I. INTRODUCTION

The purpose of the homestead provisions as contained in Article X, section 4(c) of the Florida Constitution and Chapters 731 – 733 of the Florida Statutes are to protect families in Florida. Accordingly, the owner of a homestead, as well as the surviving spouse and descendants of a deceased homestead owner, are granted certain protections with regard to the homestead property. Those protections consist of both a creditor exemption for the homestead property as well as a set of devise restrictions designed to limit the ability of the owner to devise the homestead property when he or she is survived by a surviving spouse or minor descendants.

In addition to the constitutional provisions, there are several statutes contained in the Florida Probate Code that control the descent and devise of homestead. See F.S. 731.201(33), F.S. 732.401, F.S. 732.4015, F.S. 732.4017, F.S. 733.607(1) and F.S. 733.608. In 2010 there was significant legislation concerning the descent and devise of homestead and the rights of a surviving spouse in relation to the homestead property. This outline reviews the rights of a surviving spouse in homestead property, including those important changes in 2010.

Finally, there has been significant confusion in the case law regarding homestead property held in a revocable trust or homestead property that “pours over” into a revocable trust upon the death of the grantor. Recent case law has clarified some of the confusion on this issue, but many more questions remain unanswered. This outline reviews some of those issues.

II. ELECTION OF SURVIVING SPOUSE IN HOMESTEAD PROPERTY

Article X, Section 4 of the Florida Constitution provides creditor protection for the owner of homestead property as well as the spouse and heirs of the owner upon his or her death. The devise restrictions on the homestead property are also contained in Article X, Section 4 of the Florida Constitution. While the Florida Constitution provides for certain devise restrictions on homestead property, it does not address how that property descends upon the death of the owner of the homestead. The descent of homestead property is covered in the Florida Statutes, specifically F.S. 732.401.
a. **Article X, Section 4, Florida Constitution** – Provides creditor protection for the owner of homestead property as well as the spouse and heirs of the owner upon his or her death and institutes certain devise restrictions on the property if the owner is survived by a spouse or a minor child,

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

b. **F.S. 732.401(1)** - While Article X, Section 4 of the Florida Constitution provides for the devise restrictions on homestead property, F.S. 732.401(1) controls the descent and devise of restricted homestead property. If the owner of homestead real property attempted to devise homestead in a manner not permitted by the constitution, or failed to make a devise of the homestead, 732.401(1), Florida Statutes, 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.

i. **A Life Estate the Spouse Can't Afford.** Because the surviving spouse only has a life estate, he or she has a duty to the remaindermen to maintain the property. If the surviving spouse cannot afford to do so, selling the home may be an option, but is possible only if the remaindermen agree. The sale, however, creates complex estate and gift tax issues affecting all parties involved. The remedy of a partition action under Chapter 64, Florida Statutes, is not available to force the sale of the property since the remaindermen (descendants) do not have a current possessory interest in the property.

c. **F.S. 732.401(2)** - Subsection (2) was created to provide the surviving spouse with a choice upon the death of the first spouse. The spouse can accept the life estate provided under Subsection (1) or elect to take an undivided one-half interest in the homestead, with the decedent's descendants receiving the other undivided one-half interest:

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

i. This alternative creates a tenancy in common relationship between the spouse and the decedent's descendants. The law applicable to tenancy in common interests is clearer in the areas of valuation, allocation of ownership expenses, and division of sale proceeds. In addition, the surviving spouse could utilize the partition procedures under Chapter 64 that are not available to a life tenant. One half of the net proceeds of the partition action would be payable to the surviving spouse and the balance would be payable to the vested remaindermen.

ii. The election should not jeopardize any homestead-related property tax provisions as to the surviving spouse's interest. Florida Statutes section 193.155 provides that a change of ownership in homestead real property results in the reassessment of homestead property values to current just value as of January 1 in the year following the change of ownership.
Section 193.155(c)(3) provides that there is no change of ownership when the change in ownership is by operation of law under section 732.4015. Under section 193.155(8) a homestead owner can apply the benefits of the Amendment 10 Cap to a new homestead. This would benefit the surviving spouse who elects an undivided one-half interest in the homestead, sells his or her interest, and then establishes a new homestead.

iii. Subsection (2)(a) describes who may make the election, when the election must be made, and the manner of making the election.

1. The surviving spouse may make the election.
2. The surviving spouse’s guardian or attorney-in-fact may also make the election, but the election can be made only after the court finds that the election is necessary for the spouse’s best interests, taking into account the surviving spouse’s life expectancy. The amendment is patterned after the elective share procedures found in section 732.2135, Florida Statutes.

iv. Subsection (2)(b) addresses the time for making the election by the surviving spouse and provides that the election must be filed within six months of the decedent’s death. Although the surviving spouse would have a short period of time to make the election, he or she would still benefit from the constitutional protections by receiving a life estate in the homestead if no election is made.

1. When the decedent's estate is required to file a federal estate tax return and pay estate tax (which is due within 9 months after the date of death), it is critical to know whether the homestead election has been made in advance of the due date for the filing of the return and payment of tax. The life estate provided to the surviving spouse under section 732.401 is eligible for the marital deduction to the extent of the full value of the property under Internal Revenue Code section 2056. The election to take an undivided one-half interest would result in only the value of a ½ interest in the homestead being eligible for the marital deduction. Whether the spouse accepts a life estate or elects a ½ interest, persons other than the spouse could be affected significantly by the reduction in the estate tax marital deduction by the value of a ½ interest in the homestead.1

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1 Protected homestead property is exempt from estate tax apportionment under Florida Statutes section 733.817, so others pay the tax, if any.
v. Subsection (2)(c) provides that the time for making the election is tolled when a guardian or attorney in fact petitions the court for approval to make the election.

1. Prior to the 2012 amendment, Subsection (2)(c) read as follows,

A petition by an attorney in fact or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent’s death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

2. The language was confusing because a party already had six months to make an election so there was no need for a “tolling” of the election if an order authorizing the election was entered prior to the end of the six-month election period.

3. The 2012 amendment to Subsection (c) simply clarifies the tolling provisions to accurately reflect the intent of the legislature that the six-month election period would be tolled if a petition by an attorney-in-fact or a guardian was timely filed during the six-month election period. The tolling continues for at least 30 days after the rendition of the order allowing the election,

A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent’s death and during the surviving spouse’s lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election tolls the time for making the election until 6 months after the decedent’s death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

4. BEWARE – The effective date is July 1, 2012 but the application is specifically limited only to estates of persons dying on or after July 1, 2012.

vi. Subsection (2)(d) provides that the election is irrevocable. This avoids the potential title problems that would be created if the election were made and then withdrawn.
vii. Subsection (2)(e) provides that the election may be made by recording a notice of the election in the official record books for the county or counties in which the homestead is located. This allows the surviving spouse to exercise the election even if probate proceedings have not been initiated. The homestead election procedure differs from the elective share procedures which require a pending probate proceeding. The homestead election might not require a full probate proceeding because protected homestead is not considered an asset of the probate estate.²

d. **F.S. 732.401(3)** - Provides that while the surviving spouse holds a life estate, he or she is responsible for the costs of ownership normally allocated to a life tenant. Upon electing an undivided one-half interest as tenant in common, the ownership expenses would then shift accordingly, as of the date the election is filed. The change in the allocation of expenses should not jeopardize the marital deduction against estate taxes if the election is made. Of course, there is no change in allocation of expenses if no election is made,

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent’s descendants, as remaindersmen, in accordance with Chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

i. The responsibility for expenses allocated to a life tenant differs from that of a tenant in common. The following chart illustrates differences in the usual allocation of ownership expenses under the two forms of ownership.³

<table>
<thead>
<tr>
<th>Life Tenant Obligations</th>
<th>Obligation as 50% Tenant in Common</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mortgage Principal:</td>
<td>None</td>
</tr>
<tr>
<td>Mortgage Interest:</td>
<td>100%</td>
</tr>
<tr>
<td>Property Taxes</td>
<td>100%</td>
</tr>
<tr>
<td>Ordinary Maintenance</td>
<td>100%</td>
</tr>
<tr>
<td>Long-term Maintenance</td>
<td>None</td>
</tr>
</tbody>
</table>

³ The chart is for illustration purposes only and the allocation of expenses can be adjusted by the specific facts of any given situation as provided by current law.
III. **HOMESTEAD AND JOINT PROPERTY**

Prior to 2010, there was confusion regarding the status of joint property and whether the survivorship provisions of the JTWROS title trumped the forced descent provisions of the homestead provisions. For example, assume a father purchased a house with his child and titled the property as JTWROS. The property is the homestead of the father. Subsequent to the purchase of the property, the father marries and both husband and wife continue to reside on the property. When husband dies, who receives the property?

Case law from the Second DCA held that the daughter would be entitled to fee simple ownership in the property, but there was no other case law. See *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA 1984). The 2010 amendments to F.S. 732.401 clarified the issue.

a. **F.S. 732.401(5)** - During the 2010 legislative session F.S. 732.401 was amended to add F.S. 732.401(5) which clarified that property owned by the decedent as a joint tenants with rights of survivorship is not subject to the restrictions on devise. Prior to the 2010 amendment, F.S. 732.401 provided that property owned as tenancy by the entireties was not subject to the homestead devise restrictions, but was silent about property owned as joint tenants with right of survivorship. The language was added to prevent the argument that its omission in the statute reflected the legislature's intent to treat such interests differently. The language in Subsection (5) reads,

(5) This section [F.S. 732.401] does not apply to property that the decedent owned as in tenancy by the entireties or joint tenancy with rights of survivorship.

b. **F.S. 731.201(33)** – This statute was amended in 2012 in order to make the definition of “protected homestead” consistent with the 2010 amendment to F.S. 732.401(5) and specifically excludes property owned in joint tenancy with right of survivorship from the definition,

(33) “Protected homestead” means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner’s surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship as tenants by the entirety is not protected homestead.

i. The effective date is July 1, 2012 but it is specifically made applicable to proceedings pending before or commenced after July 1, 2012.
c. F.S. 732.201 – F.S. 732.2155 - Homestead vs. TBE When Determining Elective Share

When a spouse dies, the manner in which the marital residence was titled can have a dramatic impact on the elective share. The elective share calculation can be dramatically different depending on whether the marital residence was owned as TBE or was owned solely by the deceased spouse. The reason is that pursuant to F.S. 732.2045(i), property that is the protected homestead of the decedent is not included in the elective estate. As it is not included in the elective estate, it is not counted as property received in satisfaction of the elective share under F.S. 732.2075.

i. Hypothetical – Spouse 1 dies a resident of Florida married to Spouse 2 and there are no lineal descendants. Spouse 1 excludes Spouse 2 from his will and leaves all assets to his longtime girlfriend. Spouse 1 dies owning the following assets:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brokerage Account</td>
<td>$1,900,000</td>
</tr>
<tr>
<td>Personal property</td>
<td>$100,000</td>
</tr>
<tr>
<td>Residence</td>
<td>$1,000,000</td>
</tr>
</tbody>
</table>

Total = $3,000,000

1. Total elective share if residence owned as TBE:

F.S. 732.2035(3) - Elective Estate only includes the value of ½ of the residence as it is owned TBE so elective estate is $2,500,000.

F.S. 732.2065 - Elective Share is 30% of elective estate so elective share is $750,000.

F.S. 732.2075 - Satisfaction of Elective Share includes ½ value of property owned as TBE so Spouse 2 is counted as having already received $500,000 in satisfaction of the elective share. Accordingly, surviving spouse entitled to $250,000 in additional assets to satisfy elective share.

Spouse 2 ends up with a house valued at $1,000,000 (but she already has TBE ownership in house at the time of death which the elective share statute counted as already being owned ½ by Spouse 2) and $250,000 in assets.

2. Total elective share if residence owned by deceased spouse:
F.S. 732.2045(i) - Elective Estate excludes the entire value of the protected homestead so elective estate is $2,000,000.

F.S. 732.2065 - Elective Share is 30% of elective estate so elective share is $600,000.

F.S. 732.2075 - As the homestead was improperly devised, Spouse 2 is entitled to a fee simple interest in the homestead per F.S. 732.401. There is no deemed satisfaction of elective share as exempt homestead is not included in elective estate, so spouse is entitled to assets with a value of $600,000.

Spouse 2 ends up with a house valued at $1,000,000 and receives $600,000 in other assets from the decedent’s estate obtaining significantly more assets.

IV. DISCLAIMER OF HOMESTEAD BY SPOUSE

There may be situations where the surviving spouse may wish to disclaim her life estate in the homestead property. One would be if the property is “upside down” because the mortgage owed on the property was greater than the value of the property. On the opposite end of the spectrum, if the homestead property is valuable, the surviving spouse may want to utilize the decedent’s estate tax exemption and use the homestead to fund the decedent’s credit shelter trust. The descent of the homestead upon disclaimer by the surviving spouse depends upon whether the homestead property was devise restricted:

a. **F.S. 732.401(4)** - If property was devise restricted and resulted in a life estate in spouse with remainder to descendants then a disclaimer by spouse will accelerate the remainder interests of descendants:

F.S. 732.401(4) - If the surviving spouse’s life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent’s descendants may not be divested.

b. **F.S. 732.4015(3)** - If the property was properly devised to the spouse and there is a disclaimer by the spouse then the property passes according to the provisions of chapter 739:

F.S. 732.4015(3) - If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse’s interest is
disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

- QUERY – What happens when spouse and all descendants disclaim property? Does it escheat to the state of Florida or pass back into estate as an estate asset?

V. WAIVER OF HOMESTEAD RIGHTS BY SPOUSE

A spouse is free to waive the protections afforded that spouse by Article X, Section 4 of the Florida Constitution. Any such waiver must meet stringent requirements provided by Florida Statutes.

a. **F.S. 732.702** - Provides that a spouse may waive any rights to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate.

   i. Subsection (1) provides that in order to be considered valid, a waiver must be signed by the waiving party in the presence of two subscribing witnesses.

   ii. Subsection (2) provides that if the waiver is executed after marriage, each spouse shall make a fair disclosure to the other of that spouse’s estate.

b. **Habeeb v. Linder, 36 FLW D300 (February 9, 2011)** – A warranty deed executed by husband and wife transferring property from TBE into wife’s name alone was sufficient to form the basis for the husband’s waiver of his homestead rights.

   i. Ramco Form 01 used – transferred “all the tenements, hereditaments and appurtenances thereto”.

   ii. Court relied on language in the deed and held, “In this case the term ‘hereditaments’ in the 1979 warranty deed encompasses the homestead rights of each grantor as the survivor.” “Hereditaments” defined as anything capable of being inherited.

   iii. On May 17, in a sua sponte Order, the 3rd District Court of Appeals withdrew the Habeeb decision via this order:

   "Upon the Court's own motion, and upon consideration of a settlement of this appeal before the issuance of a final opinion, the non-final opinion issued February 9, 2011, 36 Fla. L. Weekly D300, is hereby withdrawn."
iv. The *Habeeb* case cannot be cited as precedence but leaves one with uncertainty as to the status of many situations where homestead property transferred from both spouses to one spouse or to one of the spouse’s revocable trust.

VI. **INTERVIVOS HOMESTEAD TRUSTS**

While Article X, Section 4 of the Florida Constitution imposes devise restrictions on homestead property, there is no restriction on the lifetime alienation of homestead property. If the owner is married at the time of the transfer, the spouse must consent to that transfer. In 2010, the Florida Legislature passed F.S. 732.4017 that provides statutory guidelines of accomplishing lifetime transfers of homestead property, either outright or to a continuing trust.

a. **F.S. 732.4017** – Provides guidance to the estate planning practitioner on how to effectively avoid the devise restrictions on homestead property through the use of an inter vivo conveyance while still preserving certain rights in the owner. The conveyance can be outright (such as a deed of a remainder interest to a named individual), or it can be in trust for the benefit of one or more beneficiaries.

i. Subsection (1) of the new statute sets forth two essential requirements:

1. There must be a valid inter vivos conveyance of an interest to one or more persons other than the homestead owner, and

2. The homestead owner cannot have the power, acting in any capacity, whether alone or in conjunction with another person, to revoke the interest that is conveyed, or to revest the interest in the owner.

ii. Subsection (2) applies to conveyances made in trust, and permits the owner of the homestead property to retain a power to alter the beneficial use and enjoyment of the interest that is conveyed by any one or more of the beneficiaries of the trust, as long as the power cannot be exercised in favor of the owner, the owner’s creditors, the owner’s estate, or the creditors of the owner’s estate, or in a manner that would discharge a legal obligation of the owner.

1. The owner can exercise a power to alter the interests of beneficiaries who are identified in the trust instrument, but cannot exercise it in favor of persons not included in the class of beneficiaries identified in the trust instrument. For example, if the trust is a discretionary trust for the benefit of the owner’s
descendants living from time to time, the owner can exercise a power to exclude a child of the owner as a beneficiary, or to change the ages specified for outright distributions, but the owner could not direct that distributions be made to the owner’s spouse or to anyone else not a descendant of the owner. The power can be only be exercised during the owner’s lifetime, and thus cannot be exercised by will.

2. Retention of such a power usually will be necessary in order to avoid immediate gift tax consequences upon the transfer of an interest in the homestead property, even if the owner retains a separate interest in the property (because of the rules under section 2702 of the federal Internal Revenue Code). For example, if the owner of homestead property conveys the homestead property to an irrevocable discretionary sprinkling trust for the benefit of the owner’s descendants living from time to time, the full fair market value of the property will be subject to gift tax even if the owner retains a life estate in the homestead (because under section 2702 there is no offset for any interest retained by the owner other than an annuity or unitrust interest). Retention of a power to alter the beneficial use or enjoyment of the interest conveyed (whether the power is limited in scope or is unlimited) will eliminate immediate gift tax consequences even if the power is limited in its scope, by utilizing the incomplete gift rules under section 2511 of the Internal Revenue Code.

iii. Subsection (3) makes it clear that if an inter vivos conveyance satisfies the requirements of subsection (1), the owner can retain separate interests in the homestead property, such as a life estate (which would be desirable if the owner intends to continue to occupy the homestead property and wishes to retain homestead property tax benefits such as the Save Our Homes cap on increases in assessed taxable value). Interests that satisfy the requirements of subsection (1) will not be treated as testamentary in nature even if they are future interests, such as a remainder interest following a life estate retained by the homestead owner. Furthermore, an interest that satisfies the requirements of subsection (1) is not testamentary in nature even if the interest is subject to extinction upon the occurrence of an irrevocably specified event or contingency, such as the owner being alive on a date when all of the owner’s children have reached the age of majority (at which time the constitutional restrictions on devise would no longer exist).

iv. The following are examples of qualifying inter vivos conveyances that are not subject to the constitutional and statutory restrictions on the devise of
homestead property (whether or not the owner is survived by a spouse or minor child, assuming that all other conveyancing requirements have been met):

1. An inter vivos conveyance to a qualified personal residence trust (within the meaning of section 2702 of the Internal Revenue Code).

2. An inter vivos conveyance of a remainder interest in homestead property (whether outright or in trust) following a life estate retained by the owner.

3. An inter vivos conveyance of a remainder interest in homestead property that is subject to complete divestment if the owner of the homestead property survives to a date that is specified in the instrument of conveyance, or if the conveyance is in trust, to a date that is specified in the trust instrument. (Example: a vested remainder interest that is subject to divestment with a reversion back to the homestead owner if he or she is still alive on a specified date, or that is subject to divestment with a reversion back to the owner’s estate if he or she is not survived by a minor child upon his or her death).

v. Conveyance of an interest that meets the requirements of the new statute should not cause the homestead owner’s retained interest to be revalued for assessment purposes, as long as the person conveying the interest retains a life estate or other interest that qualifies as homestead for real property tax purposes under current law.

VII. HOMESTEAD IN REVOCABLE TRUSTS

There has been significant confusion in the case law regarding homestead property held in a revocable trust or homestead property that “pours over” into a revocable trust upon the death of the grantor. The relevant issues when homestead property is held in a revocable trust are:

(1) The first issue is whether the devise restrictions and forced descent of the property pursuant to the Florida Constitution and the Florida Statutes will apply.

(2) The second issue is whether the exemption from forced sale pursuant to Article X, Section 4(b) of the Florida Constitution will inure to the benefit of the designated trust beneficiaries.
The final issue is the timing and method of the passage of title to property titled in a revocable trust and what parties (trustee vs. beneficiaries) have the responsibilities for paying the expenses related with the property during the initial trust administration.

a. Devise Restrictions and Forced Descent

i. The relevant statutes indicate that property held in a revocable trust is devise restricted just as if the property held in the revocable trust was titled in the name of the grantor individually upon death.

ii. See F.S. 732.4015(2) that expands the definition of “owner” and “devise” found in section (2) to include revocable trusts. Application of this definition makes a revocable trust transparent for the limitations imposed upon the devise of homestead real property.

b. Inurement of Creditor Protection Upon Death of Grantor - Is the grantor of a trust described in §733.707(3), during grantor’s lifetime, entitled to the benefits of the creditor protections provided under Article X, Section 4(a) of the constitution for homestead real property titled in the name of the trustee of the trust? If so, does that exemption inure to the benefit of the beneficiaries of the trust after the death of the grantor under Art. X, §4(b)?

i. Significant case law has developed on the first issue, and the cases have been consistent in holding that the creditor protection under Article X, Section 4(a) does apply to property held in a revocable trust during the lifetime of the grantor. See Callava v. Feinberg, 864 So.2d 429 (Fla. 3d DCA 2004), Engelke v. Estate of Engelke, 921 So.2d 693 (Fla. 4th DCA 2006), In re Alexander, 346 B.R. 546 (Bankr. M.D. Fla. 2006), and Cutler v. Cutler, 994 So.2d 341 (Fla. 3rd DCA 2008) The holdings in Callava, Engelke, Cutler and Alexander appear to confirm that a grantor of a revocable living trust will be able to retain the constitutional protection under Article X, §4(a), of the Florida Constitution during the grantor's lifetime.

ii. Once we have established that the grantor of a revocable trust is entitled to the lifetime constitutional exemption from forced sale, we must examine whether that exemption inures under Art. X, §4(b) to the beneficiaries of the trust as it would if the real property were devised directly to a member of the protected class under a will.

1. Elmowitz v. Estate of Zimmerman, 647 So.2d 1064 (Fla. 3d DCA 1994) – Held that the exemption from creditors did not inure to the
beneficiaries of revocable trust. In this case, the 3rd DCA held that the devise of homestead to the decedent’s revocable trust caused the homestead creditor exemption to be lost. This is the only case with this type of holding.

a. The *Elmowitz* court noted in a footnote that the property was not specifically devised to the beneficiary of the trust but rather, the beneficiary was entitled only to an amount equivalent in value to 50% of the trust assets and was not entitled to an undivided or equitable interest in the protected homestead property.

b. There is an implication in the footnote that if the property was specifically devised under the revocable trust that the exemption may have inured to the beneficiary, “It is noted that the Zimmerman’s property was not specifically devised to Plotkin, thus she could not claim protection under Article X, Section 4(b) of Florida’s Constitution . . . and was only entitled to an equivalent in value from the assets of the trust.”

c. The court in *Elmowitz* cited *In re Estate of Morrow*, 611 So.2d 80 (Fla. 2d DCA 1992), as support for its holding. However, *Morrow* did not reach the question of whether protected homestead property transferred to a trust loses its protected status because there was no beneficiary who was a member of the protected class to provide the personal representative with justification for filing the petition.

d. *Elmowitz* cited by Florida Supreme Court as authority in *Warburton* but for a different proposition.

2. *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So.2d 774 (Fla. 1st DCA 1992) – The 1st DCA addressed the issue of whether the exemption inures when the protected homestead is devised in a will to a testamentary trust. The court looked to the substance rather than the form of the devise in holding that the property retained its exempt character. In Mrs. Downing’s will she devised her homestead to her former husband, as trustee of a testamentary spendthrift trust for her daughter (the opinion implies that the daughter was not a minor). The court said that “the trustee, Mr. Downing, although possessed of legal title in the subject property, exercised nothing more than a supervisory interest in the homestead. Were the facts otherwise, this result may have been different.” Id. at 776. Although the opinion does
not discuss any of the specific terms of the trust, one must wonder if the trustee had the power to sell the property. Really an example of a court stretching to reach a particular result.

3. *Engelke v. Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006) – The 4th DCA confirmed its acceptance of the transparency of the trust for homestead purposes. In *Engelke*, the decedent’s ½ interest in his residence was transferred to his revocable trust prior to his death. He retained the right to live on the property and the right to revoke the trust at any time. On his death, his wife continued to have the right to live on the property during her lifetime and, upon her death or removal from the home, the decedent’s children would receive the home through the residuary provisions of the trust. *Id.* at 694. The court held that the decedent’s interest in the property was protected during his lifetime under Art. X, §4(a) and the exemption inured to his heirs under §4(b) upon his death. *Id.* at 696. In support of its holding, the court cited *Hubert v. Hubert*, 622 So.2d 1049 (Fla. 4th DCA 1993), in which the court held the decedent’s exemption inured to his sons where the decedent devised his property to a “good friend” for her life with a remainder to his sons. While the value of the life estate could be reached by the decedent’s creditors, the value of the remainder interest remains protected. *Id.* at 1051.

4. *Arnoson, et al v. Aronson*, 81 So.3d 515 (Fla. 3d DCA 2012) – In *Arnonson*, the owner of a homestead conveyed the property to his revocable trust during his lifetime. A spouse and two adult sons from a prior marriage survived him. Upon his death, the surviving spouse was to receive an interest in all assets as a lifetime beneficiary of a marital trust. Not only did the spouse have the right to income, there was a possibility of principal invasions and a 5 x 5 power under which she had the right annually to withdraw the greatest of 5% of the assets of the trust or $5,000. The only significant asset of the trust was the homestead property and the sons, as trustees, were seeking to liquidate the homestead property to cover expenses in the estate and trust administration.

   a. The 3d DCA held that the property was the homestead of the grantor, and because a spouse survived him, the property was not subject to devise except to the surviving spouse. See Article X, Section 4(c) and F.S. 732.4015(1), “The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner’s spouse if there be no minor child.” The 3rd DCA held that because the property was homestead, it could not be utilized by the trustees for payment of estate and trust expenses.
c. **Passage of Title** – While this issue is well settled in the probate context, there is still some uncertainty with regard to trusts.

i. In the Florida Probate Code, these issues are well settled and it is clear that in the case of protected homestead, title passes at the moment of death outside of the probate estate.

1. F.S. §733.607(1) provides, “Except as otherwise provided by a decedent’s will, every personal representative has a right to, and shall take possession or control of, the decedent’s property, except the protected homestead, ...” (Emphasis supplied).

2. F.S. §733.608(1)(a) provides, “All real and personal property of the decedent, except the protected homestead, ... shall be assets in the hands of the personal representative . . .”

3. It is clear that both of those statutes apply only to a personal representative and not in a trust context. F.S. §733.607 even refers specifically to “a decedent’s will” and both refer to “the personal representative”.

ii. With regard to homestead property held in revocable trusts, there are no trust statutes addressing when or how the title to such property passes to the beneficiaries upon the death of the grantor of a revocable trust. While there are no statutes, a recent case from the Third DCA provides some clarity with regard to devise restricted homestead property that is held in a revocable trust upon the death of the grantor.

1. **Armoson, et al v. Aronson**, 81 So.3d 515 (Fla. 3d DCA 2012) – This case provides some much needed guidance regarding homestead property and how trustees should handle that homestead property upon the death of the grantor/owner. See prior discussion of this case above for facts of case.

   a. As the property was improperly devised, the property passed according to F.S. 732.401(1) with a life estate vesting in the spouse and a remainder interest vesting in the two adult sons.

   b. IMPORTANT - of special note is that the 3d DCA held, “At the moment of Hillard’s death, his homestead property passed outside of probate . . . in a twinkle of an eye, as it
were to his wife for life, and thereafter to his surviving sons, James and Jonathan per stirpes." Id. at 519.

c. All of the authority cited by the 3d DCA in support of this proposition was based on homestead property held in an estate context. The author is assuming that this is because once the trust devise of the homestead property was declared invalid, the property became subject to the intestacy provisions so application of the homestead cases in the estate context was appropriate.

2. IMPORTANT – The Aronson case does not address the issue of how and when title passes on homestead property if it is properly devised pursuant to the terms of the trust.

3. Example – The grantor of a revocable trust dies with his or her homestead held in the trust. A spouse and one adult child survive the grantor. The trust devises all assets of the trust through a residuary clause outright to the spouse.

- Who pays the expenses of the property during administration such as mortgage payments, condo maintenance and assessments, upkeep, utilities, taxes?

- Who is responsible for damage to the property during initial administration such as hurricane damage or vandalism or theft?

- Who is responsible for insuring the property?

- As an attorney for the trustee, can you base your fees on the value of the homestead property? See F.S. 736.1007.

4. Still no answers to this issue but last year the RPPTL Section of the Florida Bar formed the Homestead Issues Study Committee to study and address various homestead issues. The committees is currently working on the issue of homestead property held in revocable trusts and create a statutory framework to provide much needed guidance in this area.