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## **HOW FAR DOES THE FLORIDA HOMESTEAD EXEMPTION EXTEND**

Florida has three distinct types of "Homestead" classifications: (1) property tax exemption, (2) creditor protection and (3) descent and devise. These classifications can have a direct impact on how a client's estate plan is drafted.

### **EXECUTIVE SUMMARY:**

The April 29, 2009 appellate court ruling in *Bayview Loan Servicing, LLC, Appellant, v. Nivia Giblin* addressed the issue of how far the Florida "Homestead Exemption" extends when a decedent has an estate plan drafted that excludes a surviving spouse. Following precedent, the 4<sup>th</sup> District Court of Appeals extended the "Homestead Exemption" to a decedent's personal residence occupied by his spouse and child, even though the decedent never resided on the property.

### **FACTS:**

Thomas F. Giblin ("Decedent") and Nivia Giblin ("Spouse") were married in 1959 and later had a daughter together. In 1981 the couple separated but never divorced. In 2000, the Decedent purchased, solely in his individual name, residential real property (the "residence") in Broward County. Only his Spouse and daughter moved into the residence and lived there through his date of death in 2001.

Under the terms of the Decedent's Last Will and Testament ("Will"), he bequeathed his estate to his children and grandchildren. During the course of administration of his estate, the personal representative obtained a mortgage on the residence with Bayview Loan Servicing, LLC (the "Lender").

Subsequently, the Lender commenced a foreclosure action against the estate. In response, Spouse filed a petition to determine the homestead status of the residence (something that would grant her a life estate in the residence under Florida law) and exemption from creditor claims. The trial court concluded, after an evidentiary hearing, the residence: (1) Fell within the meaning of article X, section 4 of the Florida Constitution and (2) Was the Decedent's homestead at date of death.

Consistent with its conclusion, the trial court issued an order that "title to the Property descended and the constitutional exemption from the claims of decedent's creditors

inured to the decedent's surviving spouse, Nivia Giblin, as to a life estate, with a vested remainder in the descendants of the decedent in being at the time of the decedent's death." The Lender appealed the ruling.

### **Florida Constitution:**

Article X, Section 4, of the Florida Constitution provides:

(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 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; . . .

(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. . . .

### **Florida Law:**

Under Florida law, a "homestead exemption can be established to each of two people who, while married, are legitimately living apart in separate residences, ..." (*In re Colwell*, 196 F.3d 1225 (11th Cir. 1999)). The "homestead exemption" has been expanded to include a husband's residence, when living apart from his wife who resided in a different residence, despite the fact the couple owned a third residence on which they claimed the homestead exemption (*Law v. Law*, 738 So.2d 522 (Fla. 4th DCA 1999)).

### **Appellate Ruling:**

On appeal, the 4<sup>th</sup> District Court of Appeals concurred with the trial court and held the language contained in Article X, Section 4, paragraph (c) to be clear and unambiguous.

As a result, Spouse received a life estate in the residence with a vested remainder interest to his descendants under § 732.401(1) of the Florida Statutes.

### **COMMENT:**

Under Florida homestead law, a personal residence can qualify as exempt property even when a decedent never lived in it. This fact is an important consideration when drafting or revising an estate plan for a Florida resident.

As this case demonstrates, planners must pay particular attention to the impact of § 732.401(1) of the Florida Statutes and Article X, Section 4 of the Florida Constitution, or even the most carefully drafted estate plan can be negated.

**NOTE:**

The District Court of Appeals only ruled on the issue of whether the subject property was the decedent's homestead, title to which should pass accordingly. The Lender would be free to pursue any available cause of action that was **not** inconsistent with the court's determination.