Kelley's Homestead Paradigm

Not Protected Homestead* Subject to probate, administrative expenses, creditors' claims, and freely devisable

Protected Homestead.* NOT subject to probate (F.S. 733.608, *McKean v. Warburton*, 919 So. 2d 341), administrative expenses (*Engelke v. Estate of Engelke,* 921 So. 2d 693) or creditors' claims (art. X sec. 4(b))

If the homestead was owned as tenants by the entireties or JTWROS, this Paradigm does not apply. Title passes automatically to the surviving tenant or tenants free of decedent's creditors. *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA 1984). 732.401(5) codifies *Ostyn*.

At Level 2 — protected homestead may not be devised by will or rev trust. F.S. 732.4015
At Level 3 — protected homestead may be devised only to the spouse.**
Below Level 3 — decedent's homestead may be freely devised.

* Protected Homestead is defined in 731.301(33). Also see F.S. 733.608(2).

** Devise of protected homestead is limited in the same manner whether title is held by an individual or by a revocable trust. 732.4015(2)(a).

Level 1 ► Was the property decedent's homestead ?

Art X sec 4(a)

No → Probate the homestead realty like any other asset subject to administration and claims.

Yes ↓

Level 2 ► Was decedent survived by a minor child ?

Art X sec 4(b),(c)

Yes → Life estate*** to spouse, if any, remainder to descendant(s) in being. If no spouse, or if waiver of spousal rights,**** or spousal disclaimer,***** fee simple to descendant(s).

732.401, 732.4015, 732.102
732.103, 732.702, 739.201

No ↓

Level 3 ► Was decedent survived by a spouse ?

Art X sec 4(b),(c)

Yes → Was decedent's entire homestead devised to the spouse ?

Estate of Finch, 401 So. 2d 1308
Estate of Cleeves, 509 So. 2d 1256

Yes → Spouse takes decedent's entire Interest

No → Was there a valid waiver of spousal rights**** ?

Yes → Spouse takes decedent's entire Interest

No → Was decedent survived by a descendant ?

Cavanaugh v. Cavanaugh 542 So. 2d 1345

Yes → Spouse takes a life estate*** with remainder in fee simple to descendant(s) in being.

No → Was decedent survived by heirs ?

732.702

City Nat'l Bank v. Tescher, 578 So. 2d 701
Steffens v. Evans, 70 So.3d 758
Art X sec 4(c), F.S. 732.401(1), 732.102(1)

732.401

No ↓

Level 4 ► Was decedent survived by heirs ?

Art X sec 4(b)

No → Probate the homestead realty like any other asset subject to administration and claims.

Yes ↓

*** The spouse may elect to take a ½ interest as tenant in common rather than a life estate. F.S. 732.401(2)

**** If spousal rights are waived, that spouse is treated as predeceased. 732.702, *Tescher, supra*.

***** A disclaimed intestate or validly devised spousal interest passes pursuant to 739.201. Disclaimer of a surviving spouse's life estate does not divest a descendant's vested remainder interest. 732.401(4).

Level 5 ► Was decedent's homestead devised (even by the will or trust residuary) ?

No → Decedent's intestate heirs take as tenants in common.

732.401, 732.103

Yes ↓

Estate of Murphy, 340 So. 2d 107
McKean v. Warburton, 919 So. 2d 341
Engelke v. Estate of Engelke, 921 So. 2d 693

Level 6 ► Was it devised to an heir(s) listed in 732.103?

No → Probate the homestead realty like any other asset subject to administration and claims.

Yes → Devisee-heirs take title as devised.

Art X sec 4(b),(c)

Snyder v. Davis, 699 So. 2d 999
Public Health Trust v. Lopez, 531 So. 2d 946
Bartelt v. Bartelt, 579 So. 2d 282

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