

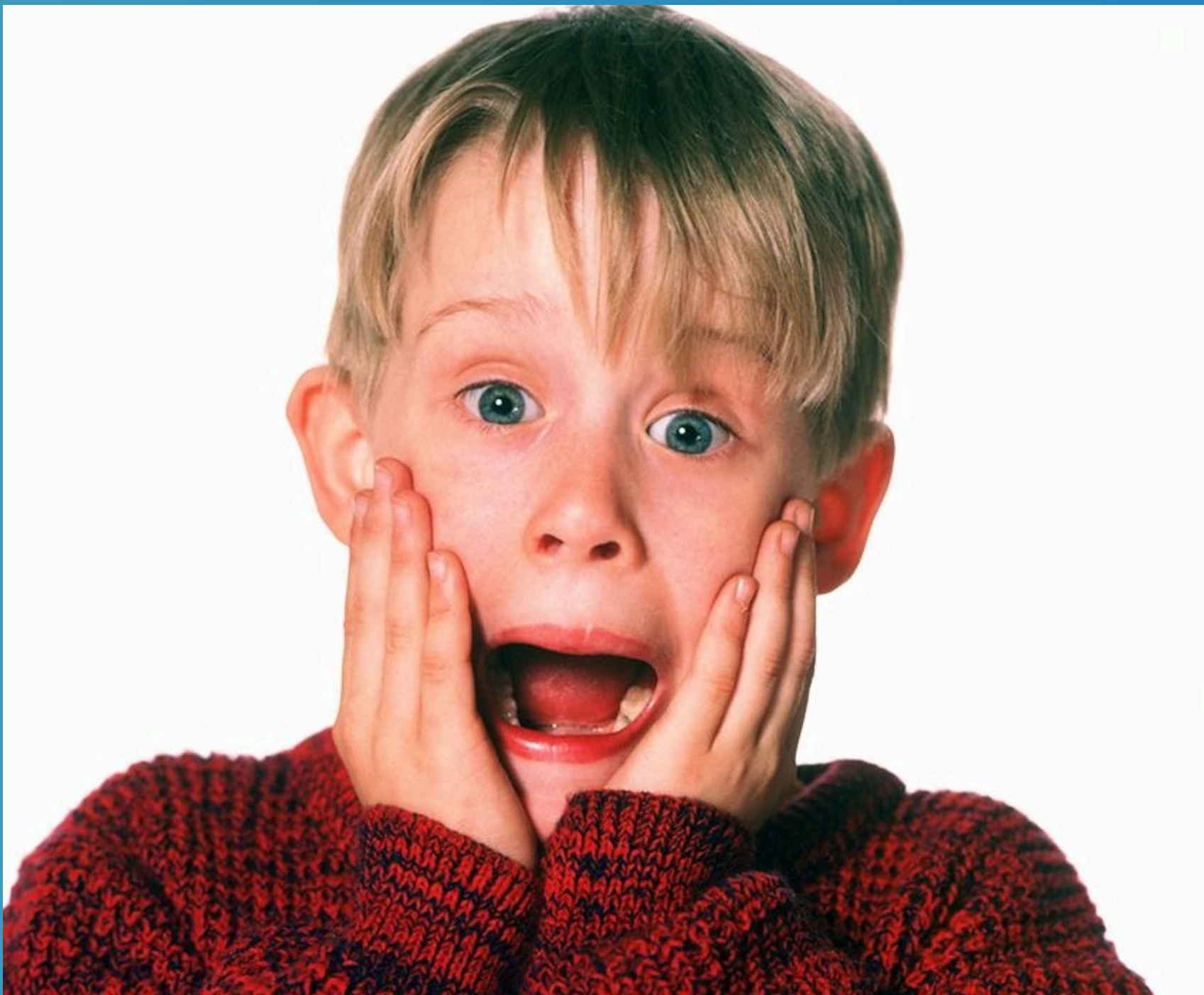


Fund Assembly

Homestead – Conveyances, Mortgages and Disposition After the Death of the Titleholder

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Introduction

What we will discuss

- Why is homestead treated differently
 - Affect on conveyances and/or mortgages
 - Affect of the death of owner
- What tools are available to help you avoid homestead issues
 - Sec. 732.7025, F.S.
 - Enhanced life estates
 - Revocable Living Trusts
- What are the limitations of each
- Underwriting Considerations for each

Homestead: Why is it different?

- Article X, Section 4(c), of the Florida Constitution, which says:
- (c) The 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. 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. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Article X, Section 4(c): What is the purpose

- As stated in *Stone v. Stone*, 157 So.3d 295 (Fla. 4th DCA 2014),

Article X, Section 4 (c) “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.”

Homestead: Why is it different?

- Article X, Sec. 4(c) of the State Constitution creates two protected classes when it comes to homestead
 - Surviving Spouses and
 - Minor children
- If the decedent homestead owner was survived by either a spouse or minor child, then decedent homestead owner's ability to devise the homestead property will be limited.
- If the devise of homestead violates the State Constitutional restrictions, the homestead property will descend pursuant to Sec. 732.401, F.S.

Homestead: Why is it different?

- Sec. 732.401, F.S., provides in part:

(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.

Homestead: Why is it different?

- The first question to ask when dealing with homestead property where the owner has died is: Was the decedent homestead owner survived by a spouse or minor child?
 - If not, the decedent homestead owner is free to devise the homestead property to anyone they wish.
 - If the decedent homestead owner was survived by a spouse but not by a minor child, the devise must be to the surviving spouse, unless that spouse has properly waived their homestead rights.
 - If the decedent homestead owner was survived by minor child, the homestead property would descend according to Sec. 732.401, F.S.

Homestead: Why is it different?

- **Scenario #1:** Gary Groom and Betty Bride were married in 2016. Shortly after their wedding, Gary and Betty bought Dog Acre with the hope of living out their golden years there raising Golden Retrievers. After a health scare, Gary and Betty decide to convey Dog Acre into just Gary's name for estate planning purposes. Gary now comes to you for assistance in closing on the refinance of the existing mortgage encumbering Dog Acre. Does Betty need to join on the mortgage?

Homestead: Why is it different?

- **Answer #1:** Article X, Section 4(c) of the State Constitution states:
 - 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.
- Since Gary is married to Betty and the subject property is Gary's homestead property, Gary cannot "alienate the homestead by mortgage" without the joinder of Betty. So, yes, Betty must join on the mortgage.

Homestead: Why is it different?

- **Scenario #2:** Same facts as scenario #1, except Gary has passed away. What changes? Who needs to sign now?

Homestead: Why is it different?

- **Answer #2:** The death of the homestead owner complicates the question. The facts provided are no longer sufficient to give a definitive answer. We know that Gary was survived by a spouse, so we know she will need to sign. However, we don't know if Gary was survived by any lineal descendants. We don't know if there was a spousal waiver of homestead rights. We don't know if Gary attempted to devise the homestead property to someone other than his surviving spouse. The point is, after the death of a homestead owner, several issues will need to be resolved.

What “tools” are available?

- Three “tools” that can help you resolve the homestead issues that are created when the homestead owner dies are:
 - Sec. 732.7025, F.S.: Waiver of homestead rights through deed;
 - Life Estate Deeds; and
 - Trusts

What “tools” are available? Sec. 732.7025, F.S.

- Sec. 732.7025, F.S., provides:
- (1) A spouse waives his or her rights as a surviving spouse with respect to the devise restrictions under s. 4(c), Art. X of the State Constitution if the following or substantially similar language is included in a deed:

“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.”

- (2) The waiver language in subsection (1) may not be considered a waiver of the protection against the owner’s creditor claims during the owner’s lifetime and after death. Such language may not be considered a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner’s spouse.

Sec. 732.7025, F.S. (cont.)

- Sec. 732.7025, F.S.
 - Became effective as of July 1, 2018
 - Waiver through a deed was not previously provided for under the old waiver statute, Sec. 732.702, F.S.
 - The proper use of the statute creates a statutory presumption of a valid waiver

Sec. 732.7025, F.S. (cont.)

- To effectively use the statutory waiver in Sec. 732.7025, F.S., you must:
 - Include substantially the same language as that found in the statute in your deed.
 - The deed should have been executed after July 1, 2018; and
 - The spouse that is waiving their homestead rights must join on the deed

Sec. 732.7025, F.S. (cont.)

- What are the limitations of Sec. 732.7025, F.S.?
 - It is not valid if the waiving spouse does not join on the deed.
 - It does not work to waive the rights of a minor child, if any.
 - The joinder of the waiving spouse will still be required during the lifetime of the homestead owner for mortgages or deeds

Sec. 732.7025, F.S. (cont.)

- **Scenario #3:** Same as Scenario #1, except the deed from Gary and Betty to just Gary also contained the statutory waiver language contained in Sec. 732.7025. Does Betty still need to join on the mortgage?

Sec. 732.7025, F.S. (cont.)

- **Answer #3:** Yes, Betty still needs to join on the mortgage. Sec. 732.7025(2), F.S., specifically states that the waiver language “may not be considered a waiver of the restrictions against alienation by **mortgage**, sale, gift, or deed without the joinder of the owner’s spouse.” [Emphasis added] Since Barry is still alive in scenario #1 and is attempting to refinance the mortgage, the Sec. 723.7025, F.S., waiver language would not work to avoid having his spouse join on the mortgage.

Sec. 732.7025, F.S. (cont.)

- **Scenario #4:** Same facts as Scenario #3 except Gary has died and his estate has been probated and the personal representative has been discharged. Gary's Will provided that Dog Acre be devised to his 3 sons from a prior marriage, his only heirs except for Betty. Who would need to sign the mortgage now?

Sec. 732.7025, F.S. (cont.)

- **Answer #4:** In this case, since Betty waived her rights with regard to the restriction on the devise of homestead through the deed vesting title in Gary, as long as all of Gary's children are adults, only the three sons would need to sign. If Gary had been survived by a minor child, Betty's waiver would not work to waive the rights of the minor child and the State Constitutional restrictions on the devise of homestead would control and the homestead property would descend according to Sec. 732.401, F.S.

What “tools” are available? -Life Estate Deeds

- Life Estate Deeds
 - A life estate deed splits the fee simple title into two separate parts: the life estate and the remainder interest
 - The life estate interest and the remainder interest must be held by different people, otherwise, there could be a merger of both interests into a fee simple
 - There are two kinds of life estate deeds:
 - Simple life estate deeds and
 - Enhanced life estate deeds

Life Estate Deeds (cont.)

- Simple life estate deeds- key facts
 - The gift to the remainderman is complete at the time of the conveyance that creates the simple life estate.
 - At the death of the life tenant, they do not “own” any interest in the subject property
 - Homestead issues exist at the time of creation of the life estate deed, not at the time of death

Life Estate Deeds (cont.)

- Enhanced life estate deeds- key facts
 - Generally, the life tenant retains control of the property until the time of their death
 - The life tenant will typically retain the power to “sell, convey, mortgage, lease, or otherwise manage and dispose of the property” without the joinder or consent of the remaindermen
 - The gift to the remainderman is not complete until the death of the enhanced life tenant

Life Estate Deeds (cont.)

- Why is it important that the transfer to the remainderman is not complete at the time title is vested by the enhance life estate deed?
 - This means that the death of the life tenant triggered the transfer which could be considered a “devise” and
 - The devise of homestead is restricted by Article X, Section 4(c) of the State Constitution

Life Estate Deeds (cont.)

- **Scenario #5:** Husband and wife convey their homestead property to Wife for life with enhanced powers and the remainder, if any, to the wife's two adult daughters from a previous marriage. Wife subsequently passes away and the property is being sold. For the purposes of insuring title, who needs to sign the deed to a new buyer?

Life Estate Deeds

- **Answer #5:** Since the wife held title under an enhanced life estate at the time of her death, the transfer to the remainderman was not complete until her death. As such, that transfer would be considered a devise and it would be subject to the restrictions on the devise of homestead property. The “devise” to anyone other than the surviving spouse would be considered to violate those restrictions and deeds would be required from the husband and all of the heirs of the wife.

Life Estate Deeds (cont.)

- **Scenario #6:** Husband and wife convey their homestead property to wife for life with enhanced power and the remainder if any to Tom Trustee, as trustee of W's minor child trust. The deed also contains the Sec. 689.073, F.S., powers for Tom as trustee of the trust. Shortly after that conveyance, husband passes away. Wife passes away soon thereafter. Can title be insured based on a deed from Tom Trustee?

Life Estate Deeds (cont.)

- **Answer #6:** In this case, the husband passed away first, so Wife, the enhanced life tenant, was not survived by a spouse. However, the enhanced life estate deed notes that the remainderman is the trustee of the trust for Wife's minor children. Therefore, Wife appears to have been survived by minor children and the "devise" to the trustee as remainderman would violate the State Constitutional restrictions on the devise of homestead. Deeds from Tom Trustee, as trustee of the trust, along with deeds from all of the heirs of Wife, will be necessary to insure title. This may require that a guardian be appointed for the minor children.

Life Estate Deeds (cont.)

- What are the limitations of enhanced life estate deeds?
 - The powers of the enhanced life tenant must be clearly stated in the vesting deed
 - Common language for creating enhanced life estate - “without any liability for waste, and with full power and authority in said life tenant to sell, convey, mortgage, lease, or otherwise manage and dispose of the property herein, in fee simple, with or without consideration, without joinder of the remainderman, and with full power and authority to retain any and all proceeds generated thereby...”
 - Note - this language does not clearly state that the life tenant has the power to remove a remainderman or to gift the property to someone

Life Estate Deeds (cont.)

- Homestead issues must be considered at the time the enhanced life estate is created as well as when the enhanced life tenant dies
 - If the enhanced life tenant is married at the time of creation, spousal joinder will be required on the vesting deed.
 - If the enhanced life tenant is survived by a spouse or minor child, there is a potential violation of the State Constitutional restrictions on the devise of homestead and a determination will need to be made as to who will need to convey for title to be insurable.
 - If the enhanced life tenant is not survived by a spouse or minor child and there were no homestead issues at the time the enhanced life estate was created, there would be no homestead issues at the death of the enhanced life tenant

What “tools” are available? -Trusts

- Trusts
 - Single Settlor Revocable Trusts
 - During the lifetime of the settlor, the joinder of the settlor's spouse will be required for conveyances or mortgages
 - After the death of the settlor, how the homestead will be treated will depend on whether or not the settlor was survived by a spouse or minor child

Trusts (cont.)

- Aronson v. Aronson, 81 So.3d 51 (Fla. 3d DCA 2012)
 - Facts: Husband created his revocable trust and named himself as trustee. He then conveyed a non-homestead condominium unit to himself, as trustee of his trust. After the condominium unit was conveyed to the trust, the Husband and Wife moved into the condominium unit. Thereafter, the Husband died. The trust provided that the homestead property went to the wife for life with the remainder to his two sons from a prior marriage. The Court held that, pursuant to Sec. 732.4015, F.S., Article X, Section 4(c), of the Florida Constitution applies “equally to property held by a revocable trust as to testamentary bequest.” Since the Husband was survived by a spouse and the homestead property was not devised to the surviving spouse, the devise in the trust was invalid and the homestead property passed outside of probate pursuant to Sec. 732.401, F.S.

Trusts (cont.)

- *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th DCA 1981)
 - Facts: Husband created his revocable trust and named himself as trustee. Prior to his death, Husband conveyed his homestead property to himself as trustee of his trust. After Husband's death, the trust provided that his homestead property went to his surviving spouse. However, Husband was also survived by a minor child from a previous marriage. The Court held that the Husband, as the settlor of his trust, retained "all equitable right, title, possession and interest in the property until his death," and that he could not use the trust to circumvent the Constitutional restrictions on the devise of homestead.

Trusts (cont.)

- These two cases exemplify the limitations of using a trust to dispose of homestead after the death of the homestead owner.
- So, what are the limitations of using a trust?
 - If the deceased homestead owner is survived by a minor child, the homestead property will descend pursuant to Sec. 732.401, F.S. regardless of what the terms of the trust say.
 - This is true even if the decedent homestead owner is survived by a spouse
 - Why is that? Because Article X, Section 4(c) of the Florida Constitution states: “The 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.”

Trusts (cont.)

- If the homestead is survived by a spouse but no minor child, it is possible that the terms of the trust will prevail.
 - Why is that? Because Article X, Section 4(c) of the Florida Constitution makes an exception to the restriction and allows for the devise of homestead to the surviving spouse “if there be no minor child.”
- So what will your Underwriter want to know?
 - Was the settlor survived by a spouse or minor child
 - If there was a surviving spouse, but no minor child, does the trust provide that the surviving spouse gets the homestead property in fee simple?

Trusts (cont.)

- If the trust does not provide that the surviving spouse gets the homestead property in fee simple, did the surviving spouse validly waive their homestead rights?
 - If yes to either question, then there would not be a violation of the restrictions on the devise of homestead and the terms of the trust would prevail.

Trust (cont.)

- Joint Revocable Trusts- where both spouses are the settlors and the initial trustees
 - After the death of the first spouse to die- what does the trust provide?
- **Scenario #7:** Husband and Wife create a joint trust where they are both Settlers and Trustees of the Trust. After conveying their homestead property to themselves as trustees of their Trust, husband dies. The Trust provides that, after the death of the first spouse to die, the surviving spouse shall remain as the sole trustee and shall continue to have the power to revoke the trust and upon the death of the surviving spouse the trust assets go to Husband and Wife's adult children. Wife comes to you for help selling the homestead property. From whom will deeds be required in order to insure title?

Trusts (cont.)

- **Answer:** Since the surviving spouse retained control of the trust, with full power to revoke and amend the trust after the death of the first spouse to die, then only the surviving spouse would need to convey for the purposes of insuring title.
- **Scenario #8:** Same facts as Scenario #7 except Husband and Wife also had a minor child at the time Husband died. Who needs to sign now?

Trusts (cont.)

- **Answer:** Since the first spouse to die was survived by a minor child, there is no exception to the Constitutional restriction on the devise of homestead and title to the homestead property would descend pursuant to Sec. 732.401, F.S. and deeds would need to be obtained from all of the heirs of the first spouse to die, together with a deed from the trustee of the trust.
- In joint trusts, the first thing you have ask is: Was the deceased settlor survived by a minor child?
 - If yes, deeds will be required from all of the heirs of the decedent and from the trustee of the trust

Trusts (cont.)

- If the deceased settlor was not survived by a minor child, were they survived by a spouse?
 - If they were survived by a spouse, does the trust provide that the surviving spouse retains the power to revoke and amend the trust?
 - If yes, there is no violation of the Constitutional restrictions on the devise of homestead
 - If no, did the surviving spouse validly waive their homestead rights?

Trusts (cont.)

- Other Trusts
 - Qualified Personal Residence Trusts (QPRTs)
 - This type of trust is designed to allow the settlor to transfer a personal home to beneficiaries, reduce the amount of gift tax for doing so and “remove” the value of the home from their estate. The settlor is allowed to retain an interest in the property for a period of time and, once that period ends, the property is transferred to the beneficiaries.
 - The “term” that the settlor retains their interest in the property is the key

Trusts (cont.)

- QPRTs must be reviewed to determine what the “term” of the trust is and how it ended.
 - If the term of the trust ended because the period ended, the homestead issues would have arisen at the time of vesting, not at the time the term ends.
 - If the term of the trust ended because of the death of the settlor, the homestead issues at the time the terms ends would also need to considered.
 - Was the settlor survived by a spouse or minor child?

Trusts (cont.)

- Irrevocable Trust
 - Similar to a simple life estate deed, here the transfer is complete at the time of conveyance, so, if there are no violations at that time, there would be no homestead issues to resolve after the death of the settlor.





Thank You!
for attending