

# REAL ESTATE LAW

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## ye olde florida homestead



*A well respected Winter Park attorney, Frank Pohl practices in the area of real estate law.*

*His column covers a wide range of topics that can help you better understand and avoid potential legal issues related to buying, selling, and owning a home.*

*If you have topics or questions pertaining to the legal aspects of residential real estate that you would like to see addressed in this column, send them to Frank c/o:*

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The early settlers used to homestead land by building a home, and staking the land boundaries. In present day Florida, we do things differently. To homestead property we first purchase the property, which has already been staked, and then we move in. If only this was all there is to the concept of *homesteading*, a word that is the source of more questions, and more confusion, than any other in Florida real estate law.

This scenario will give you a glimpse into the legal concept of homestead property: Charlie Hustle is in a high stakes poker game, and has a full house. Convinced he has a winner, Charlie bets the house--literally. Charlie, his wife Charming, and their twin 10-year old boys, all live in *the house*. Winn Takem tops Charlie with four 3s. Since he is the only one in title, Charlie signs a deed in front of two witnesses and a notary public (who just happens to be at the game), conveying the house to Takem who records the deed the following day. Ashamed, Charlie *forgets* to tell Charming what happened. Two weeks later, Charming is served with an eviction notice by the county sheriff. Charlie may be an idiot but Charming isn't. She hires an attorney and gets the deed set aside. Why--because of the Florida homestead laws. Although the title was solely in Charlie's name, Charming and the family still have their *rights* of homestead.

Homestead laws were created to protect the family unit, and revolve around the concept of *intent*. In order for property to be characterized as homestead, the property owner must both reside on the property and *INTEND* to reside on the property as his/her principal residence. Only individuals can get the benefit of our homestead law--corporations, partnerships, limited liability companies, and the like cannot apply nor qualify for homestead status. This means that if you buy a house in your corporation's name, and reside on the property, you cannot obtain the benefits of Florida's homestead laws. There is also a size limit applied to homestead--up to one-half of an acre within the limits of a municipality, and up to 160 acres outside of the city limits, all of which land must be contiguous.

There are three separate and distinct homestead perspectives to consider--alienation of homestead property, protection from creditors, and real property tax reductions. This article focuses on the joinder/alienation provisions. Protection from creditors and taxes will be presented in a later article.

The Florida Constitution requires that every deed, mortgage, or other transfer of an interest in homestead property be signed by both the husband and the wife, even if only one of them is in title. Imagine the frustration of Jim Jones, who is transferring from New York to Orlando and has signed a contract to purchase a home solely in his own name. He has had a loan approved by the bank and has been told by the bank officer that his wife won't have to attend the closing. At the closing table he learns that he can't complete the purchase of the property (thereby losing his rate lock on the mortgage) because his wife is out of town on vacation and can't be reached. Many lenders insist that they don't need to have the wife sign the mortgage. When it is explained to the lender (typically an out of state lender unfamiliar with Florida law) that the

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transaction cannot be insured without the wife's signature, they have a different response to the question.

An equally frustrating situation is that of a buyer in the middle of an acrimonious divorce, whose spouse refuses to sign anything while they are still married. You can imagine the potential for some unscrupulous twisting of facts in order to make the transaction close. If someone other than the buyer's spouse poses as the spouse and signs, then the buyer's spouse can (and often does) have the deed set aside, or the mortgage negated, since the real spouse didn't sign. This is true even if the property has been transferred a couple of times since the time of the *defective* transfer. Title Insurance claims do get filed over this exact scenario.

Equally disconcerting to property owners are the Constitutional limitations on devising the homestead by will. This body of law is complex and confusing. Simply stated, the law says that homestead property cannot be devised (transferred at death by a will) to anyone if the property owner has a minor child and a spouse. In other words, the

property must pass through the laws established by the Florida legislature. Additionally, if there are no minor children and there is a spouse, the only person you can devise the homestead property to is the spouse.

Many people try to bypass this limitation by transferring their property into a revocable trust. Unfortunately, there is case law that states this is not effective (if you are survived by spouse and/or minor child). The net effect will be the loss of time and the potential expense of a probate proceeding. This body of law is frequently misinterpreted by non-lawyers and lawyers alike. It is highly recommended that any estate planning involving homestead property include the counsel of an attorney familiar with Florida homestead law.

The definition of homestead, as presented here, is relatively simple and straightforward. Yet there are many court cases interpreting this law and, not surprisingly, often with different results. This article is not designed to guide you through all the various nuances and interpretations of Florida homestead law. Suffice it to say that you should always consult with your legal advisor before taking any *creative* steps with your homestead real property. ▲