

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/SB 512

INTRODUCER: Rules Committee and Senator Young

SUBJECT: Homestead Waivers

DATE: February 1, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Present	Yeatman	CA	<b>Favorable</b>
2.	Davis	Cibula	JU	<b>Favorable</b>
3.	Present	Phelps	RC	<b>Fav/CS</b>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 512 provides form language that a spouse may include in a deed to demonstrate that he or she knowingly waives the right to inherit homestead property. The State Constitution prohibits an owner from transferring homestead property when the owner has a spouse or minor child but permits a transfer of the property to the spouse if there is no minor child. A spouse, however, may waive this restriction in a signed and witnessed written contract or agreement.

The bill provides that a spouse waives his or her rights as a surviving spouse with regard to the devise restrictions contained in the State Constitution if certain language, or substantially similar language, is included in a deed.

This waiver language is not a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death. Additionally, the language is not a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

**II. Present Situation:**

**Florida Constitution**

The Florida Constitution protects homestead property in three specific ways.<sup>1</sup> The Constitution:

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<sup>1</sup> *Chames v. DeMayo*, 972 So. 2d 850, 853 (Fla. 2007) (quoting *Snyder v. Davis*, 699 So. 2d 999, 1001-02 (Fla. 1996)).

- Provides homesteads with an exemption from taxes;<sup>2</sup>
- Protects homesteads from forced sale by creditors;<sup>3</sup> and
- Limits the manner in which homestead owners may alienate or devise<sup>4</sup> the property.<sup>5</sup>

The purpose of this longstanding public policy is to preserve the home as a shelter for a family so that the family does not become a public charge.<sup>6</sup> By protecting a family's financial interest, the state's financial interests are protected as well.

To protect the interests of the family unit, the Constitution provides in Section 4(c) of Article X that a homestead may not be devised when the owner is survived by a spouse or minor child. However, the homestead may be devised to the owner's spouse if there is no minor child. The Florida Supreme court has noted that this provision "protects the surviving spouse and minor children from having the homestead property transferred out from under them by the other spouse (or parent) without the consent of both spouses."<sup>7</sup>

The Constitution also provides that the owner of homestead property, if married, may alienate the property by mortgage, sale, or gift, if joined by the spouse. Therefore, under the exemption, both spouses are required to join in a conveyance of a homestead that is owned by one spouse to a third party.<sup>8</sup> Requiring the joinder of both spouses in a deed or mortgage serves to "inhibit" all other forms of transferring property away from a spouse or destroying the homestead status of the property.<sup>9</sup>

Section 4(c) of Article X states:

The homestead shall not be subject to devise if the owner is survived by the 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 . . . .

### Florida Statutes

The statutes also echo the Constitution's prohibition on devising homestead property. Section 732.4015, F.S., states that "the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children."

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<sup>2</sup> FLA. CONST. art. VII, s. 6.

<sup>3</sup> *Id.* at art. X, s. 4(a)-(b).

<sup>4</sup> To "alienate" means to transfer property to another person and to "devise" means to give property in a testamentary instrument such as a will. BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014).

<sup>5</sup> FLA. CONST. art. X, s. 4(c).

<sup>6</sup> 28A Fla. Jur. 2d *Homesteads*, s. 3.

<sup>7</sup> *Stone v. Stone*, 157 So. 3d 295, 299 (Fla. 2014).

<sup>8</sup> 28A Fla. Jur. 2d *Homesteads*, s. 78.

<sup>9</sup> *Id.* at s. 79.

## Waiving Homestead Rights – Statutes and Case Law

The question naturally arises as to how a spouse's interest in homestead property, which is legally protected, may be validly transferred. The statutes provide a procedure for waiving spousal rights, particularly homestead rights, under written contracts, agreements, or waivers.<sup>10</sup> But there is a difference of opinion among practitioners as to whether a deed is covered under the umbrella of "contracts, agreements, or waivers." Generally, a waiver of "all rights" is deemed sufficient to waive all of a spouse's rights in an agreement under the statute when signed by the waiving party in the presence of two subscribing witnesses. The statute<sup>11</sup> further provides that if the agreement, contract, or waiver is executed after a marriage, each spouse must make a fair disclosure to the other of that spouse's estate. Disclosure is not required before marriage and no consideration is required for the agreement, contract, or waiver to be valid when executed before or after a marriage.

The issue has arisen in litigation, though, as to what constitutes a valid waiver of homestead rights in a deed. Recently, the issue has been raised as to whether joining in a deed without a more formal agreement or acknowledgement constitutes a valid waiver of homestead rights.

The Fourth District Court of Appeal has issued two decisions dealing with homestead waiver. In *Stone v. Stone*,<sup>12</sup> the court held that a spouse validly waived her homestead rights when she joined in the execution of a deed that conveyed her husband's one-half interest in a homestead property to a qualified personal resident trust. The deed was determined to constitute a waiver even though it contained no particular waiver language and there was no evidence of financial disclosure.

The court was also presented with an issue of spousal waiver in the case of *Lyons v. Lyons*.<sup>13</sup> In that case, a wife's interest in a homestead residence was conveyed in a deed to a qualified personal residence trust without the husband being joined. The court held that the wife did not have standing to later challenge the transfer. The court determined that only the husband, and not the wife, could challenge the transfer.

As a result of these very fact-specific decisions, it is not consistently clear when a knowing and intelligent waiver has occurred. Attorneys who specialize in this area of estate planning and homestead provisions have determined that a statute could be drafted supplying language that would clarify when a person knowingly waives homestead rights in a deed. Statutory language that provides express deed waiver language could reduce the expense of litigation, reduce court time dedicated to resolving these legal conflicts, and reduce the chance that a waiver in a deed is made by mistake or misunderstanding.<sup>14</sup>

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<sup>10</sup> Section 732.702, F.S.

<sup>11</sup> Section 732.702(2), F.S.

<sup>12</sup> *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014).

<sup>13</sup> *Lyons v. Lyons*, 155 So. 3d 1179 (Fla. 4th DCA 2014).

<sup>14</sup> The Florida Supreme Court has held that a surviving spouse may validly waive her homestead rights. However, for the waiver of a constitutional right to be valid, the waiver "must be made knowingly, voluntarily, and intelligently." See *Chames*, 972 So. 2d at 861 (Fla. 2007).

**III. Effect of Proposed Changes:**

The bill provides form language that a spouse may include in a deed to waive his or her right to inherit homestead property. The specific language provides that a spouse has waived his or her rights as a surviving spouse with regard to the devise restrictions contained in s. 4(c), Article X of the State Constitution when certain language, or substantially similar language is included in a deed. The form waiver language states:

By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.

This waiver language is not a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death. Additionally, the language is not a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

The bill takes effect July 1, 2018.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill may provide more certainty and greater predictability for Florida residents and their attorneys as they plan for the disposition of constitutionally protected homesteads upon death.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 732.7025 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Rules on February 1, 2018:**

- Provides that a spouse may waive his or her rights as a surviving spouse with respect to the devise restrictions under the State Constitution by executing a deed; and
- Clarifies that a spouse waives such rights if he or she uses specified form language.

**B. Amendments:**

None.