Beyond the Grave: Probate's Impact on Florida Title Transfers

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What We'll Cover

- What probate is, and when it is and is not needed with respect to the passage of title to Florida real property;
- The different types of estate administrations available in Florida;
- Probate concerns when the deceased is not a Florida resident;
- The impact of Florida's homestead laws on the passage of title to a deceased's primary residence;
- Common probate documents and how they can help clear title concerns when property is being deeded out of an estate;
- Estate Taxes.

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Definitions

- **Probate:** All procedures and legal acts necessary to determine the heirs or devisees of a decedent and the proper distribution of a deceased's assets. Probate means "proven".
- **Testate Estate:** An estate where the decedent died with a valid will. A valid will must be in writing and signed by the testator (the person making the will) before two witnesses. The witnesses must sign the will in the presence of the testator and in the presence of each other.
- **Intestate Estate:** An estate or any part of an estate not deposed of in a valid will.

Definitions

- **Testate Succession:** The disposition of a decedent's property by will.
- **Intestate Succession:** Florida's laws of descent and distribution applicable to decedents who die without a will (or a will exists but is invalid). The Florida statutes governing intestate succession are set forth in Sections 732.102-103 F.S.
- **Lineal Descendant:** A decedent's blood relative such as a child or grandchild.

Definitions

- **Heirs:** Those persons, including the surviving spouse, who are entitled to the property of the decedent under the statutes of intestate succession. For the most part, this means family members of the decedent. Heirs cannot be non-human.
- **Devisee:** Traditionally, the person to whom real property is given under a will. However, Florida uses the term broadly to refer to the recipient of any gift (real property or personal property) under a will.
- **Personal Representative:** The individual legally appointed to administer the estate of a deceased person. Commonly known as a "PR". Formerly known (and still known in some jurisdictions) as an "Executor" (male) or "Executrix" (female), or "Administrator" (male) or "Administratrix" (female).

What Does Probate Do?

The purpose of a probate administration is to provide a legal process for settling a deceased person's estate in an orderly, supervised way. It ensures that the deceased's assets are properly distributed, debts are paid, and legal rights are protected. Probate can also serve to judicially confirm the validity of a will, the appointment of a personal representative, or the determination of heirs or devisees. Remember, "probate" means "proven".

What Does Probate Do?

Generally, title to real property vests immediately in the heirs or devisees as of the date of death. This is true even though it may take the probate court several months to confirm the identity of said heirs or devisees. Once the probate court has determined to whom property of the deceased has passed, such vesting is considered to be retroactive to the date of death.

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What Does Probate Do?

A deceased's "probate estate" consists of most (but not all) of the assets of the deceased at the time of death. This includes:

- Real Property (but not homestead real property)
- Personal Property
- Debts of the decedent

In order to release Florida assets from the estate, a probate case needs to be opened in a Florida probate court (a special division of the circuit court).

What Does Probate Do?

Requirements for probate include:

- Must be opened in the Florida county where venue is proper.
- Heirs or devisees must be identified.
- If a will exists, it must be located and filed in the probate court.
- Court appoints a Personal Representative to oversee the distribution of assets and payment of creditors from the estate. (No PR appointed in summary administration)

What Does Probate Do?

Venue for probate cases is proper in the Florida county where:

- The decedent was domiciled at their date of death;
- The decedent was possessed of any property, if the decedent had no domicile in this state; or
- A debtor of the decedent resides if the decedent had no domicile in this state and possessed no property in this state (fairly uncommon, at least for title insurance work).

What Does Probate Do?

You only have to file one probate per decedent in one Florida county. This is true even if the deceased owned property in multiple Florida counties. You can always obtain certified copies of probate documents from the county where the probate case was actually filed and then record those in the official records of the county where your subject real property is located.

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What Does Probate Do?

Who can petition to open a probate in Florida?

Pursuant to Sec. 733.202 F.S., **"Any interested person may petition for administration."** According to Sec. 731.201(23) F.S. "'Interested person' means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." This is an extremely broad definition. Usually, probates are opened by an heir or devisee of the deceased, or by someone who expects to be appointed as PR. However, it is also possible for a probate administration to be opened by a creditor of the deceased, or by any other interested person.

Types of Probate Administrations

Formal Administration: This is the most common type of probate administration in Florida. It is governed by Chapter 733 of the Florida Statutes. Formal administration is typically used in cases where the total value of the probate estate (which excludes homestead property) is in excess of $75,000.00.

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Types of Probate Administrations

In a Formal Administration:

- A Petition for Administration is filed. This will list the persons and/or entities that are believed to be beneficiaries of the estate.
- A PR is appointed by the probate court and confirmed by the filing of Letters of Administration, which are then recorded in the official records.
- In a testate estate, the will is filed along with an Order Admitting Will to Probate. Both of these documents should be recorded in the official records as both are essential to confirming the valid transfer of title under a will.
- A 90-day Notice to Creditors is filed *unless* the decedent has been dead for two years or more. (See F.S. 733.710)
- After the creditor period has passed, an Order Determining Homestead may be entered if applicable.

Types of Probate Administrations

<u>Summary Administration:</u> Governed by Chapter 735 of the Florida Statutes. This is a simpler and more expedited form of estate administration that is available when the value of the estate (not including homestead property) is $75,000.00 or less OR the deceased has been dead for more than two years.

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Types of Probate Administrations

In a Summary Administration:

- A Petition for Summary Administration is filed. This will list the persons and/or entities that are believed to be beneficiaries of the estate.
- No PR is appointed.
- Can be utilized in both testate and intestate estates.
- At the end of the proceeding an Order of Summary Administration and/or an Order Determining Homestead is/are filed to confirm the beneficiaries to whom the assets of the estate have passed.

Types of Probate Administrations

<u>Ancillary Administration:</u> Governed by Sec. 734.102 F.S. If a non-resident dies leaving assets in Florida, then ancillary administration may be opened in this state to determine disposition of the Florida real property. It is important to note that out-of-state probate proceedings cannot be relied upon to distribute Florida real property. This is because the **probate courts of other jurisdictions have no authority over Florida real property**, and **PRs appointed by out-of-state probate courts have no authority to transfer Florida real property either.**

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Types of Probate Administrations

In an Ancillary Administration:

- The decedent died as a resident of another state or country.
- A Petition for Ancillary Administration is filed. This will list the persons and/or entities that are believed to be beneficiaries of the estate.
- If the decedent has already been probated in another jurisdiction, authenticated or exemplified copies of documentation from the domiciliary probate case would typically be filed in the Florida ancillary probate.

Types of Probate Administrations

- An ancillary administration can be either formal or summary.
  - In a **formal** ancillary administration, an Ancillary PR will be appointed by the Florida probate court. If qualified under Florida law, a PR appointed by the domiciliary probate court may also be appointed to serve as Ancillary PR in Florida pursuant to the issuance of Ancillary Letters of Administration.
  - A **summary** ancillary administration is governed by Sec. 734.1025 F.S. and only applies to testate estates where the value of all Florida property is **no more than $50,000.00** and where the deceased has been dead for **less than two years**. Under this statutory framework, as long as no claims against the estate are timely filed, no PR would be appointed, and the and the foreign will would be admitted to probate.
- An ancillary administration may be necessary to distribute or sell Florida real property. Out-of-state probates and PRs cannot be relied upon.

The Personal Representative

- The Personal Representative (or “PR”) is the fiduciary appointed by the court to administer an estate, be it testate or intestate.
- If a will exists, a PR (along with one or more successor PRs) will typically be named therein. However, the PR must be qualified to act. Persons *not* qualified to act as PR are described in Sec. 733.303 F.S. Specifically, a person is not qualified to act as PR if the person:
  a) Has been convicted of a felony.
  b) Has been convicted in any state or foreign jurisdiction of abuse, neglect, or exploitation of an elderly person or a disabled adult, as those terms are defined in s. 825.101.
  c) Is mentally or physically unable to perform the duties.
  d) Is under the age of 18 years.

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The Personal Representative

The duties and powers of the PR are set forth with specificity in Section 733.601 et seq. Generally speaking, however, the duties and powers of the PR are to:

- Settle and distribute the estate;
- Take possession or control of the decedent's property (but not homestead property);
- Manage assets of the estate during administration to preserve them; and
- Arrange for the liquidity of the estate to pay the claims and expenses of administration and make distributions.

The Personal Representative

But in a testate estate, the will can spell out precisely what the PR can and cannot do. One common power that title insurance professionals will often look for is the power to sell and convey real property, commonly known as the **"power of sale"**.

If the power of sale is provided for in the will, the PR may convey real property (excluding homestead). If the power of sale is not provided for in the will (or if the estate is intestate), the PR may not convey real property **except pursuant to court order.**

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The Personal Representative

If an Order Authorizing Sale of Real Property is obtained, it should be recorded. These orders may be general in nature, but they will usually be limited to authorizing a PR to sell pursuant to a specific purchase and sale agreement. If a contract cancels subsequent to the issuance of an Order Authorizing Sale, it may be necessary to obtain and record a new Order prior to closing a sale under a new contract. Be sure to check with Underwriting for guidance if you encounter one of these situations.

A Word About Recording Probate Documents

- **28.223 Probate records; recordation.—**
- (1) The clerk of the circuit shall record all wills and codicils admitted to probate, orders admitting the will to probate, orders determining beneficiaries, orders revoking the probate of any wills and codicils, letters of administration, **orders affecting or describing real property**, final orders, orders of final discharge, and orders of guardianship filed in the clerk's office. **No other petitions, pleadings, papers, or other orders relating to probate matters shall be recorded except on the written direction of the court.** The direction may be in the order by incorporation in the order of the words "To be recorded," or words to that effect. Failure to record an order or a judgment shall not affect its validity.
- (4) Certified **transcripts** of the whole or any part of probate or administration proceedings in any court of this state or of any foreign state or country **may be recorded**. If the certified copy is not a part of a pending probate proceeding in the court, the person causing it to be recorded shall pay the costs of recordation.

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Humorous Interlude

Hey Chat GPT! Give me a limerick about Florida Probate Law!

In Florida, when someone dies,
Their estate may bring legal surprise.
With wills to be read,
And creditors fed,
Probate sorts truth from the lies!

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Homestead Headaches

What Do We Mean When We Talk About "Homestead" Property?

To sum up this question as succinctly as possible, a person's homestead is their primary residence in Florida. There are various requirements on size (160 acres if located outside of a municipality, or ½ acre if located within a municipality), length of occupancy, and the types of ownership that qualify; but for our purposes, when we talk about homestead, we are talking about someone's primary residence. And in the probate context, we are talking about the deceased's primary residence on their date of death.

Homestead Headaches

<u>The Three Main Categories of Florida Homestead Law:</u> When addressing how Florida law treats homestead property, the discussion can be compartmentalized into three distinct categories:

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Homestead Headaches

1. **Ad Valorem Property Tax Break:** As most Florida homeowners know, a property tax exemption is available for homestead property. When claimed, the homestead exemption can reduce a property's assessed value by up to $50,000.00. This can result in a substantial savings on one's annual property tax bill. While not to be completely discounted, this particular application of Florida homestead law is not the one that we are going to be most concerned about here.

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Homestead Headaches

2. **Protection Against Creditors' Claims:** Article X, Section 4(a) of the Florida Constitution provides that homestead property "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".

While the protection against creditors' claims is an important concept to understand in the world of title insurance, and it may, under certain circumstances, allow us to disregard a judgment lien that would otherwise attach to non-homestead property, this is once again not the primary facet of homestead law that we are concerned about in these materials.

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Homestead Headaches

3. Restraint on Alienation and Devise: This is the big one. Article X, Section 4(c) of the Florida Constitution provides in part that "[t]he 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." So if the deceased was not survived by a spouse or minor child, then the property is said to be "freely devisable", and the deceased could have made whatever arrangements they wanted for the disposition of their homestead property after their death.

Homestead Headaches

When the Deceased was Survived by a Spouse or Minor Child: As Article X, Section 4(c) states, only one type of devise of homestead property can be made when the deceased is survived by a spouse or minor child, and that is a devise to the owner's spouse if there is no minor child. Any other type of devise attempted to be made in this situation is considered to be invalid (or unauthorized).

Homestead Headaches

It is also important to realize that a "devise" under Florida law is not limited to dispositions by will. A conveyance to a revocable trust, or a conveyance into a life estate is also considered a devise, and the constraints imposed by Article X, Section 4(c) still apply. **One cannot circumvent the Florida Constitution by dumping their property into a life estate or revocable trust!** Attempts to do this are sometimes referred to as creating an "Aronson" problem, after the case of *Aronson v. Aronson*, 81 So.3d 515 (Fla. 3d DCA 2012).

Homestead Headaches

Florida Statute 732.401: This statute is applied when homestead property is "not devised as authorized by law and the constitution" and the decedent is "survived by a spouse and one or more descendants". This means that the statute could potentially kick in in two situations:

- In intestate estates; and
- When an attempted devise was made in contravention of the restraint on devise set forth in the Florida Constitution. This can occur through a will, or through a conveyance into a life estate or revocable trust.

When you are faced with one of these situations, and you are dealing with homestead property and a deceased owner who was survived by a spouse and one or more descendants, what happens?

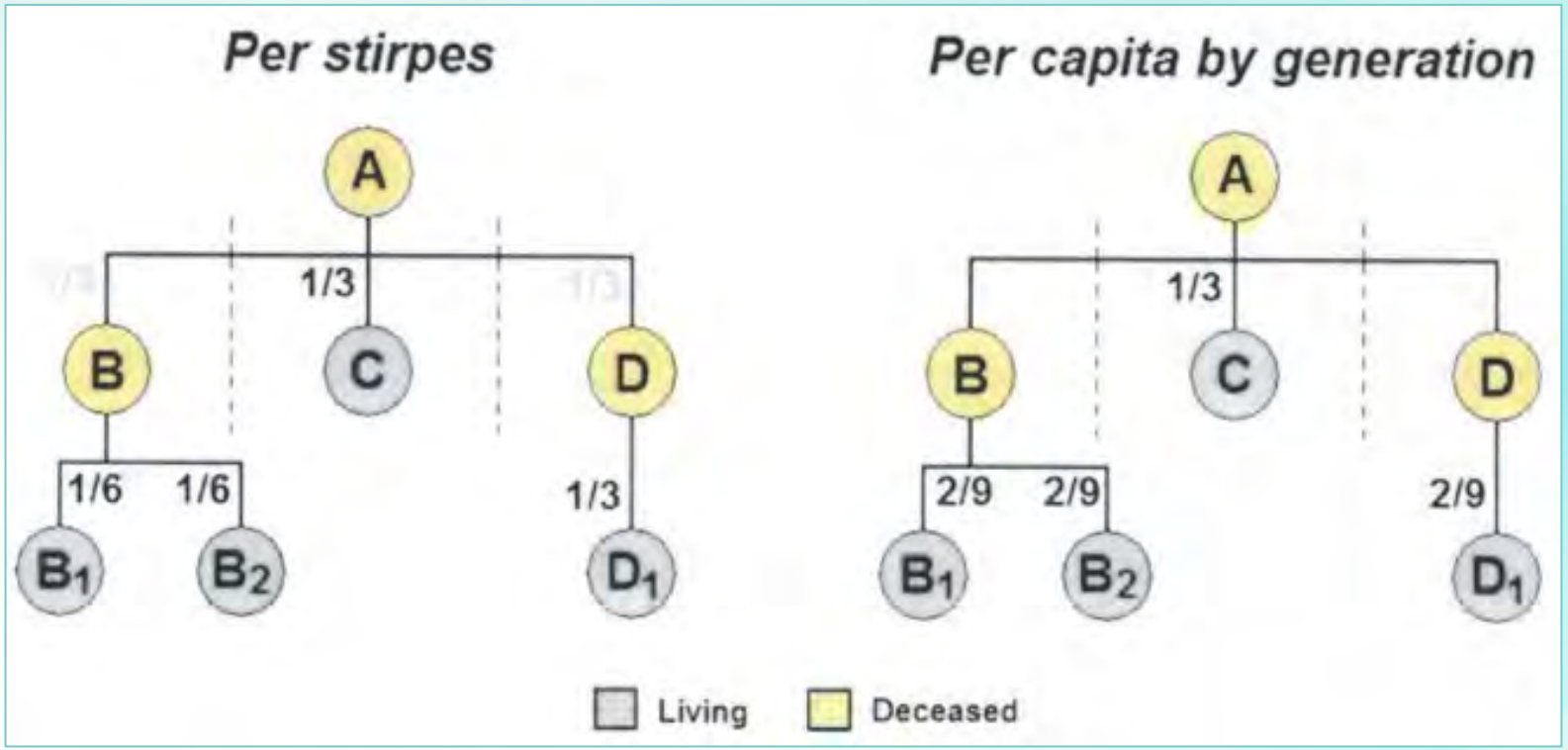
Homestead Headaches

- 732.401(1) states that “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.”
- 732.401(2) provides an alternative disposition that the surviving spouse can elect to take in lieu of subsection (1). Specifically, subsection (2) provides that 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.” This election must be made within six months of the decedent’s death.

Homestead Headaches

What is meant by "Per Stirpes" anyway? Florida Statute 732.104 states that "[d]escent shall be per stirpes, whether to descendants or to collateral heirs." This means that, unless a will or trust states otherwise, Florida law defaults to per stirpes distribution when determining how a decedent's estate is divided among heirs. Under per stirpes, if a beneficiary (usually a child of the decedent) predeceases the decedent, that beneficiary's share passes to his or her descendants rather than being divided among the remaining living heirs at the same level.

Homestead Headaches



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Homestead Headaches

The PR Can Only Convey Homestead Property in Limited Situations: Homestead property is not considered to be a probate asset in Florida. This means that title to homestead passes outside of the probate estate. As a result, the PR generally has no authority over homestead property and is therefore not able to convey it, even with a court order. But there are two notable exceptions, both of which can only arise in a testate situation when the deceased is not survived by a spouse or minor child:

- **The will *specifically* directs the PR to sell or convey the homestead property.** Note that *general* authority to convey real property is not sufficient to allow the PR to convey homestead.
- **The decedent validly devised the homestead to a non-heir.**

In both of the above circumstances, the decedent's homestead loses its homestead status and becomes an asset of the probate estate, thus allowing the PR the power to convey.

Homestead Headaches

The Order Determining Homestead Status of Real Property: Commonly known as an "ODH", this order is not always necessary, but it can be very helpful in confirming not only that a particular piece of real property constituted the homestead of the deceased, but also to whom title to said property passed upon the death of the decedent. Your underwriter may require that one be obtained and recorded in order to ensure the marketability of the title.

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Humorous Interlude

Chat GPT tells me: “Let me know if you want one with a legal twist like **homestead exemption** or **summary administration** — I can keep them coming!”

In probate, the heirs made a claim,
On the house in the dead owner's name.
“It’s homestead!” they cried,
So creditors sighed—
*That asset was **out of the game**.*

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Alternatives to Traditional Probate

<u>No Probate Needed When Title is Vested in Certain Manners :</u> If title was held as a joint tenancy with right of survivorship, tenancy by the entireties, or a valid life estate, **probate should not be needed at all**. Title will pass by operation of law to the surviving spouse, surviving joint tenant(s), or the remaindermen, as the case may be. Probate may also not be required if title was being held in the deceased's revocable trust, a common estate planning tool. It is also important to note that the Florida constitutional restrictions on the devise of homestead property do not apply to titles held as a tenancy by the entireties or a joint tenancy with right of survivorship, but the restrictions do apply to life estates and trusts.

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Alternatives to Traditional Probate

Petition to Admit Foreign Will to Record: As an alternative to ancillary administration, Sec. 734.104 F.S. outlines a procedure through which a will that was admitted to probate in another jurisdiction can be admitted in Florida and thereby deemed effective to pass title to Florida real property. The requirements are:

- The decedent must have had a will that was admitted to probate in another jurisdiction;
- The will must be executed as required by Florida law; and
- The decedent must have been dead for at least two years. (Note: If the decedent has been dead for less than two years, a summary ancillary administration may be available under Sec. 734.1025)
- Once admitted to record through this process, the foreign will shall be as valid and effectual to pass title to Florida real property as if the will had been admitted to probate in this state.

Alternatives to Traditional Probate

F.S. 733.105 – Determination of Beneficiaries: This statute provides a procedure through which a court can be asked to determine the beneficiaries of an estate or their shares. In can be used in testate or intestate estates when doubt exists about: a) who is entitled to receive any part of the property; or (b) the shares and amounts that any person is entitled to receive. The procedure can be followed when a probate case has already been opened, but it can also be used as the basis for bringing a separate civil action to determine beneficiaries in cases where no probate action has been commenced (thus making it an alternative to probate). The procedure can be especially helpful in situations where there is doubt surrounding whether all heirs (or correct heirs) have been named and served in a probate action, or when the decedent died many years ago and no probate has been filed.

A Brief Word About Estate Taxes

- The State of Florida abolished estate taxes in 2005. Federal estate taxes still exist, but for U.S. citizens, they only apply to very high-net-worth individuals as determined at their date of death. For example, for U.S. citizens dying in 2024, the exemption threshold for federal estate tax liability is estates valued at $13,610,000.00. Very few people die with estates this large.
- However, for foreign citizens, the threshold is only $60,000.00. This is a very low number, and most Florida properties are valued in excess of this amount. The bottom line here is that we need to be much more careful about potential federal estate tax liability when we are dealing with foreign decedents.

A Brief Word About Estate Taxes

- The good news is that, pursuant to 26 U.S.C. § 6324(a)(2), no federal estate tax will apply to properties being conveyed out of the surviving tenant of a survivorship estate (TBE or JTWROS) as long as the property is being conveyed to a bona-fide purchaser for value (BFP).
- More good news is that if it exists at all, the lien of federal estate taxes is only good for ten years after the death of the decedent.

A Brief Word About Estate Taxes

- Other situations (including conveyances from a PR and conveyances from heirs or devisees when no survivorship property is involved) can be murkier. A good rule to follow is that, unless you are dealing with survivorship property, or a deceased US citizen's estate that you know does not exceed the $13MM+ threshold, contact your underwriting counsel for direction on how to best ensure that the lien of federal estate taxes has been cleared.
- If no federal estate tax is due, it never hurts to record an affidavit or other evidence confirming that a federal estate tax return is not required to be filed. A Florida Form DR-312 is sufficient for this purpose.
- If federal estate tax liability *is* incurred, proof from the IRS of payment of the tax, or release of the estate tax lien from a specific property, will be required.
- NOTE: Estate tax liens are a matter that is covered by the Fifth Revised Florida Mutual Indemnification Agreement.

Hey Chat GPT! Let's end this presentation with a soothing haiku about Florida probate law.

Wills unlock the past—
Heirs wait, creditors whisper,
Courts bring quiet close.

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Thank You!

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