Homestead and Estate Scenarios  
Revised 5-11-13  

Intestate – Dad dies without a Will

1. Dad dies without a will, leaves a surviving spouse, one minor son and an adult daughter

The homestead automatically descends to the surviving spouse for life, with the remainder one half to the son, one half to the daughter.\(^1\)

Per stirpes means that if any child died but the dead child had offspring (Dad’s grandchildren) would take the share of the deceased child.

The personal representative and probate court have no authority over the homestead property. But because we are not totally sure that the property was homestead without an order determining homestead. Without a probate, we don’t know who is entitled to an interest in the estate or in the homestead. We often document the transaction BOTH as if it was homestead and was not homestead.

In a sale of the property:

- Dad’s estate should be probated, and an order determining homestead entered. The order determining homestead should determine whether the property is homestead and the heirs in whom it vested.

- a deed should be recorded from the spouse and the adult daughter (assuming no other heirs were identified in the probate/order determining homestead)

\(^1\) 732.401(1) and (2) provide:

“(1) If not devised as authorized by law and the constitution, 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.

(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.”
• a guardian must be appointed for the minor child and a court order entered authorizing the guardian to convey the interest of the minor.

• Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – discuss that one you’re your favorite underwriter)

• A release of the P.R. lien (or a deed from the P.R. with appropriate order)

• Other Probate Requirements as appropriate, including estate tax releases

• Record copies of required documents from the probate court file in the official records. (See Checklist)

2. Dad dies without a will, survived by a Spouse, one adult daughter (Diane)– who gave him one grandchild (Alice) and one deceased son (Sam) who left him two grandchildren (Gary & Glenda).

The homestead automatically descends to the surviving spouse for life, with the remainder one half to the daughter Diane, one-quarter each to the grandchildren Gary & Glenda (the children of the deceased son). No share passes to the granddaughter Alice.

Per stirpes means that if any child died but had children (Dad’s grandchildren) would take the share that would have otherwise gone to the deceased child.

Once again, we know the answer, because it was given in the scenario. For the next examiner, we need to document how we know the property really was homestead, and how we know that these were the only heirs who took an interest.

In a sale of the homestead:

• Dad’s estate must be probated

• Order determining homestead and identifying the heirs entitled to the homestead.

• a deed should be recorded from the spouse and the adult daughter Diane, and if adults from Gary and Glenda. (and any other heirs identified in the order)

• a guardian must be appointed for any minor grandchild and a court order entered authorizing the guardian to convey the interest of the minor.

• Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – in which case you should discuss appropriate requirements with underwriting)

• release of the P.R. Lien
• Discuss with your underwriter whether they will require a probate of the estate of the deceased son, Sam. If Sam predeceased Dad, many underwriters will rely on the determination of homestead naming Gary and Glenda as the lineal descendants who took the property. If Sam died after Dad, an interest in the property vested in Sam on Dad’s death, so they will call for a separate probate of Sam’s estate to determine his heirs and entitlement to that share.

• Other Probate Requirements as appropriate, including estate tax releases

• Record copies of required documents from the probate court file in the official records. (See Checklist)

3. Dad was divorced before he died without a will, but was survived by a minor child who lived full-time with the ex-wife.

That the child didn’t live in Dad’s house is irrelevant to our analysis. The test is whether the property was the homestead of the deceased. Since there was no surviving spouse, the homestead property passes to all lineal descendants in being per stirpes.

In a sale of Dad’s homestead:

• Dad’s estate must be probated

• Order determining homestead and identifying the heirs entitled to the homestead.

• a guardian must be appointed for the minor child and a court order entered authorizing the guardian to convey the interest of the minor.

• Deed from the guardian (and any other heirs identified in the order)

• Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – discuss appropriate requirements with underwriting)

• A release of the P.R. Lien

• Other Probate Requirements as appropriate, including estate tax releases

• Record copies of required documents from the probate court file in the official records. (See Checklist)

4. Dad Dies without a will, No Spouse or Minor child.

The homestead passes to the heirs listed in the “intestacy statute” §732.103.
• Dad’s estate must be probated

• Order determining homestead and identifying the heirs entitled to the homestead.

• Deed from the person(s) who are determined by the court to take under the intestacy statute.

• Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – in which case you should discuss appropriate requirements with underwriting)

• release of the P.R. Lien

• Other Probate Requirements as appropriate, including estate tax releases

• Record copies of required documents from the probate court file in the official records. (see Checklist)

Testate – Dad dies with a Will

5. Dad dies, survived by a Spouse (Mom), Junior a minor child, and Sally an adult daughter. His will leaves everything to Mom [or Dad’s friend Lola].

Tracing through the Kelley Paradigm, either of these devises would be void. The property (if homestead) would vest as a life estate in Mom, with the remainder one-half to Junior and one-half to Sally. Anytime there is a minor child surviving the owner of the homestead, the property may not be devised to ANYBODY!

The sale of the homestead will require:

• Dad’s estate must be probated

• Order determining homestead and identifying the heirs entitled to the homestead. This gives you certainty.

• a deed should be recorded from Mom and the adult daughter Sally (and any other heirs identified in the order)

• a guardian must be appointed for Junior and a court order entered authorizing the guardian to convey the interest of the minor.

• Deed from guardian
• Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – in which case you should discuss appropriate requirements with underwriting)

• a release of the P.R. Lien, or a deed from the Personal Representative (which also constitutes a release of the P.R. Lien) and a probate order authorizing the sale or proof that there is a power of sale in the will.

• Other Probate Requirements as appropriate, including estate tax releases

• Record copies of required documents from the probate court file in the official records. (See Checklist)
  
  o Note, under this fact patterns some underwriters will insure without an order determining homestead (for example, if one wasn’t obtained and the probate is now closed) if deeds are obtained from all parties named in the will, all persons identified in the probate and the transaction is backstopped with a deed from the Personal Representative (which also constitutes a release of the P.R. Lien) and either a probate order authorizing the sale or proof that there is a power of sale in the will. But the order determining homestead is preferred because there is always some uncertainty about lineal descendants.

6. Dad dies, survived by a Spouse (Mom), Junior and Sally, both adults. His will leaves the homestead outright to Mom.

This is the classic example of a permitted devise to the spouse. She is receiving the entire fee simple interest in the homestead. Dad may validly devise his entire interest in the homestead (which may be less than fee simple) to his spouse even where there are adult children. If he devises it to anyone else, the devise will fail and it will go to the spouse for life with the remainder to all lineal descendants per stirpes.

a. Same facts, but the will recites that Junior is a drug addict, has stolen from Dad, so leaves the house to Mom and Sally, but not Junior.

The devise to the spouse and less than all of the lineal descendants will fail and the property will vest in the spouse for life with the remainder to the lineal descendants per stirpes.

b. Same facts, but the will mentions that Mom is not a good manager of money, so the will leaves the homestead and everything else to a trust created in the will and appoints a professional money manager as trustee. Mom is the sole beneficiary of the trust during her life, and on Mom’s death, in equal shares to the then living children.
Even though the interest in the trust goes to essentially the same place as the constitution requires (Mom for life, then the kids), the devise fails as to the homestead. The homestead will pass to Mom for life with the remainder one-half each to Sally & Junior.

In each of these cases, a sale of the homestead will require:

- Dad’s estate must be probated
- Order determining homestead and identifying the heirs entitled to the homestead.
- Release of P.R. Lien
- a deed should be recorded from Mom, Junior and Sally (and any other heirs identified in the order)
- Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – in which case you should discuss appropriate requirements with underwriting)
  - Note, under these fact patterns some underwriters will insure without an order determining homestead if the transaction is backstopped with a deed from the Personal Representative (which also constitutes a release of the P.R. Lien) and a probate order authorizing the sale or proof that there is a power of sale in the will. In the case of the testamentary trust, a separate deed from the trustee. But the order determining homestead is preferred because there is always some uncertainty about lineal descendants.
- Other Probate Requirements as appropriate, including estate tax releases
- Record copies of required documents from the probate court file in the official records. (See Checklist)

7. Dad dies, not survived by spouse or minor children. Will directs Personal representative to sell house and distribute proceeds to heirs.

This is one of the few situations in which you can cleanly rely on a deed from the P.R. to convey protected homestead property. See In re: Estate of Price, 513 So.2d 767 (Fla. 1st DCA 1987), and only because there is no surviving spouse or minor child.
Homestead Property Held in Inter-Vivos/Living Trust
Schools of Thought on Living trusts:

Under the constitutional restriction on devise, a Deed by the settlor/beneficiary to the trustee of an inter vivos revocable trust does not deprive the settler/beneficiary of beneficial ownership of the homestead. Even though the homestead is held in a trust, it is still the homestead of the settler and the constitutional restrictions still apply.

There are two schools of thought about what happens in this context.

1. The deed into the trust is retroactively deemed void, if at the time of death of the grantor/trustee the property is homestead and grantor/trustee is survived by spouse (unless trust gives property outright to the spouse in fee simple) or minor child. This view leaves the ownership of the homestead as it was before the conveyance into the trust.

This conclusion is based on a concurring opinion In re Estate of Johnson 397 So.2d 970 (Fla. 4th DCA, 1981), concluding the conveyance into the trust is not a “sale, nor a mortgage” and it couldn’t have been a “gift” because the trust was revocable. Based on this analysis, some insurers view the case as “reverting” the title to the state immediately before the conveyance into trust. Where the homestead was previously held as an estate by the entireties, this can resolve certain problems without the need to probate the estate of the trust grantor.

2. The “devise” out of the trust is deemed void as conflicting with the constitutional prohibition on devise. Under this view, homestead is analyzed in terms of a failed devise and a probate of the settler of the trust is usually required. This view is based on Aronson v. Aronson, 81 So.3d 515 (Fla. 3rd DCA, 2012).

As you would expect, these different theories can give rise to substantially different closing requirements. So, when faced with one of these scenarios, it is important to understand the philosophy and requirements of the insurer you plan to write on.

CAUTION: We always refer to these rules as applying only to a “revocable” trust, but certain powers retained in an irrevocable trust (see §732.4017) or a land trust under §698.071 can also be viewed as an impermissible devise. Discuss with your Florida-based Underwriter.
8. Dad deeds his solely-owned homestead to himself as trustee of his revocable trust. He dies several years later, not survived by a spouse or minor child. Trust provides successor trustee will manage assets for benefit of his three named adult children.

While an inter-vivos trust will be treated as a substitute for devise subject to the constitutional limitations, since Dad is not survived by a wife or minor children, he is free to devise his homestead to anyone he chooses. Since there are no restrictions on doing so in a will, there will be none in a living trust.

Here, the two different schools of thought don’t come into play.

A conveyance of this property does not require probate, and can be accomplished with a deed from the successor trustee and normal trust certifications.

Because this is an estate scenario, you will still need to document clearance of any estate taxes.

a. Same as above, but trust provides that it terminates on Dad’s death and the successor trustee is directed to distribute to the three adult children.

Same requirements as above, but adding deeds from the three adult children (joined by their spouses if the property is homestead as to any of the children)

9. Dad owns the homestead property alone in his own name, and deeds it to himself as trustee of his irrevocable trust. He dies several years later, survived by a spouse but no minor children. Trust provides successor trustee will manage assets for benefit of his wife for life, then for his three named adult children.

Because Dad couldn’t bequeath his homestead property in this manner in a will (subject to trust management), his attempt to do it in a revocable trust also fails.

Here both schools of thought get you to the same place. The homestead is evaluated as if Dad still owned the property in his own name at death. If there is a “back-up” Last Will (to deal with any property omitted from the trust), we evaluate it to see if that will includes a permitted devise to the spouse.

If not resolved in the back-up will, the homestead property passes outside of the trust to vest in the surviving spouse for life, with the remainder in equal shares to his children per stirpes.

To insure a sale of the homestead property:

- Dad owned the property so his estate must be probated
• The probate should include an order determining homestead and an express determination as to the (lack of) legal effect of the trust.

• a deed should be recorded from the heirs (as identified in the homestead order). In an abundance of caution, many underwriters will want to backstop this with a deed from the successor trustee of the trust and the usual trust certifications, even after the court has determined the trust ineffectual as to the homestead property. This is desirable because it shows a clean chain of title into and out of the trustee.

• Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – in which case you should discuss appropriate requirements with underwriting)

• a release of the P.R. Lien

• Other Probate Requirements as appropriate, including estate tax releases

• Normal trust requirements to show valid trust, trustee authority to sell and successor trustee (if you are backstopping the transaction with a trustee deed)

• Record copies of required documents from the probate court file in the official records. (See Checklist)

  a. Same as 9, but the spouse signed a pre-nuptial agreement waiving homestead rights.

While a spouse may validly waive homestead rights allowing the property to pass through a will or trust as if the spouse had pre-deceased, most underwriters require either a judicial determination of the validity of the pre-nuptial agreement, (usually accomplished in the determination of homestead in Dad’s probate proceeding) or a deed from the spouse.

A conveyance of this property does not require probate (Dad is treated as not having been survived by a spouse and the kids are adults), and can be accomplished with a deed from the successor trustee and normal trust certifications (if the spouse will provide a deed); otherwise most insurers will require a judicial determination of the validity of the pre-nuptial agreement, so you might as well decide it in probate.

  b. Same as 9, but the spouse signed a timely disclaimer of the interest in the homestead.

A conveyance of this property does not require probate, and can be accomplished with a deed from the successor trustee and normal trust certifications and recordation of the disclaimer by the spouse.

Note that a disclaimer does not avoid federal tax liens and can be a challenged as a fraud against creditors. The provisions of chapter 739, Fla. Stat. should be carefully reviewed
to make certain that all pre-conditions to a disclaimer have been satisfied (and documented in the record).

10. Dad and Mom own the homestead property as tenants by the entirety and jointly convey it into a living trust. Both are beneficiaries of the trust. Upon the death of either beneficiary, the trust continues to be managed for the benefit of the surviving spouse, and the surviving spouse retains the power to revoke the trust and recapture all assets. On death of the second spouse, the trust terminates with all property vesting in equal shares in the three named children.

a. Dad died, Mom decides to sell the homestead property.

Under this scenario, the two schools of thought come into play – so talk with your underwriter.

Under the first school of thought, we treat the conveyance from Dad to the trust as having been void, so we evaluate it as if the property is still owned as tenants by the entirety. So we would record an affidavit of continuous marriage and accept a deed out of Mom. Since record title is still held by the Trustee (and we could be wrong about our homestead determination), the deed from Mom should be joined by the surviving trustee/successor trustee of the trust, and usual trust certifications made.

No probate of Dad’s estate is required in this scenario.

Under the second school of thought, the trust itself is viewed as an invalid attempt to devise, so Dad’s portion of the trust estate would still be treated as having been owned by him individually.

• a deed should be recorded from the heirs (as identified in the homestead order after consideration of any back-up will).

• Because an undivided Tenant by the Entireties portion of the property was owned by Mom and contributed to the Trust, title to that portion is still owned by the trustee. So you will require a deed from the successor trustee of the trust

• Clearance of any liens against the inheriting heirs (unless the property would also qualify as their homestead as of Dad’s death – in which case you should discuss appropriate requirements with underwriting)

• a release of the P.R. Lien

• Other Probate Requirements as appropriate, including estate tax releases

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2 Some contend that only the conveyance of an undivided one-half interest is voided in this scenario as the conveyance of the other half to the benefit of Mom in the trust is permitted under Art. X, Sec. 4. Others argue that a tenancy by the entireties can’t be severed this easily and that the beneficial interest in the trust is also a tenancy by the entireties. Fortunately, it is not necessary to decide those questions to convey title where Mom and the trustee are willing to cooperate.
• Normal trust requirements to show valid trust, trustee authority to sell and successor trustee

• Record copies of required documents from the probate court file in the official records. (See Checklist)

So the school of thought adopted by your underwriter can make a big difference.

b. Same facts as above, but the trust becomes irrevocable upon the death of the first spouse. Mom decides to sell the homestead property.

Since we are evaluating this scenario after Dad has passed, but while Mom is still with us, the change in nature of the trust from revocable to irrevocable doesn’t matter (yet) to our homestead evaluation.

But again, the two schools of thought come into play. So the homestead evaluation is exactly the same as for scenario 10.a.

However, because the trust became irrevocable when Dad died, that converted the possible future interest of the three children into a vested future interest, so deeds should also be obtained from each of the three children (with appropriate spousal joinders or non-homestead representations) as part of the transaction.

c. Same facts as Scenario 10. Dad dies in 2010, Mom continues to live in the homestead until she passes in 2012. Through her death, Mom had the power to revoke the entire trust. Upon the death of the second spouse, the trust is to terminate and vest in the three named adult children.

Once again, the schools of thought come into play.

Under the first school of thought, the analysis is that the initial deed into the trust was void, so the property continued to be owned as a tenancy by the entireties. On Dad’s death, the entire homestead passed to Mom. On Mom’s death, her portion of the initial deed became void,^2 so Mom is treated as owning the homestead in fee simple.

For a conveyance of the property:

• Affidavit of continuous marriage between Mom and Dad

• Probate of Mom’s estate with an order determining homestead.

• Record certified copy of Dad’s death certificate and an affidavit of continuous marriage.
• a deed should be recorded from the three named children and any additional heirs identified in the order determining homestead. In an abundance of caution, many underwriters will want to backstop this with a deed from the successor trustee of the trust.

• Clearance of any liens against the inheriting heirs and named children (unless the property would also qualify as their homestead as of Mom’s death – in which case you should discuss appropriate requirements with underwriting)

• a release of the P.R. Lien

• Other Probate Requirements as appropriate, including estate tax releases

• Normal trust requirements to show valid trust, trustee authority to sell and successor trustee (if you are backstopping the transaction with a trustee deed)

• Record copies of required documents from the probate court file in the official records. (See Checklist)

Under the second school of thought, there was an invalid attempt to devise homestead when Dad died, so in addition to the above, there will be a requirement for a probate of Dad’s estate, a determination of homestead and heirs (which may be different than the three children named in the trust) and a tracking of all of those interests during the intervening years.

d. Same facts as Scenario 10. But this time the trust became irrevocable on the first to die.

How does that change things? The answer is, I don’t know. It brings us back into that world of trying to count the angels dancing on the head of a pin. Did half or the entire property revert on Dad’s death? Was there still a one-half interest in the trust that arose from Dad that became irrevocable when Mom died?

The solution is once again “Belt and Suspenders” You are going to get all of the documents you need as if Mom owns the property in fee simple – meaning her probate, a deed from the heirs who took, probably a P.R. deed, and you are going to get all of the documents you would need if the property is held by the trust. If you are operating under the second school of thought, you will add all of the documents you need as if Dad owned half the property in fee simple – meaning probate, a deed from the heirs who took, and probably a P.R. deed from his P.R.

Titles don’t fail because someone without any interest releases it.

11. Mom & Dad create a living trust, sell their old home which was owned as Tenants by the Entireties, place the proceeds into the trust, and as trustees of their revocable trust buy a new home from an unrelated party. Dad dies in 2010, Mom continues to live in the homestead until she passes in 2012.
Even though a previous home was owned as tenants by the entireties, where the new homestead was acquired directly by the trust, we can’t rely on the fiction that the deed was void and reverted back to some tenancy by the entireties status that the new home never had.

So under either school of thought most underwriters will adopt the conservative approach of requiring a probate of both Dad and Mom and separate determinations of homestead.

The answers the court will reach are subject to debate and will be influenced by many factors not outlined in the scenario. It becomes highly complex and you will need to reevaluate the closing requirements after the court has determined specific facts and interests.

12. Dad conveys the homestead to an irrevocable trust which he created and funded with other assets, and reserves a life estate in the property to himself. The trust is to manage the property until the now minor children become 25.

In 2010, Florida Statutes were amended in an attempt to allow this structure and others to circumvent the constitutional restrictions on devise of a homestead.

Mechanically the statute declared that a transfer in trust is not a “devise” so long as the settlor of the trust “fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.” §732.4017.

It remains to be seen whether the courts will uphold this circumvention of a constitutional protection, so discuss it with your Florida based underwriter before relying on this statute.