



WHAT HAPPENS TO MY FLORIDA HOME WHEN I PASS AWAY?

SUMMARY

How your real estate in Florida is handled at your passing depends on the type of plan you put in place beforehand.

UNPLEASANT BUT IMPORTANT

Planning for what happens to our assets, like real estate, after we're gone is crucial. Most people have an idea of what they want to happen to their home, whether that means it's to be sold or goes to a family member. In Florida, how your real estate is handled depends on whether there is a joint owner and if you die intestate (without a will), with a will, or with a trust.

TENANCY IN COMMON (TIC)

In a tenancy in common, each owner has a distinct, separately transferable share in the property. In Florida, property with multiple owners is, by default, considered a tenancy in common unless otherwise specified, and it assumes an equal split between owners (though the percentage of ownership can be different as determined by the owners). If two spouses are both on the title or purchased the property while married, however, it is presumed to be tenancy by the entirety (more below) and automatically transfers directly to the surviving spouse.

If someone shares ownership of a property with a non-spouse through tenancy in common, their share of the property becomes part of their estate when they pass away. The deceased owner's share will be distributed according to his or her will or intestacy laws (at which point it will likely go through probate) or his or her trust. Notably, if all tenants in common qualify for the homestead exemption on their portion of the property, the property will be shielded from creditors. From there, the beneficiaries can determine what to do next with their share of the property, whether that means continuing the co-ownership with the surviving tenant(s) or selling their share to the surviving tenant(s) or otherwise. There has been precedent in which heirs of one share of the property can force a sale of it, even without the agreement of the other owner.

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP (JTWROS)

In a joint tenancy with the right of survivorship, when one owner passes away, their share of the property automatically and directly transfers to the surviving owner(s), spouse, or otherwise. The deceased owner's share does not go through probate. This transfer happens by operation of law, and no specific action is required by the surviving owner(s).

It's important to note that if there is a mortgage on the property, the surviving owner will be responsible for taking over the account. If the owner were a spouse, the surviving spouse would receive a 50% step-up in the property's cost basis. If the surviving owner was not a spouse, however, the death of one of the owners can trigger a transfer that the IRS considers a gift, and this transfer value is usually the value of the entire property, not just a portion of it.

TENANCY BY THE ENTIRETY (TBE)

Unlike JTWRROS or tenancy in common, tenancy by the entirety (TBE) is only available to married couples. If the property was purchased by both spouses or both are named on the title, the property will default to this classification in Florida. Both spouses own an undivided interest in the entire property and must both approve any transfer of the home. In Florida, if either spouse dies, the surviving spouse inherits full ownership of the property. The advantage to this type of ownership is the protection that it grants debtors, as a creditor of one spouse can't force the other spouse to transfer property. However, this is only applicable if there is a judgment against one of the spouses; if a creditor has a judgment against both spouses, TBE will not protect the property.

INTESTATE: NO WILL OR ESTATE PLAN

Intestate is a fancy way of saying you didn't leave behind a valid will or any estate planning documents. In this case, the state's intestacy laws take charge of distributing your assets, including your real estate. That means neither you nor your loved ones get a say in how the property is distributed. For most people, this isn't an ideal situation.

Florida Statutes §§732.101 to 732.111 lay out the intestate succession rules. Who gets what depends on your family structure. Usually, the surviving spouse or descendants are the main beneficiaries. If the descendants are also lineal descendants of the surviving spouse, then the surviving spouse will receive 100% of the intestate estate. However, if the descendants of the deceased spouse are not lineal descendants of the surviving spouse, the surviving spouse will receive 50%, while the lineal descendants will receive the other 50%. If there is neither a spouse nor descendants, the estate goes to other relatives following a specific order, starting with parents, siblings (including half-siblings), and then more remote relatives.

In order to determine the proper distribution, your real estate will have to go through probate, which is a court process. The court appoints a personal representative to identify your assets, pay debts and taxes, and distribute the real estate according to intestacy laws. This can take time, can get expensive, and might not align with your preferences for asset distribution.

WITH A WILL: TESTAMENTARY DISTRIBUTION

Having a will means you get to decide how your assets, including real estate, are distributed after your death. A valid will in Florida must be written and requires your signature and the signatures of two witnesses in your presence. Note that unwitnessed handwritten wills—called holographic wills—are not accepted in Florida. While it isn't required, it is recommended that you have your will notarized, which will speed up the processing of it.

In Florida, your homestead property is *not* subject to probate, as it is exempt from judgment creditors and will transfer directly to heirs without having to wait for the probate process to finish. However, probate must first be opened, and then the court must decide that the property qualifies as a homestead. As long as you don't abandon the property, moving to an assisted or nursing care facility will not cause you to lose the homestead protection. However, if you own non-homesteaded property, such as rentals or a vacation home, the distribution of your real estate will be determined in probate based on what is written in your will. A court-appointed personal representative manages the process and oversees real estate transfer to the beneficiaries you designated.

WITH A TRUST: AVOIDING PROBATE

Creating a trust allows you to avoid probate and provides privacy, flexibility, and potential estate tax benefits. Unlike with a will or dying intestate, trusts do not become part of the public record, potentially protecting your heirs from unwanted attention. In a trust, you transfer your assets, like real estate, to a trustee who manages the trust for the benefit of designated beneficiaries. The trustee, as specified in the trust document, handles the real estate distribution to beneficiaries according to your wishes.

After creating your trust, you need to make sure that you put the title of the house in the name of the trust. If this is not done, the property will go through probate like any willed or intestate asset.

DEEDING THE PROPERTY: LADY BIRD DEEDS

Florida is one of five states that allows an Enhanced Life Estate Deed, or Lady Bird Deed. Deeding a property or leaving a remainderman in Florida typically involves setting up a life estate arrangement. This allows an individual (the life tenant) to retain the right to live on and use a property for the duration of their life, while designating another individual or individuals (the remaindermen) to inherit the property upon the tenant's death. The life tenant is responsible for the property's maintenance and taxes while still living in and using the property. However, this means that the life tenant cannot sell, mortgage, or transfer the property without the remainderman's consent.

Deeding the property means it will avoid probate. It can also keep the property from being counted as an asset for Medicaid eligibility. However, if a remainderman dies before the tenant, the property might be subject to additional legal complexities.

WHAT IF I LEAVE A MORTGAGE ON THE HOUSE?

When you still have a note on your primary Florida house, you needn't worry that the mortgage company will call in the full debt when you pass away. Florida law prohibits this for homestead property (commercial real estate is a different matter). Even if your heir walks away from the property, the mortgage company cannot come after him or her for the remaining balance, although it is recommended that your heir hires an attorney to properly abandon the homestead. The foreclosure, in that case, will likely name you as the defendant to clear your name from the property title.

WHAT IF I HAVE A REVERSE MORTGAGE?

One of the contractual agreements with the reverse mortgage company requires your estate or heirs to pay off the outstanding loan. In most cases, this entails selling the house, but your heirs may have the option to pay off the loan if they would prefer to keep the house.

WHAT IF I HAVE MORE THAN ONE HEIR?

Not every inheritance will transfer to a single beneficiary. When it comes to real estate, the heirs will need to discuss and decide between themselves if they want to keep the property for rental income or to use themselves, buy the other heirs out, or sell the property and split the proceeds. In the meantime, beneficiaries are required to keep mortgage and tax payments up to date.

WHAT IF MY HEIR SELLS THE HOUSE?

When you leave your property to a beneficiary(ies) through intestacy, your will, or a trust, the house will receive a step-up in the cost basis. This means that the home will be valued at the time of your death, not at the time of your purchase. If your home has risen in value a great deal from the time you first bought it—very possible here in Florida—this can save your heir a fair bit in taxes when he or she sells the house. At that point, the taxes will be owed only on any gain in value between the time of your death and the time your heir sells the home. **This is one of the reasons not to gift your property, as doing so will not provide a step-up in cost basis.**

PLAN IN ADVANCE

Planning for the distribution of your real estate in Florida is essential to ensure your wishes are followed. There are many different ways to set up your estate, each with its purposes and weaknesses. The type of joint owner setup you have will change the way a property is handled at your death, and each way has its pros and cons. Dying intestate can lead to a long and unpredictable probate process, while having a will or trust gives you more control over how your real estate is distributed. Deeding a property may be appropriate if you do not intend ever to sell your property, provided you do not expect your remainderman to precede you in death.

It's important to consult with an experienced estate planning attorney to create a comprehensive estate plan that reflects your unique circumstances and ensures a smooth transfer of your real estate to your intended beneficiaries. Remember, planning ahead ensures your loved ones are taken care of even when you're no longer around.

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