

State of Florida
Ninth Judicial Circuit of Florida

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**PROCEDURE FOR DETERMINING PROTECTED HOMESTEAD IN A
PROBATE PROCEEDING AS DISTINGUISHED FROM A
NON-PROBATE PROCEEDING FOR EITHER DECLARATORY RELIEF
OR AN ACTION TO QUIET TITLE**

In a probate proceeding, the descent of the property must be determined before a determination of the continuing status of the protected homestead exemption can be made. A determination that the decedent died intestate or an order admitting a will to probate and record is a prerequisite to the determination of the descent of the decedent's homestead.¹

A non-probate proceeding to determine homestead, if correctly construed, is a complaint for declaratory relief pursuant to chapter 86, Florida Statutes, or an action to quiet title pursuant to chapter 65, Florida Statutes, either of which must proceed under the Florida Rules of Civil Procedure, not the Florida Probate Rules. See Ford v. Ford, 581 So. 2d 203 (Fla. 5th DCA 1991) (stating that “[r]egardless of the demands of the title insurance industry, the Probate Rules are not a substitute for declaratory judgment actions or quiet title suits”).

¹ The language used in the Florida Probate Rules and in the Florida Statutes to refer to homestead property that is exempt pursuant to Article X, section 4, Florida Constitution, has been changed from “homestead” to “protected homestead.” See § 731.201(29), Fla. Stat. (2002); Fla. Prob. R. 5.404, 5.405. Presumably, this is to distinguish between the exemption from liens and judgments, which protects the homestead during probate, and the exemption from property taxes on the first \$25,000 of homestead property.

This distinction between a probate and a non-probate proceeding is very important because, although both the civil and probate divisions of the Circuit Court have *subject matter jurisdiction* to determine the homestead status of real property, only when such a determination is made as a part of a probate proceeding can the simplified method of service and notice provided in the Probate Rules apply to give the Court *personal jurisdiction* over all the necessary parties. The relevant section of the Florida Probate Code provides that:

(1) When notice to an interested person of a petition or other proceeding is required, the notice shall be given to the interested person or that person's attorney *as provided in the Florida Probate Rules*.

(2) Formal notice shall be sufficient to acquire jurisdiction *over the person* receiving formal notice to the extent of the person's interest in the estate.

(3) Persons given notice of any proceeding shall be bound by all orders entered in that proceeding.

§ 731.301, Fla. Stat. (2002) (emphasis added).

The provisions of the Probate Code governing notice and service are rules 5.040 and 5.041. Rule 5.040 defines formal notice, which is essentially notice requiring a returned signed receipt, or "other evidence satisfactory to the court that delivery was made to the addressee or the addressee's agent." Fla. Prob. R. 5.040(a)(4). Persons so served have twenty days to file a response. Fla. Prob. R. 5.040(1). When the proper probate procedure is followed, the court's orders are then binding on others who are not actually parties to the proceeding. Section 731.303, Florida Statutes, details which additional parties are so bound and the circumstances under which they are bound.

By contrast, a petition or complaint seeking only a homestead determination and no other

relief is *not* a probate proceeding. The only alternative for notice and service is pursuant to chapter 48 or chapter 49, Florida Statutes, which require that there be personal or constructive service and the presence of all persons (or their representation by a guardian ad litem), with an interest in the property. See Burns v. Estate of Cobb, 589 So. 2d 413 (Fla. 5th DCA 1991). In Burns, without any other probate proceeding, the decedent's sons petitioned the probate court for, and received, a ruling that their father's property constituted homestead as defined by Article X, section 4, Florida Constitution. 489 So. 2d at 414-15. Carol Burns, who had an interest in the property, later petitioned to have the administration of the estate "reopened." Id. at 415. There had never been an administration of the estate opened; therefore, it could not be reopened, and the court's ruling was not binding on Ms. Burns, who had not been given proper notice. Id. The appellate court remanded the case to the circuit civil court, not probate court, to determine Ms. Burns' interest in the land and other related issues. Id. at 416.

A petition to determine protected homestead may be combined with a petition for summary administration if the statutory requirements of chapter 735, Florida Statutes are met; however, formal administration is usually the better choice when a determination of protected homestead is sought.

Attached to this **Procedure for Determining Protected Homestead** is a sample petition and order: "Personal Representative's Petition to Determine Homestead Status" and "Order Determining Homestead Status." See §§ 19.47, 19.48, Practice Under Florida Probate Code (2002).

March 31, 2003