue Code may play an important role in estate tax planning. Although a person making a disclaimer ordinarily cannot accept the benefits of the property disclaimed, there are exceptions for the surviving spouse.<sup>2</sup> Even if the disclaimed interest ultimately passes to the surviving spouse under state intestacy law, the spouse's disclaimer can be tax-qualified. Section 739.501, Florida Statutes, provides that if the disclaimer is a tax-qualified disclaimer satisfying the requirements of section 2518 of the Internal Revenue Code, the disclaimer is effective for purposes of Florida law.

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<sup>2</sup> Treasury Regulations Section 25.2518-2(e)(2) provides that a disclaimer is qualified if (1) the interest passing to the surviving spouse is limited by an ascertainable standard, such as the normal provisions of a credit shelter trust; or (2) the interest passing to the surviving spouse will be included in the surviving spouse's estate for federal estate tax purposes.

### **III. EFFECT OF PROPOSED CHANGES**

#### **A. Section 732.401**

New subsection (4) has been added to codify the ruling in the circuit court's *Ryerson* decision, which involved a surviving spouse's disclaimer of her interests in homestead which had been invalidly devised.<sup>3</sup> The proposed change would provide certainty for the courts, probate and real estate practitioners, as well as the parties involved, clarifying the interplay between the law of disclaimers and constitutional homestead protections.

#### **B. Section 732.4015**

New subsection (3) is intended to eliminate confusion in situations where a devise of homestead to the surviving spouse is a valid devise. In such cases, a disclaimer of the devise by the surviving spouse results in the disclaimed interest passing as if the surviving spouse had predeceased the decedent. The decedent's will or trust would then determine to whom the homestead passes. If the devise of homestead to the spouse is valid, the decedent's descendants do not receive a vested remainder in the homestead at the moment of death. The surviving spouse's disclaimer of a valid devise to the surviving spouse does not cut off any vested rights of the decedent's descendants under the constitution because they had none to start with. Further, because the spouse is the one disclaiming, the public policies behind the constitutional restrictions on devise are satisfied. The purpose of this proposal is to clarify this area of the law to ensure that estate planning techniques will not be frustrated by inconsistent application of the law.

### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

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<sup>3</sup> *Ryerson* held that where homestead was invalidly devised, a post death disclaimer of the surviving spouse's life estate in homestead did not divest the decedent's descendants of their vested remainder interests. At least one other circuit court has held that the spouse's disclaimer would divest the decedent's descendants of their interests and give effect to the otherwise invalid devise. The *Ryerson* decision is correct under the constitution. *In re: Estate of Frances N. Janien*, 12 Fla. L. Weekly Supp. 221 (February 28, 2005), Case No. 502004CP000973 (Fla. 15th Cir. Ct., (December 6, 2004); *In Re: Estate of Joseph T. Ryerson, Jr.*, No. 93-307 (Fla. 15<sup>th</sup> Cir. Ct., June 17, 1993), *aff'd*, per curiam, No. 93-2074 (Fla. 4<sup>th</sup> DCA July 20, 1994). *In Re: Estate of Harry Sudakoff*, No. 91-87 (Fla. 12<sup>th</sup> Cir. Ct. March 25, 1994), *aff'd*, per curiam, No. 94-02102 (Fla. 2d DCA, March 10, 1995) held contrary to *Ryerson*.

None

#### **IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

There will be a positive economic impact on the private sector. Specifically, the proposed changes will clarify the result upon a post-death disclaimer of homestead rights and allow the citizens of this state to engage in estate tax planning with a certainty which does not exist at the present time.

#### **V. CONSTITUTIONAL ISSUES**

None. The proposed changes do not conflict with any constitutional provisions and are consistent with the public policy underlying the constitutional restrictions on the devise of homestead.

#### **VI. OTHER INTERESTED PARTIES**

The title insurance companies will be interested in this matter as it will have some effect on the issuance of title insurance.