HOMESTEAD WAIVER IMPUTED TO WARRANTY DEED [FLORIDA]

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The Florida Constitution prohibits a decedent from devising his or her homestead to third parties if the decedent is surviving by a spouse at death. When there are no surviving lineal descendants of the decedent, the surviving spouse will receive 100% of the homestead if an invalid devise is attempted.

Virginia Habeeb died in November 2008, survived by her husband Mitchell and no lineal descendants. Virginia owned homestead property. Her last will gave a life estate interest to Mitchell, with the remainder interest to her sister. Mitchell died about a year later, and his estate challenged the devise as invalid under the Constitution, and asserted that the entire homestead passed to Mitchell at Virginia's death.

In 1979, Virginia and Mitchell had owned the subject condominium as tenants by the entireties. In that year, Mitchell and Virginia signed a Ramco form warranty deed granting to Virginia a fee simple interest in the condominium. Based on this, Virginia's estate claimed that Mitchell had waived his homestead rights in the condominium, and thus no homestead restrictions on the devise applied at Virginia's death. Both the trial court and the appellate court agreed with Virginia's estate.

Virginia's estate had several obstacles to overcome to assert a valid waiver, per the requirements of Fla.Stats. Section 732.702. That statute, in 1979, allowed for a waiver BY A WRITTEN CONTRACT, AGREEMENT, OR WAIVER. The statute further required that each spouse make a FAIR DISCLOSURE TO THE OTHER OF HIS OR HER ESTATE if the waiver is signed after marriage.

A. WRITTEN CONTRACT, AGREEMENT OR WAIVER ISSUE. Virginia's estate argued that the warranty deed constituted the waiver of homestead rights. Clearly, the deed contained no waiver language, and did not mention the term "homestead." Fla.Stats. section 732.702(1) does indicate that a waiver of "all rights" or equivalent language, as to

property or an estate will constitute a waiver of homestead, so there is no requirement of an express reference to homestead rights to have a valid waiver.

In reviewing the issues, the appellate court noted that the Ramco form provides that the grantor "grants, bargains, sells, aliens, remises, releases, conveys, and confirms" to the grantee "all that certain land" as well as "all the tenements, hereditaments and appurtenances thereto" to the grantee. The court indicated that the term "heriditaments" includes "anything capable of being inherited." Based on this language, the court found a valid "waiver" by Mitchell of his homestead rights.

This appears to be quite a stretch. There is no express waiver language whatsoever. Further, the deed language can be read as a waiver of any retained rights of Mitchell that arose by reason of HIS ownership interest in the property – not those under separate homestead provisions applicable to his wife's subsequent ownership. Additionally, there was no mention of any discussions, knowledge, or other direct evidence of intent by Mitchell, that indicated he knew of his homestead rights or that he knew he was waiving them (other than an implied intent based on Mitchell's actions after Virginia's death and prior to Mitchell passing away).

B. FAIR DISCLOSURE ISSUE. Most knowledgeable practitioners implementing a post-marital waiver of homestead rights would have the spouses prepare a written disclosure of assets, or at least a written acknowledgment of knowledge of each other's assets, to meet the fair disclosure requirement. There is no evidence that Mitchell or Virginia made such disclosures to each other in 1979 when the transfer was made to Virginia.

The appellate court was undisturbed by this lack of evidence or disclosure. Instead, it relied on (a) the parties having been married around 30 years at the time of the 1979 transfer, (b) the deed having been prepared by an attorney and signed before two witnesses and a notary public, (c) the parties preparing later estate planning documents based on the real estate transfer and without regard to homestead restrictions, and (d) Mitchell not having made objections during the period he survived Virginia.

Again, the courts appear to have really stretched to find a waiver, when there clearly was no express evidence of one.

COMMENTS. The holdings of the case can be distilled to (a) a warranty deed between spouses can constitute a waiver of homestead right, and (b) disclosure of assets can be inferred from the length of marriage. The courts' clearly reached to find compliance with the statutory requirements of waiver, especially since when there is doubt whether a constitutional right has been waived, there is a presumption against the waiver (as acknowledged by the appellate court in its opinion!). While perhaps the reaching did not result in an egregious result in this case, it provides fodder and precedent for assertions of waiver of homestead without clear disclosure of assets or clear waiver language in future cases.

While the courts were applying the waiver statute as it existed in 1979, the portions of Fla.Stats. Section 732.702 addressed in the case are essentially unchanged, so that the analysis has continued application to such waivers being made today.

As an aside, a useful summary table of the Florida restrictions on transfers of homestead property is available here.

RICHARD J. ABEEB, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MITCHELL HABEEB v. CATHERINE RISK LINDER, AS PERSONAL REPRESENTATIVE OF VIRGINIA HABEEB, 3rd DCA (February 9, 2011)

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