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LIFE ESTATE DEEDS: FOUR VARIATIONS ON A THEME

By Jerome Ira Solkoff

Life estate deeds can be valuable tools for both estate and Medicaid planners. Such deeds can remove property from parents' estates while permitting them life use and giving their children a "stepped-up" basis. There are even ways to write deeds to avoid Medicaid transfer penalties and for the parent to retain full independence and control. However, draftsmanship is the key to obtaining the intended benefits. Following are sketches of several forms of life estate deeds that can prove useful in estate and Medicaid planning.

The 'Plain Vanilla' Deed

The most common form of the deed is one in which Mom and Dad convey their real estate to their children, reserving a life use for themselves. For example, the deed might read:

> Lyndon and Lady Bird, his wife, Grantors, to Lucy and Lynda, joint tenants with rights of survivorship, Grantees, reserving, however, life use unto Lyndon and Lady Bird.

That conveyance satisfies an estate plan by conveying present title to the children and taking the property out of the parents' estates. Since the parents retain life use, they cannot be forcibly evicted by their children. If Lyndon and Lady Bird live in a state that allows a "homestead" exemption (reduction from assessed value) for real estate tax purposes to owners or occupants of a primary home, they will have preserved their exemption by retaining life estates.

The grantors have reserved a valuable power (the life estate interest) in the realty and therefore the children receive a step-up in basis when the grantors die and the children obtain full ownership rights. I.R.C. §1014. Retention of the life use means that no completed gift has been made. To determine if Lucy and Lynda will have to pay capital gains taxes on a sale after the grantors' deaths, they must use the value of the realty at the time of the death of the last of their parents to die.

This deed form carries with it several disadvantages:

(1) The property can be subject to liens of the children's creditors, although the creditors would take interests subject to the grantors' life uses.

(2) If the property is a condominium parcel, Lucy and Lynda would have to weather the association's transfer approval process and deal with the "condo commandos."

(3) Lyndon and Lady Bird have effectively removed their control, freedom, independence, and say-so. Thus, it will take the signatures of all four of the parties to effect a sale, lease, or mortgage of the property. This may be a problem should one party refuse to sign a necessary document or be incapable of signing. It also hinders the grantors' right to change the document should circumstances change. The death or estrangement of a child, a pending divorce, or business reversals of a child may also give rise to the need to change the deed.

(4) Lyndon and Lady Bird have created a Medicaid transfer problem. Medicaid agencies will impose a disqualification period due to the conveyance of present title to the children. The length of the disqualification period will be based on the value of the property less the parents' life estate value retained. In November 1994, the Health Care Financing Administration (HCFA), by Transmittal No. 64 to the State Medicaid Manual, published a chart to be used to determine values of life estates and residual interests.

By reserving the life estate interest, Lyndon and Lady Bird have cut back on the term of the disqualification. For example, the HCFA chart states that if a 70-year-old has realty worth $100,000 conveyed with reservation of a life estate, one would multiply the worth by .60522 to determine the value of the grantor's use. This use would then be valued at $60,522, and the remaining $39,478 would be used to determine the length of the Medicaid disqualification period. If one were to give the $100,000 home to children without reservation of the life estate interest, the entire market value would be used to determine the disqualification period. The HCFA transmittal is silent, however, as to what

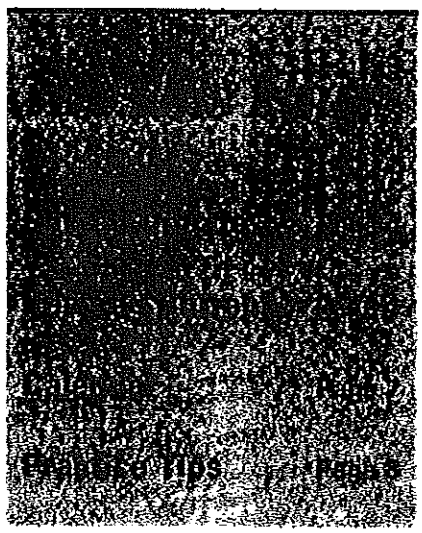

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chart age to use when there are multiple grantors, such as Lyndon and Lady Bird. Presumably, the age of the younger of the two would be used to determine the residual value transferred.

Often, an individual seeing an attorney to plan for incapacity does not have time to wait out a disqualification period. The family may already be in a crisis situation. Even though Lyndon and Lady Bird have cut back the term of the waiting period by use of the life estate deed form, there is still a disqualification period that must be accounted for. Lyndon and Lady Bird should seek other ways to preserve the home to avoid paying nursing home costs they may not be able to afford during a disqualification period.

An Alternate Strategy

There is another way to write the deed that eliminates all of the above problems. Let us consider the following scenario: Ozzie is a candidate for nursing home residence and is married to Harriet. They have two sons, Ricky and David. Ozzie and Harriet convey title to Harriet with a remainder interest to Ricky and David. The deed reads as follows:

> Ozzie and Harriet, his wife, Grantors, to Harriet, a married woman, a life estate, without any liability for waste, with full power and authority in her to sell, convey, mortgage, lease, or otherwise dispose of the property described below in fee simple, with or without consideration, without joinder by the remaindermen, and to keep absolutely any and all proceeds derived therefrom. Upon the death of the life tenant, title shall be in Ricky and David, joint tenants with right of survivorship.

To avoid further problems if Harriet should predecease Ozzie, you may add the following provision after the legal description of the property:

> By execution of this deed the Grantor, Ozzie, irrevocably waives and renounces any and all rights as to the property described above he may or could have now or later as survivor upon the death of his wife, Harriet, including, but not limited to, rights of election, homestead, curtesy and/or dower.

Ozzie has conveyed present title to Harriet. Because interspousal transfers are allowed, no Medicaid transfer penalty period is imposed. Harriet retains all necessary hereditaments of ownership and thus maintains her full independence and control and retains the homestead real estate tax exemptions. She need not worry about liens on the children's assets, and she can change the deed with her signature alone as often as circumstances warrant.

Medicaid authorities may not count the realty as Ozzie's asset or place a lien against the property at the time of his death, even if he survived Harriet, because he has renounced all marital rights and other interest in the property. A significant difficulty in Medicaid planning is protecting assets should the Medicaid applicant outlive the community spouse. The "Ozzie and Harriet" form of deed provides such protection.

Ricky and David have only a future interest, subject to possible divestment by Harriet, and no present rights to the title. Thus their creditors have no interest in the property until Harriet is deceased. In the meantime, Harriet can change the deed to protect against the creditor claims of an errant son. There is also no present gift to Ricky and David that would incur a disqualification period, so they obtain the advantage of the stepped-up basis of property value existing at the time of Harriet's death. No gift tax return need be filed by Ozzie and Harriet. Probate is avoided if Ricky and David survive Harriet but, should one or both die during Harriet's lifetime and she wishes to change the deed to cover circumstances then existing, she could do so.

The Lien Question

A single person can also make the same deed from himself to himself with remainder to children or others. For example, Abe conveys the property to himself, with the same right and authority as Harriet had in the last example, and remainder to Tad. No present gift is made to Tad, and he receives title without probate proceedings. Depending on each state's Medicaid recovery system rules, the authorities may not place a lien on the property upon Abe's death.

In Florida, the constitutional protection of the homestead allows property to vest in lineal descendants without creditor liens. Medicaid authorities are precluded from asserting a lien against the property after Abe's death to reimburse benefits received during Abe's lifetime. Moreover, as a second precaution, Abe's deed effectively precludes probate proceedings that could trigger a Medicaid lien.

The question of lien rights persists if the property is not a homestead or if Abe has no lineal descendants. Because Abe maintained hereditaments of ownership, nonhomestead realty is clearly a countable asset in determining his qualification for Medicaid.

Though the majority of states do not offer the constitutional protection of the homestead, Medicaid authorities would still have difficulty asserting a lien in Florida and elsewhere, even if Abe's property is nonhomestead or if he had no lineal descendants, because Tad will take title the moment Abe dies and a probate proceeding is not needed. Still, Medicaid recovery procedures are in their infancy and there are scant guidelines to give a definitive answer to the lien question. The "Abe" deed may be one method of protecting realty from liens, but much depends on individual state laws and future case rulings.

Lyndon and Lady Bird's deed may be a safer procedure for nonhomestead property. Perhaps the transaction can be structured as a sale to Lynda and Lucy, eliminating a disqualification period for uncompensated transfers. A mortgage for the full purchase price can be taken by Lyndon, Lady Bird, or both. If a fair rate of return is received on the

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mortgage note, the mortgage itself is not be a countable asset, installments paid on the promissory note but are income.

Numerous title insurance companies in Florida have approved the "Ozzie and Harriet" and "Abe" deed forms, including Attorney's Title Fund, Chicago Title, Commonwealth, Peninsular, and TransAmerica. Attorneys' Title Fund, in particular, has written a "Note" in its handbook approving the form and its consequences. HCFA, too, in Transmittal 64, states that retention of life estate title in situations such as those pertaining in the cases of Harriet or Abe with hereditaments of ownership does not constitute an uncompensated transfer to the children.

Some states may not permit the "Ozzie and Harriet" or "Abe" deed form, although this writer has used the same successfully in several states. It would be best for an attorney to consult with his or her title insurance underwriter to get an opinion before use.

A Life Estate in Another's Home

Still another life estate deed form could be used for the purchase of interests in other persons' homes. This could also be a way of turning countable assets into noncountable assets for Medicaid purposes. In many states, life estate interests are excluded assets for Medicaid qualification.

Joe or Rose, or both together, can purchase life estate interests in the homes of their children, Ted or Patricia, or both, or in the homes of other persons. A contract should be carefully drawn between the parties to evidence the investment rather than a gift. Attached to the contract should be a market-value appraisal of the home of the grantor, and reference should be made to HCFA's Transmittal No. 64 chart, which gives the life estate percentage value that Joe and Rose can have in the home, depending on their age. The chart's percentage compared to the appraised value establishes the purchase price.

Upon payment of the purchase price so computed, the grantor gives Joe or Rose (or both) a deed that will be recorded in the recorder's office in the county where the property is located. The deed should state, as provided in the contract, that the grantor (Ted or Patricia, or both) owns the property and may live there, subject to the nonexclusive, nonassignable life estate interest of Joe or Rose.

Once a child receives the payment, the hope is that he or she will set the funds aside and use them to benefit Mom and Dad, although there is no legal obligation to do so. The purchase price paid is the child's money to keep. In addition, the purchase price may be paid in cash, in comparably valued assets, or in a combination of both. Such a deed is a way to transfer other countable assets out of the Medicaid applicant's or spouse's estate.

When the owner of the life estate interest (Joe or Rose, or both) dies, that interest is extinguished and the child owns the home free of any claim by the estate of the decedent.

Should the owner of the life estate knock on the grantor's door, bag and baggage in hand, he or she cannot be turned away. Moreover, if the home is sold or leased, the life estate owner is entitled to part of the proceeds. The purchase price paid to the grantor reduces the grantor's cost basis in the home and, upon ultimate sale of the house, he or she would have to pay capital gains taxes on the difference between the reduced cost basis and the sales price. However, the grantor can avoid capital gains taxes by purchasing a new home with the sale proceeds or by using his once-in-a-lifetime, over-55 capital gains tax-exemption election of up to $125,000.

If Ted or Patricia wishes to sell their home, the owner of the life estate interest must also convey his or her interest, or else Ted or Patricia cannot pass fee title. The life tenant could get part of the sale proceeds or could be awarded a life estate interest in Patricia's new home.

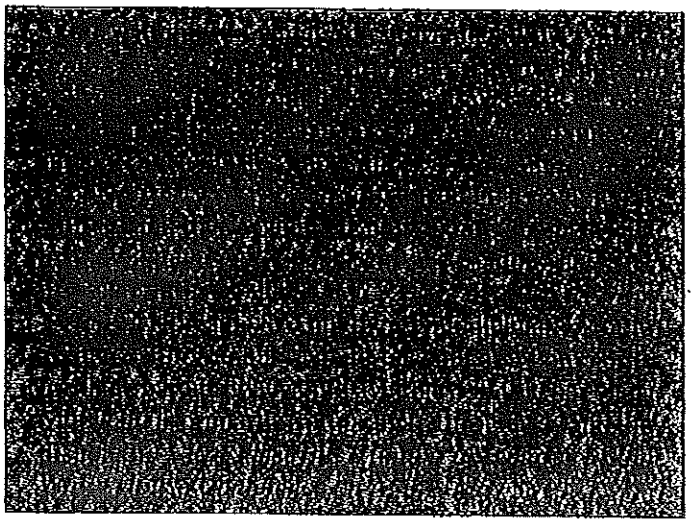
Joe or Rose has thus reduced countable assets to qualify for Medicaid benefits and have made a valuable investment. No income comes back to them for their investment, unless the property is sold or leased, and thus the transaction does not create an "income cap" problem for Medicaid purposes.

Conclusion

When using the life estate deed forms discussed here, it may be wise to have the life tenant give a durable power of attorney to a child or someone else. The power could enable the attorney-in-fact to later cancel the life estate interest or otherwise permit a sale, lease, or mortgage of the property should the life tenant be incompetent to do so. Of course, the trustworthiness of the persons one deals with is of prime concern in any life estate transaction.

Elder law practitioners should include life estate deed forms in their arsenal of tools for estate plans and Medicaid qualification.

Jerome Ira Solkoff is in private practice in Deerfield Beach, Florida. He is certified as an Elder Law Attorney by the Elder Law Foundation, serves as Florida coordinator of the National Academy of Elder Law Attorneys, and was founder and past chair of the Elder Law Section of The Florida Bar. He is currently writing a "Practice Guide for Florida Elder Law," to be published by Lawyers' Cooperative Publishing Company in spring 1996.



Fund Insures Enhanced Life Estates

Fund Insurability of Life Estate Deeds With Enhanced Powers In the Life Estate Holders Results In Better Tricks From an Old Dog!

by Stephen L. Mackey, Fund Underwriting Counsel

The life estate has a long history in common law and in Florida. A life estate is a freehold possessory estate. A freehold possessory estate vests in the owner a present possessory right to the use, occupation and enjoyment of the land. The owner of a life estate has the right of possession and use of the property for as long as the life by which the estate is measured continues. Upon the death of the person upon whose life the estate is measured, the right of possession vests in the remainderman.

A life estate may exist in personal property as well as real property. Life estates may be created by deed or by will. No specific language is required to create a life estate. The key to the language utilized is the *intent* to create a life estate. The most common usage in Florida is "to X for life" or "to X for as long as she shall live." Ordinarily upon the death of "X" the property passes to the remainderman named in the deed or will establishing the life estate, or, if no remainderman is named, the life estate reverts back to the grantor or lapses. It is also possible for a grantor to reserve a life estate while conveying the remainder interest in fee simple. The grantor can convey "to X, subject to a life estate in _____ (Grantor)."

Life estates may also be established to be measured by a life different from that of the holder of the life estate. That is considered a life estate "per autre vie." For instance the grantor may convey to X for as long as Y shall live. In Florida perhaps a more common scenario for a life estate per autre vie is when grantor conveys a life estate to X and X subsequently conveys his interest to Y. Y has a life estate for the life of X.

Remainder Interest

The remainder interest is a right to future ownership created by the instrument creating the life estate. A vested remainder and a vested remainder subject to divestment are actual estates in property. A remainder is vested if there is a present right to future possession even though that present right may be eliminated by some future event. When a present right may be eliminated by the occurrence of some future contingency, then that remainder is vested subject to divestment.

Alternatively, a contingent remainder takes effect on the occurrence of an event that may or may not occur prior to the termination of the preceding estate. With a vested remainder there is uncertainty as to whether the estate will ever be enjoyed in possession. With a contingent remainder, the right to the actual estate is uncertain.

Background

Initially, under common law, life estates were more common than fee simple estates. As the alienability of real property increased, the desirability of restricting transfers to life estates declined. However, statutory limitations on other estates, such as the fee tail, and the abolition of the Rule in Shelley's Case have forced some conveyances to be interpreted as life estates. Indeed, the Florida courts have struggled in determining and distinguishing life estates from other types of tenancies (i.e., tenancies at will, etc.). An example of a problem area is *"to X for as long as she lives as a widow."* Phrasing this in the alternative may better serve the intended purpose, for example: "to X for life or until she remarries." The key test to many Florida decisions is the grantor's intent to terminate the estate on the death of the grantee.

The common law concepts of dower and curtesy resulted in life estates by operation of law. Florida life estates are also created by the homestead descent provisions. It should be

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creating a joint tenancy with parents and *minor* children should be specifically avoided as in most instances subsequent conveyance or mortgaging of the property would require the burden and expense of a formal guardianship to convey the minor's interest.

The most frequently seen format for the life estate deed also often has some potential drawbacks. The usual form of the language often reads:

> SAM JONES and MELINDA JONES, his wife, as Grantors, to Grantees, SAM JONES and MELINDA JONES, his wife or the survivor thereof, as to a life estate, remainder to DOUGLAS JONES, a single man, and JENNIFER JONES, a single woman.

Frequently the remainder interest is modified by designating the remaindermen as joint tenants with right of survivorship. This type of conveyance still requires the remainderman to sign off on any conveyance or mortgaging of the property. The parents here, Sam and Melinda, could also be liable to their children for waste regarding the property! The parents again limit their control over the property in order to accomplish the estate-planning goals of avoiding probate. Complications of this form of life estate and the use of the joint tenancy format may increase depending on the nature of the type of property involved. For example, if the property is a condominium, the association may require its approval of the children as the joint tenants or as remaindermen.

THE FUND has recently been insuring a new generation of life estate deeds that are addressing the rules, concepts, and problems detailed above in this article. Specifically, these instruments seek to avoid probate requirements, preserve homestead tax exemptions, retain greater grantor control, avoid requirements of remainder interests to join in conveyance of the property, avoid liability to remaindermen for waste, and avoid any division of profits from sale with remainder interests. See TN 2.11.06.

Sample Language

The key element in the successful utilization of the expanded powers life estate is careful draftsmanship. Remember, the instrument creating the life estate can vary the rights and duties between the life tenant and the remaindermen, Also, the life tenant has the right to alienate his interest. For example, evaluate the power of this language:

> SAM JONES and MELINDA JONES, his wife, Grantors, to:
> SAM JONES and MELINDA JONES, for a 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 described 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, and upon the death of the last life tenant, the remainder, if any, to DOUGLAS JONES, a single man and JENNIFER JONES, a single woman, as Grantees.

Consider the power of this language. The level of control Sam and Melinda have reserved virtually equals all the powers and attributes of a fee simple. They have *not* retained the right to dispose of the property by devise upon death. They have preserved their right to homestead tax benefits by retaining rights to lifetime use and possession. The grantors have kept substantial control of the property by reserving the right to sell, convey, etc., in *fee simple without* the joinder of the remainderman, which greatly simplifies refinancing or sale of the property. Also the provision in the deed text permits the life tenant to retain all proceeds, or to dispose by gift. The appropriate language also provides that the remainder estate may be eliminated prior to the termination of the life tenancy. This technique permits parents to sell (or refinance) their property during their lives without any

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The popular trend to avoid probate while retaining substantial control of the property makes this a viable technique for the real property practitioner. The life estate may be the best alternative for less expensive properties and small estates. The enhanced power life estate leaves the life tenant with great flexibility during lifetime while providing a simplified disposition at death. Life estate deeds should be carefully drafted to insure maximum flexibility, proper disposition and insurability. ■

Fund Law Student Award Winners Named

Three law schools have named winners in the annual Law Student Awards program sponsored by THE FUND. Prizes of $250 were awarded for the best legal paper submitted at each of the colleges on a subject related to real property law. The entries were judged by the faculty of the students' respective law colleges. On behalf of THE FUND's Board of Directors, Michael R. Hammond, Senior Vice President of Marketing Services, announced this year's winners:

- Andrew Dickman, Nova Southeastern University Shepard Broad Law Center, for "All Dressed Up With No Place to Go";
- Diane J. Harrison, Stetson University College of Law, for "What Does the Future Hold for CERCLA's Retroactive Liability After *Eastern Enterprises v. Apfel?*"
- Christina Johnson-Boyce, University of Florida College of Law, for "Wetlands Mitigation Banking: Mitigating the Impacts of Growth on the Environment";

THE FUND also supports six Florida law colleges by awarding annual grants of $1,000 to each law school to support teaching or research in real property law; this support was additionally extended beginning in 1997 to Cumberland School of Law of Samford University in Alabama and to the University of South Carolina, which were invited to begin participating in the law student essay contests as well. THE FUND conducts annual workshops at these law schools (except for the University of South Carolina) with instruction on title examination and closing of real estate transactions.

For reprints of the law students' legal papers, call Evelyn Oaks at Fund headquarters: (407) 240-3863 or 1-800-336-3863.

Recent Title Insurance Case

"Public Records" for Title Policy Insurance Purposes Defined

First American Title Ins. Co. v. J.B. Ranch, Inc.,
966 P.2d 834
(Utah 1998)

A title insurer refused to provide a defense under a title insurance policy issued to a purchaser of real property after the county sued the purchaser. The county's claim was based on a map filed with the county clerk's office but not in the recorder's office. The title insurer denied coverage under the policy because the policy only required coverage for items on public records and the title insurer claimed that documents filed in the county clerk's office were not public records.

The Supreme Court of Utah held that the term "public records," defined in the policy as "those records which by law impart constructive notice," did not include records in the county clerk's office. By law, under the Utah Recording Statute, only documents filed in the recorder's office are deemed to impart notice of its contents to the public. Therefore, an easement shown on a map filed in the county clerk's office was not within the scope of coverage of the title insurance policy.

Transfers into Trusts and Related Issues[1]

by

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May 17, 2002

"The Tax Tail Does Not Wag the Real Property Dog" – Lucareli v. Lucareli, 614 N.W.2d 60 (Wis. App. 2000)

I. Enhanced Life Estate Deeds a/k/a "Lady Bird Deeds"

A. Definition – a transfer which divides the fee interest into a life estate and a remainder interest and which in addition gives the life tenant the power to divest the remainder interest.

B. Creation - Sample Language

1. *SAM JONES and MELINDA JONES, his wife, Grantors, to:*

SAM JONES and MELINDA JONES, for a 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 described 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, and upon the death of the last life tenant, the remainder, if any, to DOUGLAS JONES, a single man and JENNIFER JONES, a single woman, as Grantees.

2. *JOAN SMITH, a single woman, GRANTOR, to:*

GLEN SMITH, a single man, and LAUREN SMITH, a single woman, as joint tenants with right of survivorship, GRANTEES.

GRANTOR reserves unto herself for and during her lifetime, the exclusive possession, use, and enjoyment of the rents and profits of he property described herein.

GRANTOR further reserves unto herself, for an during her lifetime, the right to sell, lease, encumber by mortgage, pledge, lien, or otherwise manage and dispose, in whole or in part, or grant any interest therein, of the aforesaid premises, by gift, sale, or otherwise so as to terminate the interests of the GRANTEES, as GRANTOR in her sole discretion shall decide, except to dispose of said property, if any, by devise upon her death.

GRANTOR, further reserves unto herself the right to cancel this deed by further conveyance which may destroy any and all rights which the GRANTEES may possess under this deed.

GRANTEES shall hold a remainder interest in the property described herein and upon the death of the GRANTOR, if the property described herein has not been previously disposed of prior to GRANTOR's death, all right an title to the property remaining shall fully vest in GRANTEES, as joint tenants with right of survivorship, subject to such liens and encumbrances existing at that time.

C. Conveyance by Life Tenant

1. The life tenant may exercise the authority granted or retained in the vesting deed to convey or encumber the property.

2. The Fund will insure bona fide conveyances for value by the life tenant with powers to third parties. The Fund considers this to be analogous to a devise to a life tenant with power of appointment. See TN 2.11.06. (This assumes the life tenant and the remaindermen have not incurred judgments or other liens.)

3. The Fund is not willing to insure transfers that divest the remaindermen and re-vest the life tenant with fee simple title, without joinder by the remaindermen. These transfers may be valid; however, The Fund is concerned about the probability of litigation by the divested remaindermen.

4. The Fund requires an exception for federal tax liens against remainder interests in any type of conveyance by the life tenant. It is possible that these interests would be treated as subject to divestment based on the terms of the grant into such remaindermen; however, in light of the *Drye v. U.S.* 120 S.Ct. 474 (1999) and *U.S. v. Craft,* 122 S.Ct. 1414 (2002), cases, wisdom dictates that a release from the IRS be obtained.

5. The Fund will consider the possible divestment of state judgment liens against the vested remainder interests on a case-by-case basis.

D. Situations where used

1. Commentators have identified advantages such as Medicaid planning and probate avoidance as reasons to use this type of instrument. The author expresses no opinion on the efficacy of the Lady Bird deed in these situations and has focussed her comments instead on the title aspects of this type of instrument. (Arguably, this type of conveyance would be considered a transfer under Medicaid rules, and a transfer to a revocable trust would not be, for example).

2. Some practitioners advocate the use of the Lady Bird deed instrument to fund the grantor's/settlor's revocable trust.

Ex. 1 – "to Joan Smith for life, [with powers, etc.] and upon her death to B, as trustee of the Joan Smith Revocable Trust."

Ex. 2 – "To H & W for life, and upon the death of the last spouse to die, or if surviving spouse disclaims his or her interest hereunder, then to B as trustee of the Smith Family Revocable Trust."

E. Benefits

1. Properly drafted and used, it avoids probate of the real property that is the subject of the enhanced life estate deed.

2. It preserves for the life tenant during his/her life the homestead protection from forced sale. (*Crews v. Bosonetto*, 271 B.R. 403 (Fla. M.D. 2001) has increased practitioners' nervousness about the homestead protection when the homestead is transferred into a revocable trust.)

F. Limitations

1. The grantor has spread upon the public records the identity of his/her beneficiaries prior to grantor's death.

2. The Fund is not willing to rely on an enhanced life estate deed as a "work around" for the constitutional requirement of joinder or for the constitutional restriction on devise of homestead. (If a life tenant marries after the date of execution of the deed, joinder on a conveyance or mortgage of the homestead property would be required; if the life tenant dies survived by a spouse or minor child, the restrictions on descent of homestead would apply.)

3. Does not avoid concerns about elective share rights of a spouse.

4. If the remainder beneficiaries incur liens it creates an issue of fraudulent transfer as to such lienors when the life tenant with powers attempts to exercise those powers.

5. It may engender litigation by one remainderman against another remainderman or by both remaindermen against the life tenant in the event the life tenant's exercise of retained powers divests them.

6. If remainderman predeceases grantor, then upon death of grantor property goes thru remaindermans estate

II. Acceptance of Enhanced Life Estate Deeds in Other States – Doctrine of Repugnance

A. States in which the validity of enhanced life estate deeds has been upheld:

1. Kentucky - *Ricketts v. Louisville, St. L. & Ry. Co.*, 15 S.W. 182 (Ky. 1891) where the court upheld a complete power of revocation in a deed from a mother to son.

2. Missouri – *St. Louis County National Bank v. Fielder*, 260 S.W.2d 483 (Mo. 1953), holding that a quitclaim deed conveying real property but reserving to the grantor a life estate with power to sell, rent, lease, mortgage or otherwise dispose of such real property during his lifetime, created a defeasible fee subject to the life estate; such instrument was not invalid for being testamentary in nature by reason of the reservation of a power to revoke.

B. States in which the enhanced life estate deeds have been declared invalid:

1. Wisconsin – *Lucareli v. Lucareli*, 614 N.W.2d 60 (Wis. App. 2000), holding that grantor's reserved power of appointment was inconsistent with the terms of the warranty deed which purported to grant her fee simple interest in real property to her sons, reserving the power to appoint the property to her issue. This case was decided on "bad" facts: one of the sons, having been given a durable financial power of attorney by his mother, used the power to exercise the powers in the deed to divest his brothers who were co-remaindermen in the deed and conveyed the property to himself.

   The court considered secondary sources in which the reserved power was discussed in the context of tax and estate-planning benefits. The court was not persuaded by these treatises as to the validity of the reserved power, saying, "the tax law tail does not wag the property law dog." Id. at 64.

   "[W]here the attempted reservation is of some right inconsistent with the nature of the estate conveyed" the grant controls. 23 AM.JUR.2d *Deeds* Sec. 78 (1983).

2. Kansas – *Zaskey v. Farrow*, 154 P.2d 1013 (Kan. 1945).

C. Florida Cases Supporting the Enhanced Life Estate Deed

1. *Oglesby v. Lee*, 73 So. 840 (Fla. 1917). Facts: grantor conveyed property to his daughter, retaining a life estate and the power to sell the property. The deed also stated that if the grantor/life tenant sold the property, the proceeds of "said second sale" would be given to the daughter in lieu of the remainder interest. The father sold the fee interest in the property to a third party. After the father's death, the daughter then brought an action to have the deed to the third party declared void. The third party answered stating that the conveyance to the daughter was either a will or a deed with a reservation or condition. The Florida Supreme Court upheld the conveyance to the third party. The Court relied only upon the fact that the deed was a gift from the father to the daughter and the reservation of authority to sell was "clearly contemplated" in the deed. The court focused on the power contained in the deed and did not treat the deed as a testamentary instrument. (The Court's opinion does not indicate whether the daughter received the proceeds of the sale to the third party. If she had, we may have seen an additional equitable defense that the daughter was seeking to obtain the property after receiving the proceeds of the sale.)

2. *Green v. Barrow*, 8 So.2d 283 (Fla. 1942), upholds the validity of a devise from husband to wife of a life estate with power to convey.

3. *Sanderson v. Sanderson*, 70 So.2d 364 (Fla. 1954), following *Green, supra,* upholds a husband's devise to his wife, stating that "it is the law of this jurisdiction that a life tenant may be vested with a power of disposition, express or implied, enabling him to convey to a grantee the fee simple title." Id. at 366.

D. Miscellaneous Issues

Documentary Stamps – by Letter of Technical Advice No. 0OB4-024, dated May 12, 2000, the DOR advises that a "Lady Bird Deed" transfers no (present) interest, and that the ultimate effect of the deed is to name those with remainder interests and to convey the property upon the death of the grantors if the property has not been sold. Such a deed is subject to only minimum documentary stamp tax at the time of its delivery, but would be taxable upon the death of the grantors based upon the full amount of the consideration.

III. Transfers to Revocable Trusts – preserving title insurance coverage

A. *Covalt v. First American Title Insurance Co.*, 105 F.3d 669 (Table), 97 CJ C.A.R. 113, 1997 WL 4273, (10th Cir. Wyo. 1997). This (unpublished) case highlights the problem of title insurance coverage after an insured conveys title into his revocable trust.

Facts: In 1969 Maytag purchased property known as Hidden Valley Ranch, and received a title insurance policy insuring access. In 1988 Maytag established the Maytag Trust and quitclaimed the Ranch to the trust. Maytag died in 1990. Covalt, as trustee of the trust, discovered the access problem when he tried to sell the ranch and sued the insurer for breach of contract. The insurer successfully argued that the policy insured only the original insured and "the heirs, devisees, and personal representatives of such insured." The court agreed. The fact that Maytag had died before the trustee attempted to sell the property was additional support for the district court's finding that Maytag had no insurable interest in the ranch.

B. Possible solutions to the coverage problem

1. One solution is to purchase a new owner policy in the name of the trustee of the trust. It costs more, but it also insures the validity and priority of the deed into the trustee in addition to affording full protection against title defects. In also allows the amount of insurance to be increased to cover appreciation since the date of the original policy.

2. Another solution is for the insured owner to convey to the trustee by warranty deed, taking advantage of the policy provision that continues coverage to the insured "so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest." One disadvantage is that the grantee must make a claim against the grantor in order to trigger coverage. Another disadvantage is that if the grantor dies, liabilities under his/her warranties dies with him/her. A third disadvantage is that the measure of damages for breach of warranty is limited to the consideration paid; in these scenarios the grantee has not paid consideration.

3. Whether the transfer is by warranty deed or quitclaim deed, there may be limited coverage for the trustee as long as the named insured is alive. The Fund, for example, will recognize the person named in the policy as its insured after the insured has transferred title to the trustee of his/her revocable trust, provided the insured has retained an interest under the trust. The disadvantage here is that coverage is only to the extent of that interest, and not necessarily for 100% of policy limits. As indicated, continuing coverage dies with the insured.

4. The Additional Insured Endorsement has been submitted to the Department of Insurance for approval. A sample appears below.

TRUSTEE AS ADDITIONAL INSURED ENDORSEMENT

Attached to and forming a part of policy no. _____

[Company Name]

The policy is amended by adding as a named insured therein, the following:

(hereafter referred to as "the Added Insured")

In the event of a claim covered under the policy, the Company agrees that the Added Insured may be entitled to receive benefits under the policy provided the Added Insured can demonstrate, to the satisfaction of the Company, that it has acquired an insurable interest in the land as Trustee(s) of the Insured's trust, that the trust is valid under the laws then existing of the state of Florida, and that the trustee(s) continue(s) to be the trustee of the trust on the date such benefits are sought. It is also understood that payments made to any named insured under the policy shall reduce, pro tanto, payments or benefits to which the Added Insured may be entitled to under this endorsement.

This endorsement does not extend the coverage of the policy to any later date than the Date of Policy shown in Schedule A, nor does it impose any liability on the Company for loss or damage resulting from (1) failure of the Added Insured to have acquired an insurable estate or interest in the insured land, or (2) any defect, lien or encumbrance attaching to the land by reason of the acquisition of an estate or interest in the land by the Added Insured.

This Endorsement is made a part of the policy and is subject to all of the terms and provision thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount of insurance.

IV. Coops – Realty or Personalty? Exempt or Non-exempt?

Southern Walls, Inc. v. Stilwell Corporation, 810 So.2d 566 (Fla. 5th DCA 2002)

A coop has been held to be personalty and as such, not subject to Sec. 4(c) (restrictions on devise of Art. X, Sec. 4, Fla. Const.), *In re Estate of Wartels*, 357 So.2d 708 (Fla. 1978).

Previously, in *Holden v. Estate of Gardner*, 420 So.2d 1082 (Fla. 1982) the court held that property that is a homestead for purposes of Sec. 4(a) (exempt from forced sale) of the Florida Constitution would be homestead for purposes of 4(c) (subject to restrictions on devise of homestead).

The 5th DCA in *Southern Walls* has held that a coop is exempt from forced sale. Either the decision conflicts with the Florida Supreme Court's decision in *Wartels*, or *Wartels* is no longer good law. The Fund has long urged that coops are interests in real property, capable of having homestead status both as to exemption from forced sale and as to being subject to the restrictions on devise of homestead. In The Fund's view, *Wartels* was decided based on the law in effect in 1975 and was legislatively superceded by enactment of Florida's Cooperative Act, Ch. 719, F.S., effective on and after January 1, 1977. See Title Note 19.03.02. For discussion on leaseholds as homestead see Title Note 19.01.03 and cases cited therein.

V. Trusts – Life after *Bosonetto*

Crews v. Bosonetto, 271 B.R. 403 (Fla. M.D. 2001), appears destined to be cited for the proposition that a transfer of homestead property into a trust terminates the protection against forced sale, at least in the bankruptcy courts.

Consider *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So.2d 774 (Fla. 1st DCA 1991), for an example of state court precedent on this issue (the exemption from forced sale applies to homestead devised to trustee of spendthrift trust of which the decedent's daughter was the beneficiary.)

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[i] The author is grateful for the assistance of Ted Conner, Fund Senior Underwriting Counsel, for researching the cases relating to Lady Bird Deeds and Michael Pyle, Attorney at Law, for explaining the estate planner's perspective of Lady Bird Deeds.

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The Fund® CONCEPT

November 2002, Volume 34

Enhanced Life Estates – An Underwriting Update

by Ted Conner, Fund Senior Underwriting Counsel

The use of an "enhanced" life estate, or "Lady Bird Deed," has gained in popularity in recent years. Attorneys specializing in estate planning and elder law are using this tool with increasing frequency. See Solkoff, "Life Estate Deeds," *Elder Law Section Newsletter*, Vol. II, No. 2 (June 1993); and "Fund Insures Enhanced Life Estates," 31 *Fund Concept* 124 (Aug. 1999). THE FUND expresses no opinion on the efficacy of such deeds for their intended purpose; rather, the purpose of this article is to discuss the effect of such deeds on title to real property and THE FUND's requirements relating to the instruments. Considerations relating to the advantages or disadvantages of the deeds for estate planning or other purposes are beyond the scope of this discussion.

Background. Division of the fee interest in real property into a life estate and a remainder interest has a long history dating back to English common law. As a tool for estate planning several drawbacks are present. The life tenant may not convey or mortgage the property without joinder of the remainderman, the property will be subject to creditors of the remainderman and the life tenant is responsible to the remainderman for acts which would devalue the remainder interest. It is possible to address the first concern by including, at the time of creation, the authority to divest the remainder interest. Description of such enhanced life estates as "Lady Bird deeds" stems from published examples utilizing Lady Bird Johnson as a party.

Vested remainders may be divided into three categories. They may be (1) indefeasible vested remainders; (2) vested remainders subject to open, such a transfer to a class; or (3) vested remainders subject to complete defeasance. See 2 Boyer, *Florida Real Estate Transactions*, Sec. 22.04; and 1 Simes and Smith, *The Law of Future Interests* (2d ed. 2001), Sec. 113. The interest created by a Lady Bird deed would appear to be a vested remainder subject to complete defeasance, also referred to as divestment.

This conclusion is supported by *Oglesby v. Lee*, 73 So. 840 (Fla. 1917). In this case, a grantor conveyed property to his daughter,

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Enhanced Life Estate ...

(Continued from page 149)

retaining a life estate and the power to sell the property. The deed also stated that if the grantor/life tenant sold the property, the proceeds of "said second sale" would be given to the daughter in lieu of the remainder interest. The father sold the fee interest in the property to a third party. After the father's death, the daughter then brought an action to have the deed to the third party declared void. The third party answered stating that the conveyance to the daughter was either a will or a deed with a reservation or condition. The trial court held for the daughter. The Florida Supreme Court reversed the trial court and upheld the conveyance to the third party. The court relied only upon the fact that the deed was a gift from the father to the daughter and the reservation of authority to sell was "clearly contemplated" in the deed. The court focused on the power contained in the deed and did not treat the deed as a testamentary instrument. The court's opinion does not indicate whether the daughter received the proceeds of the sale to the third party. If she had, we may have seen an additional equitable defense that the daughter was seeking to obtain the property after receiving the proceeds of the sale.

The *Oglesby* case was cited with favor in a Kentucky case, *Ricketts v. Louisville, St. L. & Ry. Co.*, 15 S.W. 182 (Ky. 1891), where the court upheld a complete power of revocation in a deed from a mother to son. Additional Florida cases have recognized a life estate with the power to convey when created by a devise. See *Green v. Barrow*, 8 So.2d 283 (Fla. 1942); *Sanderson v. Sanderson*, 70 So.2d 364 (Fla. 1954); and TN 2.11.06.

Other states have held that the retained power to convey the fee is invalid as it is inconsistent with the grant of the fee interest. See *Lucareli v. Lucareli*, 614 N.W.2d 60 (Wis. App. 2000), wherein the court stated "the tax law tail does not wag the property law dog." In Kansas, the power to completely revoke a deed was held to be against public policy *Yordy v. Yordy*, 217 P.2d 912 (Kan. 1950). While there may be a split of authority between the states, Florida law supports the reserved authority to convey the fee.

The following addresses THE FUND's underwriting position regarding issuing a Fund policy to a bona fide, arm's length purchaser for value from the life tenant exercising a retained power of sale or the remainderman after the death of the life tenant. The creation of the life estate contemplated by this article, and commonly employed, will be by conveyance of a remainder interest with a retained power to convey the fee.

Revocation. THE FUND will *not* insure a subsequent conveyance seeking to revoke the remainder interest and vest it in a different person. Such conveyances will generally be a gift and THE FUND typically does not insure a gift of property. TN 10.03.08. It is not clear that a pure revocation of the vested remainder back to the grantor independent of a conveyance to a third party is contemplated by the typical language. The language contained in the vesting deed will likely be narrowly construed by the courts. Experience with judicial interpretation of powers of attorney teaches us that it is the factual situations involving abuse of such instruments that find their way to appellate courts. Such factual situations often result in case law that greatly restrict the use of the instruments. TN 4.02.03.

Testamentary Treatment. An obvious question is whether a deed creating an enhanced life estate is a testamentary instrument which must be executed with the formalities of a will to effectively pass title to the remainderman after the death of the life tenant. In *Zuckerman v. Alter*, 615 So.2d 661 (Fla. 1993), the Florida Supreme Court held that a revocable trust is not a testamentary instrument and would not have to be executed with the formalities of a will. The court stated

that if the legislature wanted to require such formality of execution, the legislature would have to amend the statute, which was later done for revocable trusts in Sec. 737.111, F.S. If a revocable trust, which is a "contingent equitable interest in remainder" is not a testamentary instrument, then it is unlikely a vested remainder subject to complete defeasance, created by an enhanced life estate, would be considered a testamentary interest. Additionally, it could be observed that the difference in formality of execution of a will and a deed is only that the witnesses must sign in the presence of each other and the testator with a will. This is probably done in the vast majority of deeds as well, it just is not documented on the deed.

Homestead. The effectiveness of an enhanced life estate deed as an estate planning tool may be called into question when utilized with homestead property by a grantor who is survived by spouse or minor child. Art. X, Sec. 4(c), Fla. Const. 1968 (as amended), prohibits the devise of homestead property if the owner is survived by spouse or minor child. *In re Estate of Johnson*, 397 So.2d 970 (Fla. 4th DCA 1981), expanded the application of the constitutional provision to revocable trusts. Florida courts have shown a long history of protecting homestead property and have exercised every opportunity to extend homestead protections. In the event the grantor/life tenant dies survived by a spouse or minor child, the remainderman's ownership of the property may be called into question. THE FUND will not insure a subsequent conveyance unless constitutional homestead issues are addressed.

Creation. There is no statutory form or specific language that must be used. An example of language THE FUND would recognize would be the following provision.

> SAM JONES and MELINDA JONES, his wife, Grantors, to: SAM JONES and MELINDA JONES, for a 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 described 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, and the remainder to DOUGLAS JONES, a single man and JENNIFER JONES, a single woman, as Grantees.

Conveyance by Life Tenant. If the life tenant elects to exercise the reserved authority and convey the property, only the life tenant's name needs to appear in the "grantor" portion of the deed with a reference that the conveyance of the entire fee interest is being made pursuant to the authority in the vesting deed. An example would be: SAM JONES and MELINDA JONES, his wife, convey the entire fee interest in the property described below.

Judgments. Judgements against the life tenant may constitute a lien on the property and would have to be cleared by satisfaction or partial release. If the property constitutes the homestead of the life tenant Sec. 222.01, F.S., may be available to clear the lien. Judgments against a remainderman may create a lien against the remainder interest. TN 18.03.06. Homestead status does not attach to remainder interests, even if the remainderman is residing on the property. *Aetna Ins. Co. v. LaGasse*, 223 So.2d 727 (Fla. 1969). There have not been any appellate decisions addressing the question of whether a judgment lien against a remainderman could be divested by a life tenant holding a retained power to convey. Arguably a judgment creditor would not have any greater rights than the remainderman and could thus be divested as well. THE FUND will consider the possible divestment of state judgments liens on a case by case basis.

Federal Tax Liens. Federal tax liens

against the life tenant would attach and must be addressed. There is a lack of precedent to provide a guide with respect to federal tax liens against remaindermen who may be divested by life tenants. In recent years the IRS has exercised its federally created lien rights in areas that state law has not permitted private creditors. In *Drye v. U.S.*, 120 S.Ct. 474 (1999), property was devised to the decedent's son. The IRS had previously filed a federal tax lien against the son. The son properly disclaimed the property. The court found that under state law the disavowing heir's creditors may not reach disclaimed property. The court further found that while property rights are created and defined by state law, state law is inoperative to prevent the attachment and enforcement of federal liens. It was held that 26 U.S.C., Sec. 6334, provides an exclusive list of items that are exempt from levy and that disclaimed inheritances are not on the list. With consideration given to the fact that it was the debtor's action to disclaim the property, the court sustained the lien against the property. While it would not be the remainderman's action to divest his interest, there is no precedent to prevent the IRS's ability to levy against the vested remainder once it had attached.

More recently, the United States Supreme Court has held that a federal tax lien against one spouse attaches to that spouse's interest in entirety property. *United States v. Craft*, 122 S.Ct. 1414 (2002). Taken together, these cases indicate an unwillingness by the IRS to be bound by the operation of state law to prevent a lien from attaching or to divest a lien. The fact that the property was no longer an asset in the hands of the son, and under state law was not reachable by creditors, did not prevent the Government from successfully levying in the *Drye* case. In the absence of precedent, a FUND policy must include an exception for any currently enforceable federal tax liens against any remainderman, even if they have been divested, unless a release is obtained from the IRS.

THE FUND's Underwriting Positio
For issuing a Fund policy to an arm's leng... third party purchaser, THE FUND will recognize a retained power to divest the remainderman. THE FUND will insure conveyances by the life tenant without the remainderman's joinder and conveyances by the remainderman after the life tenant's death unless the property was the life tenant's homestead and the life tenant was survived by spouse or minor child. Issues regarding judgment and tax liens against the life tenant and remainderman will need to be addressed as discussed above. ❑

New Miami-Dade FUND Counsel

Carlos M. Megias has joined THE FUND as an Underwriting Counsel at the Miami-Dade Branch. He earned a B.A. degree in economics from Chapman College, and a J.D. from Stetson University College of Law.

Carlos M. Megias, Fund Underwriting Counsel

Prior to joining THE FUND, he practiced real estate law Florida for 22 years in south Florida and was the founding partner in the firm of Megias, McCabe and Samiljan in West Palm Beach.

Megias has taught real property law for more than 10 years as an adjunct professor at Florida Atlantic University and most recently served as the legal instructor for the THE FUND's Paralegal Certification and Placement Program in West Palm Beach. He is a member of the Real Property, Probate & Trust Law Section of The Florida Bar and is a Florida board certifie... real estate lawyer. He can be reached at ... 800-432-9594, extension 7718.

ENHANCED LIFE ESTATES

Entering Uncharted Territory

Ted Conner
Fund Senior Underwriting Counsel

Attorneys practicing in the areas of estate planning and elder law have begun using "Lady Bird" deeds with increasing frequency the past few years. This discussion will identify the unique characteristics of these deeds, discuss unresolved issues and The Fund's requirements when they are encountered in a chain of title. The deeds are often used in estate and Medicaid planning. Considerations relating to the advantages or disadvantages of the deeds for tax or Medicaid purposes are outside the scope of this treatment.

I. Life Estate with Power to Convey

A. **Description.** Deeds that create a life estate and provide the life tenant with authority to convey the remainderman's interest are being used with increasing frequency. They are often referred to as "Lady Bird" deeds. This name relates to published examples that used Lady Bird Johnson as a party. See Solkoff, "Life Estate Deeds", *Elder Law Section Newsletter*, Vol. II, No. 2 (June 1993). The Fund has referred to such deeds as "Enhanced Life Estates" to provide a descriptive way to identify the deeds. See Mackey, "Fund Insures Enhanced Life Estates", 31 *Fund Concept* 124 (Aug. 1999).

B. **Sample Language.** The specific language of the deeds will vary. The forms in use include language that may create different estates in the remainderman. Examples of the grantee provisions include:

   i. John Jones, a single man, a life estate, without any liability for waste and with full power and authority in said life tenant to sell, convey, mortgage, lease or otherwise mange and dispose of the property described 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, and the remainder to Jennifer Jones, a single woman as Grantee.

   ii. Sam Smith, a single man, a life estate, without any liability for waste, with full power and authority in him to sell, convey, mortgage, lease and otherwise dispose of the property described herein in fee simple, with or without consideration, without joinder by the remainderman, and to retain absolutely any and all proceeds derived therefrom. Upon the death of the life tenant, the remainder, if any, to Sally Smith, a single woman.

C. **Florida Precedent**. Research has revealed only one Florida case that ruled directly on the effectiveness of language in a deed similar to the language employed in an enhanced life estate. In *Oglesby v. Lee*, 73 So. 840 (Fla. 1917) a grantor conveyed property to his daughter retaining a life estate and the power to sell the property. The deed also stated that if the grantor/life tenant sold the property, the proceeds of "said second sale" would be given to the daughter in lieu of the remainder interest. The father sold the fee interest in the property to a third party. After the father's death, the daughter brought an action to have the deed to the third party declared void. Stating the deed to the daughter "clearly contemplated" the reserved right to sell the property the court upheld the deed to the third party and ruled the daughter had no title to the property. The court's opinion did not indicate whether the daughter received the proceeds of the sale to the third party. If she had, we may have seen an additional equitable defense that the daughter was seeking to obtain the property after receiving the proceeds of the sale. Additional Florida cases have recognized a life estate with the power to convey when created by a devise. See *Green v. Barrow*, 8 So.2d 283 (Fla. 1942) and *Sanderson v. Sanderson*, 70 So.2d 364 (Fla. 1954).

D. **Out of State Precedent**. Courts in other states have disagreed on the treatment to be afforded enhanced life estates.

i. *Approved*. The *Oglesby* opinion cited with favor *Ricketts v. Louisville, St. L. & Ry. Co.*, 15 S.W. 182 (Ky. 1891), where the court upheld a complete power of revocation in a deed from a mother to son.

ii. *Disapproved*. Other states have held the retained power to convey the fee is invalid as it is inconsistent with the grant of the fee interest. See *Lucareli v. Lucareli*, 614 N.W.2d 60 (Wis. App. 2000), wherein the court stated "the tax law tail does not wag the property law dog." In Kansas, the power to completely revoke a deed was held to be against public policy. *Yordy v. Yordy*, 217 P.2d 912 (Kan. 1950).

E. **Nature of Future Interest**. The nature of the future interest created in the remainderman may be vested or a contingent remainder.

i. *Vested Remainder Subject to Defeasance*. Vested remainders may be divided into three categories.

1. indefeasible vested remainders
2. vested remainders subject to open, such as a transfer to a class
3. vested remainders subject to complete defeasance.

See 2 Boyer, *Florida Real Estate Transactions*, Sec. 22.04; and 1 Simes and Smith, *The Law of Future Interests* (Borron's 3d ed. 2002), Sec. 110. The interest created by an enhanced life estate, particularly the first example above, would appear to be a vested

remainder subject to complete defeasance, also referred to as divestment.

ii. Contingent Remainder. According to Simes and Smith, *The Law of Future Interests* (Borron's 3d ed. 2002), Sec. 65 there is one factual distinction to identify a contingent interest. "The contingent interest is one in which there is some condition precedent to taking effect in possession other than the mere termination of the preceding estate." See also *In re Estate of* Martin, 110 So.2d 421 (Fla. 2d DCA 1959). It could be considered that the condition precedent is the death of the life tenant without conveying the fee. The second example above would appear to come closer to creating a contingent remainder.

iii. *Effect of Nature of Future Interest.* If the fee is to be conveyed by the life tenant, or the remainderman after the death of the life tenant not survived by spouse or minor child, the determination of the vested versus contingent would not appear to be important. As in *Oglesby*, a court will likely give effect to the plain language in the deed. As will be explored below, there are factual situations in which the determination may be critical.

II. Uncharted Territory

A. **Homestead.** The enhanced life estate may be used most often in the event of a small estate with the homestead as the sole significant asset. The effectiveness of an enhanced life estate deed as an estate planning tool may be called into question when utilized with homestead property by a grantor who is survived by spouse or minor child. Art. X, Sec. 4(c), Fla. Const. (1968 (as amended), prohibits the devise of homestead property if the owner is survived by spouse or minor child. *In re Estate of Johnson*, 397 So.2d 970 (Fla. 4th DCA 1981), expanded the application of the constitutional provisions to revocable trusts. Florida courts have shown a long history of protecting homestead property and have exercised every opportunity to extend homestead protections. In the event the grantor/life tenant dies survived by a spouse or minor child, the remainderman's ownership of the property may be called into question. This challenge may be more difficult to overcome if the remainderman's interest is deemed to be a contingent interest which did not vest until the life tenant's death. The Fund will not insure a subsequent conveyance by the remainderman until the constitutional homestead issues are addressed.

B. **Elective Share.** The remainder interest could be affected by a statutory elective share.

i. *Prior to 2001.* There is one additional Florida case in which a deed granted property, reserving to the grantor a life estate coupled with the power to convey the fee. *Kelley v. Hill*, 481 So.2d 1311 (Fla. 2d DCA 1986). The opinion indicates that prior to her death,

the decedent had conveyed to her daughter by her first marriage, the property she and her second husband resided on. The opinion is silent as to whether the deed was executed before or after the marriage. The surviving husband filed a notice to take an elective share, arguing that the deed reserving a life estate with power of sale was insufficient to remove the home from her estate for purposes of calculating the elective share. The court held it would not read into Chap. 732 F.S. a legislative intent to prohibit otherwise valid conveyances that are intended to reduce the assets subject to administration. The court pointed out the husband was only asking for an elective share and did not attempt to set aside the conveyance

ii. *Current law.* Chap. 732 F.S. was amended in 1999 for persons dying after October 1, 2001. Intending to add property in revocable trusts, the elective estate now includes property that at the time of the decedent's death the transfer was revocable by the decedent. Since the life tenant may divest the remainderman in an enhanced life estate, the property may be included in the elective share estate.

C. **Death of Remainderman Before Life Tenant.** Disposition of the property if the remainderman dies before the life tenant may turn on whether the future interest is determined to be vested or contingent.

i. *Vested.* If the interest is determined to be vested the remainder interest will pass to heirs or devisees of the remainderman. *In re Estate of Martin*, 110 So.2d 421 (Fla. 2d DCA 1959). In this case, a testatrix devised property to her husband for life with the remainder to be equally divided between a son and daughter. After the testatrix's death the daughter died before the husband. Reversing the probate court the District Court of Appeal held the daughter's interest vested at the death of the testatrix and the daughter's husband took the daughter's one-half interest at the daughter's death.

ii. *Contingent.* If the interest is determined to be a contingent remainder title will not pass to through the remainderman's estate. *Travis v. Ashton*, 23 So.2d 725 (Fla. 1945). In *Travis* a grandson was named as a beneficiary of a trust with another relative, share and share alike. The grandson died before one of the grantors of the trust. The Florida Supreme Court held that since the grandson did not receive the enjoyment of any part of the trust, it was contingent and did not pass to his estate.

D. **Judgments and Liens Against Remaindermen.** Judgments, tax liens and code enforcement liens against remaindermen will attach to remainder interests. There is no precedent as to whether such liens would be divested by a conveyance by the life tenant.

i. *Judgments.* Homestead status will not attach to remainder interests, even if the remainderman is residing on the property. *Aetna Ins. Co. v. LaGasse,* 223 So.2d 727 (Fla. 1969). There have not been any appellate decisions addressing the question of whether a judgment lien against a remainderman could be divested by a life tenant holding a retained power to convey. Arguably a judgment creditor would not have any greater rights than the remainderman and could thus be divested as well. If the life tenant, recognizing the lien, simply conveys the remainder interest to another relative, fraudulent transfer issues may arise. The Fund will consider the possible divestment of state judgment liens on a case by case basis.

ii. *Federal Tax Liens.* Federal tax liens against the life tenant would attach and must be addressed. There is a lack of precedent to provide a guide with respect to federal tax liens against remaindermen who may be divested by life tenants. In recent years the IRS has exercised its federally created lien rights in areas that state law has not permitted private creditors. See *Drye v. U.S.*, 120 S.Ct. 474 (1999) and *United States .v Craft*, 122 S.Ct. 1414 (2002). In the absence of precedent, a Fund policy must contain an exception for any currently enforceable federal tax liens against any remainderman, even if they have been divested, unless a release is obtained from the IRS.

III. **Fund Underwriting Requirements.** The following requirements contemplate situations in which title is conveyed to a life tenant with authority to convey the fee interest without joinder by the holders of the remainder interests. The conveyance to be insured is an arms length conveyance for value.

A. **Sale by Life Tenant.** The Fund will insure a conveyance of the fee interest by the life tenant without joinder by the remaindermen. The validity of this reservation of authority is confirmed by *Oglesby v. Lee*, discussed above. If there are liens against the remaindermen they will have to be addressed.

B. **Sale by Remainderman.** The Fund will insure a conveyance by all of the remaindermen after the death of the life tenant. If the life tenant was survived by a spouse, the elective share must be cleared. If the property was homestead property to the life tenant, and the life tenant was survived by spouse or minor child, a determination of homestead interests in a proper probate proceeding must be made. If any of the remaindermen have died, probate proceedings and conveyance from the heirs, devisees or personal representative as appropriate will be required.

C. **Revocation.** Revocation of the remainderman's interest and a conveyance to a different remainderman creates a difficult situation. It is this factual situation where allegations of undue influence will most likely arise. Additionally, if children of a deceased spouse in a blended family are divested by a surviving spouse by revocation of their remainder interest, such facts will most likely prompt a decision that the ability to revoke the remainder interest is against public policy. If the life tenants have died, deeds must be secured from everyone who was ever granted a remainder interest.

Arlene Lakin, Esq.
Attorney at Law

THE FLORIDA BAR BOARD CERTIFIED ELDER LAW

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July 23, 2012

Patricia P. Jones Hendricks, Esq.
Assistant General Counsel and
Vice President of Underwriting
Attorneys Title Insurance Fund
P.O. Box 628600
Orlando, Florida 32862-8600

Dear Ms. Hendricks:

Leonard Mondschein, Esq., and I are both Fund members and we are soliciting your consideration of our suggestion for the Fund to revise their policy on enhanced life estate deeds, a/k/a "Lady Bird" deeds.

It has been the Fund position that the Lady Bird deed, if drafted with certain language, allows the life tenant to subsequently sell the property without the need for remaindermen's joinder. However, there remains some confusion as to whether or not the life tenant may, re-convey and, instead, change the remaindermen, or, simply, eliminate them altogether. It has been observed that the Fund seems to be requiring joinder by the remaindermen for such a change, sometimes referred to as a "revocation."

Here is the current language for a Lady Bird deed which allows a sale/conveyance without joinder of the remaindermen:

"THIS WARRANTY DEED executed this XXX, by JOHN DOE, an unremarried widow, whose address is ----------, Grantor, to JOHN DOE, an unremarried widow, whose address is _____, for a 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 described 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, and upon the death of the last life tenant, the remainder, if any, to JANE DOE, a married woman, whose post

office address is _____, Grantee."

Here is our proposed language to clarify that a life tenant retains the right to reconvey title back to him or herself, and if desirable, to change the remaindermen without joinder of the current remaindermen:

"THIS WARRANTY DEED executed this XXX, by JOHN DOE, an unremarried widow, whose address is ----------, Grantor, to JOHN DOE, an unremarried widow, whose address is _____, for a life estate, without any liability for waste, and with full power and authority in said life tenant, to sell, convey, ***re-convey****, mortgage, lease, or otherwise manage and dispose of the property described 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, and upon the death of the last life tenant, the remainder, if any, to JANE DOE, a married woman, whose post office address is _____, Grantee.*

****** Grantor reserves the right to re-convey the property to himself (or herself or themselves), and, also, the right to change the remaindermen."***

****

Lady Bird Deeds & probate issues:

Regarding the remaindermen on Lady Bird deeds, we are also seeking confirmation of the Fund's position under the subsequent fact patterns:

Fact Pattern #1: "Life tenant is A. Remaindermen are B & C who take title as joint tenants with right of survivorship and not as tenants in common." B dies. It is clear that A can sell without joinder of the remaindermen, whether B &/or C are alive. But when A dies, who owns the property? C by right of survivorship?

Fact pattern #2: : "Life tenant is A. Remaindermen are B & C who take title as tenants in common." B dies. Again, it is clear that A can sell without joinder of the remaindermen, whether B &/or C are alive. But when A dies, who owns the property? B's estate (probate required) and C (in equal shares)?

Fact pattern #3: "Life tenant is A. Remainderman is only B." B dies. . Again, it is clear that A can sell without joinder of the remaindermen (B). But when A dies, who owns the property? No one, and a probate of A's estate is required? - or - B's estate, subject to its probate administration?

The Fund's position as to recognizing and approved the "new," clarifying provisions for the Lady Bird Deed, as suggested above, would be greatly appreciated, as would the Fund's clarification as to the lady bird deed/probate issues as described above under the various hypothetical situations.

Sincerely,

Arlene Lakin, Esq.

Encl.
AL:sg

cc: Jerry W. Allender, Esq.
G. Robert Arnold, Esq.
John D. Benson, Esq.
Connie Clark, Esq.
Richard J. Dungey, Esq.
George T. Dunlap, III, Esq.
Russell D. Gautier, Esq.
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Stephen H. Reynolds, Esq.
James L. Ritchey, Esq.
Silvia B. Rojas, Esq.
Duane C. Romanello, Esq.
Mindy B. Schlorberg, Esq.
G. Thomas Smith, Esq.
Victor E. Woodman, Esq.

This deed is being prepared without the benefit of a title search. The preparer makes no representations concerning the marketability of title, and is not insuring title.

WARRANTY DEED

THIS WARRANTY DEED executed this XXX, by ***JOHN DOE,*** an unremarried widow, whose address is ----------, Grantor, to ***JOHN DOE,*** an unremarried widow, whose address is _____, for a **life estate**, without any liability for waste, and with full power and authority in said life tenant, to sell, convey, re-convey, mortgage, lease, or otherwise manage and dispose of the property described 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, and upon the death of the last life tenant, the **remainder**, if any, to ***JANE DOE,*** a married woman, whose post office address is _____, Grantee

* ***Grantor reserves the right to re-convey the property to himself (or herself or themselves), and, also, the right to change the remaindermen.***

WITNESSETH that, the Grantor, for and in consideration of the sum of $I0.00 and other good and valuable consideration paid by the Grantees the receipt whereof is hereby acknowledged, does hereby bargain, sell and grant unto the Grantees, and Grantees' heirs and assigns forever, all the right, title, and interest in and to the following described lot, piece or parcel of land, situate, lying and being in the County of Broward, State of Florida, to wit:

Street Address:

Legal Description:

Folio ID# :

THIS REAL PROPERTY IS THE HOMESTEAD OF THE GRANTOR

TO HAVE AND TO HOLD the same together with all and singular the appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, lien, equity and claim whatsoever of the said Grantor, either in law or in equity, to the Grantees and Grantees' heirs forever.

AND the Grantor does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever.

IN WITNESS WHEREOF, the Grantor has signed and sealed these presents the day and year first above written.

WITNESSES: GRANTOR:

_____ _____

Print Name: JOHN DOE

_____

Print Name:

STATE OF FLORIDA)
COUNTY OF BROWARD)

I hereby certify that on XXX, before me, an officer duly authorized to take acknowledgments and administer oaths, personally appeared JOHN DOE who executed the foregoing instrument, and she acknowledged before me that she executed the same.

WITNESS my hand and seal in the County and State last aforesaid this XXX.

_____

NOTARY PUBLIC (Seal/Stamp Required)

As to JOHN DOE:
Personally known to me:_____
Identification produced:_____

_____

Document prepared by Arlene Lakin, Esq., 7284 W. Atlantic Blvd., Margate, FL 33063 (954) 975-5159
Return document to Arlene Lakin, Esq.,7284 W.Atlantic Blvd.,Margate,FL 33063 (954)975-5159

August 7, 2012

Arlene Lakin, Esquire
Palm Lakes Plaza
7284 West Atlantic Boulevard
Margate, Florida 33063

RE: "Lady Bird" Deeds

Dear Ms. Lakin:

This responds to your inquiry of July 23, 2012 on the above. I will address your concerns in the order presented.

Unilateral Elimination of Interest of Remaindermen: Attorneys' Title Insurance Fund, Inc., was one of the first underwriters to rely on the powers in a "Lady Bird" deed to insure a bona fide sale or mortgage of the property. The FUND continues to authorize reliance on the powers in the "Lady Bird" deed for insuring a bona fide purchaser or lender for value. The Fund is not willing to insure transfers that divest the remaindermen and re-vest the life tenant with fee simple title without requiring joinder by the remaindermen. These transfers may be valid; however, The Fund is concerned about the probability of litigation by the divested remaindermen. Moreover, it is important to consider that at the time of the divestment, these transfers are "no consideration" transfers, and not appropriate for issuing title insurance in the first place.

The Fund's position is not based on case law, as there is no case law on point; rather, it is a pure risk analysis. We require the joinder of the remainderman or a quitclaim deed from the remainderman to the life tenant when the life tenant desires to eliminate a remainderman's interest. If the remainderman is willing to quitclaim their interest back to the life tenant, there is no problem. If the remainderman is unwilling to convey their interest to the life tenant, it is some indication that litigation could ensue.

One issue that should be mentioned is the possibility of judgments and tax liens against the remainderman. Once liens have attached, an attempted divestment raises the possibility of litigation with the creditors of the remainderman even where the remainderman is willing to re-convey his or her interest to the life tenant.

You propose as a solution to this problem to expand the powers in the enhanced life estate or "Lady Bird" deed to specifically include the power to re-convey without joinder of the remainderman. I do not believe that the addition of such power adds anything to the elimination of the potential for litigation with the remaindermen or their creditors and may

in fact engender other negative consequences. When the reservation of powers in a deed is so broad that it is inconsistent with the grant of the interest in the deed, either the reservation fails or the grant fails.

"Lady Bird" Deeds and Probate Issues - Fact Pattern #1: The comments that follow should not be taken as underwriting guidance as the latter involves consideration of the entire circumstances affecting a given transaction. That said, from a purely hypothetical standpoint the response to your fact pattern #1 would be that on A's death, B and C should be treated, for insuring purposes, as successors to the interest of A and if they took title as joint tenants with right of survivorship and B predeceased A and C, C would take the full fee simple interest. I assume, but have not performed the research confirming the fact, that survivorship estates can exist in remainder interests.

Fact Pattern #2: A is the Life Tenant and B and C are the remaindermen, as tenants in common. B and C presumably take their interest in equal shares unless the record indicates otherwise. B dies first, then A dies. In order to insure title, a probate would be required on B's estate to determine who B's beneficiaries are. For insuring purposes, they would be considered the successors to the interest of B, and would be co-tenants with C.

Fact Pattern #3: B is the sole remainderman and B predeceases the life tenant. At the death of the life tenant, B's estate would have to be probated to determine who B's beneficiaries are. For insuring purposes, they would be considered the successors to the interest of A and B.

Sincerely,

Patricia P. Jones

Patricia P. Jones, Esquire
Vice President & Associate General Counsel

PPJ/rmk
cc: Jerry W. Allender, Esquire
G. Robert Arnold, Esquire
John D. Benson, Esquire
Connie Clark, Esquire
Richard J. Dungey, Esquire
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Mindy B. Schlosberg, Esquire
G. Thomas Smith, Esquire
Victor E. Woodman, Esquire

by a decedent during his lifetime, in which he retains the power to alter, amend, revoke or terminate, are part of the gross estate for estate tax purposes. Under 26 U.S.C. Sec. 6324 (a) (1), a lien is imposed upon the gross estate of the decedent. Accordingly, the estate taxes should be cleared or excepted in a title policy. See **TN 2.10.09**.

The conveyance to the wife would not be a transfer to a purchaser and the lien would not be divested under 26 U.S.C. Sec. 6324 (a) (2). However, a conveyance to a purchaser or a mortgage to a security holder would divest the lien for federal estate taxes. See Reg. 301.6323 (h) - 1 for the definitions of purchaser and holder of a security interest; see Reg. 301.6324-1; see also I.R.B. No. 15-1956-p. (4-9-56). The lien for Florida estate taxes against a resident decedent's estate would be divested by Sec. 198.22, F.S., upon a conveyance to a purchaser or a mortgage to a security holder. See **TN 2.10.02**. Regardless of whether the purchase or mortgage is directly from the successor trustee or from a beneficiary who has received a distribution of the property from the successor trustee, a bona fide purchaser or mortgagee from the successor trustee or a beneficiary may be insured without exception for federal estate taxes. As to a resident decedent's estate, such a bona fide purchaser or mortgagee may be insured without exception for Florida estate taxes. The Fund Member should obtain and record an affidavit demonstrating that the conveyance is to a bona fide purchaser for full and adequate consideration which is substantially equal to the fair market value of the property.

Fund Members should be mindful of potential creditor claims and the potential for the personal representative of the estate to demand assets from the trustee, where the settlor has been dead for less than two years. See Sec. 733.707 (3), F.S.; **TN 31.06.09**.

Note: Pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001, as amended, resident and nonresident decedents dying on and after Jan. 1, 2005, will not be subject to the Florida estate tax.

SC 2.11 Wills

TN 2.11.01 – TN 2.11.05 Reserved for New Title Notes

TN 2.11.06 Power of Appointment

The owner of the property died testate. His will provides:

> *I give and devise to my daughter, MBL, for life, all of my real property situated in the State of Florida, together with the power to appoint such property by deed or will to anyone or of the following persons: her spouse, her lineal descendants, her nephews or nieces or the spouses of such lineal descendants and nephews and nieces, and in default of appointment, I give the remainder of such property to her lineal descendants surviving her, per stirpes.*

The donee of the special power of appointment contemplates exercising the power by deed. The question is whether a policy may be issued on the title based on the donee's deed. In researching the problem no Florida law directly on powers of appointment was

found. Cases of life estates and powers to convey the fee-simple title were located. The case of *Mosgrove v. Mach*, 182 So. 786 (Fla. 1938), is of the greatest concern. In that case, the testator devised a one-half interest in the residue to a person for life with a remainder over, but then gave the life tenant what appears to be broad power to sell, mortgage, etc. The court construed that power to sell as showing intent that such power should be limited to the life estate.

The later cases of *Green v. Barrow*, 8 So.2d 283 (Fla. 1942), and *Sanderson v. Sanderson*, 70 So.2d 364 (Fla. 1954), without referring to the *Mosgrove* case, discuss the law that a life tenant may be vested with a power of disposition enabling the tenant to convey the fee-simple title. Under the holdings of the *Green* and *Sanderson* cases, The Fund feels that the phrase "in default of appointment" indicates that the remaindermen take only if the power of appointment is not exercised and allows MBL to convey the fee-simple title to any one or more of the class of individuals set out in the will.

In conclusion, The Fund will authorize issuance of a title policy on the deed by the donee provided the grantee is one of the class named in the will and the title is otherwise regular.

TN 2.11.07 Reserved for New Title Note

TN 2.11.08 Proof Where Subscribing Witness Unavailable (Rev. 12/93)

The record owner of property died more than two years ago leaving a valid will whereby he devised all of his property to his wife. The widow will convey her interest, but there is difficulty concerning probate of the will since neither of the subscribing witnesses can be located. Several children survived the decedent, but are scattered all over the country. The question is whether a mere filing of the will in the county where the land is located would be sufficient to establish title in the widow.

The Fund's conclusion is that unless and until the will is probated, it is not effective as a link in the chain of title, and a title depending on such a will could not be approved as sufficient. The decedent died more than two years ago and it would seem sufficient to proceed under Ch. 735, F.S., to have summary administration. See TN **2.01.01**. In testate estates that chapter requires that the will be probated.

However, under Sec. 733.201, F.S., when shown that the witnesses have gone to parts unknown or are dead or incompetent, proof may be made by any person having no interest in the estate under the will, that he believes the writing to be the true last will and testament of the deceased.

TN 2.11.09 Future Interests — Destruction of Contingent Remainder (Rev. 12/08)

A decedent died testate devising the property in question to her sister Corrine "for the rest of her natural life, and upon her decease to my niece, Doris, absolutely and in fee simple. In the event my niece, Doris should predecease my sister, Corrine, then I give,

A period of ineligibility is not imposed if the individual successfully demonstrates the following:

1. the asset was transferred solely for reasons other than to become Medicaid eligible; or
2. the individual intended to dispose of the assets either at fair market value or in exchange for other valuable compensation; or
3. the transfers are considered allowable per policies in 1640.0609.04 and .05, 1640.0610, 1640.0611 and 1640.0612; or
4. all transferred assets were returned to the individual (see 1640.0620); or
5. imposing the period of ineligibility would place an undue hardship on the individual.

1640.0613.01 Property Transferred and Life Estate Retained (MSSI)

If an individual transfers ownership in property but retains a life estate interest, the uncompensated value depends on the type of life estate the individual retains.

If an individual retains regular life estate, determine the transferred amount by multiplying the fair market value of the property at the time of the transfer by the remainder interest factor in the life estate/remainder interest table (Appendix A-17) using the individual's age at the time of the transfer. The result is the amount of the transfer.

If an individual retains life estate using a lady bird deed or life estate with powers, no transfer has occurred. The individual retains full ownership powers in the property and it is only upon their death that the property transfers ownership to the remainderman.

1640.0613.02 Purchase of Life Estate (MSSI)

If an individual purchases regular life estate in property they have not resided in for at least a year prior to nursing home admission, a transfer has occurred equal to the full amount paid for the life estate.

If an individual purchases regular life estate and lives in the property for at least a year prior to entering a nursing home, a transfer has occurred, but the transfer amount is reduced by the value of the life estate interest. Determine the value of the life estate by multiplying the fair market value of the property as the date of the purchase by the life estate factor (based on the age of the individual as of the date of purchase) from the life estate/remainder interest table in Appendix A-17. Deduct the value of the life estate from the amount the individual paid for it. The remainder is the amount of the transfer.

If an individual purchases a lady bird life estate or life estate with powers, this gives them full rights to the property, including the right to sell. The compensation received is equal to the fair market value of the property less any indebtedness or restrictions that may reduce the actual value.

1640.0614.01 Value of Compensation Received (MSSI)

A determination of the value of compensation received must be made based on the agreement and expectation of the parties at the time of transfer or sale, if earlier. The value of compensation is the gross amount paid or agreed to be paid by the purchaser. Expenses attributed to the sale do not reduce the value. Compensation may be received in one or more forms as described in passages 1640.0614.02-1640.0614.04.

1640.0614.02 Compensation in Cash (MSSI)

Compensation in the form of cash is the total amount paid or agreed to be paid, if greater, in exchange for the asset. The eligibility specialist must obtain documentary evidence when available (for example, bill of sale, contract, receipts, and the like) or statements from the eligible individual and the person(s) to whom the property was transferred to establish the amount of cash compensation received.

1640.0550 Indian Land (MSSI, SFP)

Land that is held by an enrolled member of an Indian tribe is excluded from assets if it cannot be sold or transferred without the permission of other individuals, the tribe, or a federal agency.

1640.0551 Life Estate Interest (MSSI, SFP)

Any life estate interest held by an individual, the individual's spouse, a child or specified relative is excluded as an asset to the individual. Also, transfers of life estates need not be examined for potential penalties.

Life estate received as a result of a transfer within 36 months of application for institutional care or HCBS must be evaluated under the transfer of assets policies.

Although individuals owning life estates have the right to obtain profits from the estate property they do not have exclusive rights to the benefits of the property. Therefore, only that portion of the income made available to the individual will be counted as income to the individual.

1640.0554 Life Insurance (MSSI, SFP)

A life insurance policy is considered only to the extent of its cash surrender value. However, if the face value of all life insurance policies on any one individual totals $2,500 or less, no part of the cash surrender value of any such policy or policies will be taken into account. Life insurance having no cash surrender value (for example, term insurance or burial insurance) is not considered in determining the face value of insurance and is excluded from all computations.

The policy must be owned by the individual or the person whose assets are deemed to the individual to be considered a countable asset to the individual.

When the total face value of all life insurance policies on an eligible individual, or an eligible/ineligible spouse whose assets are deemed to the eligible individual exceed $2,500, the cash surrender values of all such policies must be counted as assets. When the cash surrender values of such policies exceed the asset limitation, an individual may adjust his insurance holdings to policies of a reduced face value. If an adjustment is made, the life insurance policies (and any cash adjustments) are reconsidered in determining eligibility.

The exclusion of a $2,500 face value insurance policy applies to each individual separately. One family member cannot be insured for the total of the amounts allowed for other family members. For example, in the case of a couple, one spouse cannot be insured for $5,000 based on the assumption that the couple is allowed a total of $5,000 in life insurance.

1640.0555 Verification of Life Insurance (MSSI, SFP)

The individual must provide the following information on life insurance policies

1. the owner of the policy;
2. the individual insured by the policy;
3. the amount of the policy's cash surrender value, if any; and
4. the amount of any dividends or interest earned on this policy.

The life insurance policy may provide all the necessary information. If not, the information may be obtained from the insurance company or a local agent. However, with the exception of the MSSI and SFP Programs, it is not necessary to see the policy(s) or contact the company unless the cash value must be verified.

The Florida Senate

2013 Florida Statutes

Title XIV	Chapter 193	SECTION 155
TAXATION AND FINANCE	ASSESSMENTS Entire Chapter	**Homestead assessments.**

[1]**193.155 Homestead assessments.**—Homestead property shall be assessed at just value as of January 1, 1994. Property receiving the homestead exemption after January 1, 1994, shall be assessed at just value as of January 1 of the year in which the property receives the exemption unless the provisions of subsection (8) apply.

(1) Beginning in 1995, or the year following the year the property receives homestead exemption, whichever is later, the property shall be reassessed annually on January 1. Any change resulting from such reassessment shall not exceed the lower of the following:

(a) Three percent of the assessed value of the property for the prior year; or

(b) The percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(2) If the assessed value of the property as calculated under subsection (1) exceeds the just value, the assessed value of the property shall be lowered to the just value of the property.

(3)(a) Except as provided in this subsection or subsection (8), property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change of ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except if:

1. Subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled and:

a. The transfer of title is to correct an error;

b. The transfer is between legal and equitable title or equitable and equitable title and no additional person applies for a homestead exemption on the property;

c. The change or transfer is by means of an instrument in which the owner is listed as both grantor and grantee of the real property and one or more other individuals are additionally named as grantee. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application is considered a change of ownership; or

d. The person is a lessee entitled to the homestead exemption under s. 196.041(1).

2. Legal or equitable title is changed or transferred between husband and wife, including a change or transfer to a surviving spouse or a transfer due to a dissolution of marriage;

3. The transfer occurs by operation of law to the surviving spouse or minor child or children under s. 732.401; or

4. Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and who is legally or naturally dependent upon the owner.

(b) For purposes of this subsection, a leasehold interest that qualifies for the homestead exemption under s. 196.031 or s. 196.041 shall be treated as an equitable interest in the property.

(4)[2](a) Except as provided in paragraph (b) and s. 193.624, changes, additions, or improvements to homestead property shall be assessed at just value as of the first January 1 after the changes, additions, or improvements are substantially completed.

(b) Changes, additions, or improvements that replace all or a portion of homestead property damaged or destroyed by misfortune or calamity shall not increase the homestead property's assessed value when the square

footage of the homestead property as changed or improved does not exceed 110 percent of the square footage of the homestead property before the damage or destruction. Additionally, the homestead property's assessed value shall not increase if the total square footage of the homestead property as changed or improved does not exceed 1,500 square feet. Changes, additions, or improvements that do not cause the total to exceed 110 percent of the total square footage of the homestead property before the damage or destruction or that do not cause the total to exceed 1,500 total square feet shall be reassessed as provided under subsection (1). The homestead property's assessed value shall be increased by the just value of that portion of the changed or improved homestead property which is in excess of 110 percent of the square footage of the homestead property before the damage or destruction or of that portion exceeding 1,500 square feet. Homestead property damaged or destroyed by misfortune or calamity which, after being changed or improved, has a square footage of less than 100 percent of the homestead property's total square footage before the damage or destruction shall be assessed pursuant to subsection (5). This paragraph applies to changes, additions, or improvements commenced within 3 years after the January 1 following the damage or destruction of the homestead.

(c) Changes, additions, or improvements that replace all or a portion of real property that was damaged or destroyed by misfortune or calamity shall be assessed upon substantial completion as if such damage or destruction had not occurred and in accordance with paragraph (b) if the owner of such property:

1. Was permanently residing on such property when the damage or destruction occurred;
2. Was not entitled to receive homestead exemption on such property as of January 1 of that year; and
3. Applies for and receives homestead exemption on such property the following year.

(d) Changes, additions, or improvements include improvements made to common areas or other improvements made to property other than to the homestead property by the owner or by an owner association, which improvements directly benefit the homestead property. Such changes, additions, or improvements shall be assessed at just value, and the just value shall be apportioned among the parcels benefiting from the improvement.

(5) When property is destroyed or removed and not replaced, the assessed value of the parcel shall be reduced by the assessed value attributable to the destroyed or removed property.

(6) Only property that receives a homestead exemption is subject to this section. No portion of property that is assessed solely on the basis of character or use pursuant to s. 193.461 or s. 193.501, or assessed pursuant to s. 193.505, is subject to this section. When property is assessed under s. 193.461, s. 193.501, or s. 193.505 and contains a residence under the same ownership, the portion of the property consisting of the residence and curtilage must be assessed separately, pursuant to s. 193.011, for the assessment to be subject to the limitation in this section.

(7) If a person received a homestead exemption limited to that person's proportionate interest in real property, the provisions of this section apply only to that interest.

[3](8) Property assessed under this section shall be assessed at less than just value when the person who establishes a new homestead has received a homestead exemption as of January 1 of either of the 2 immediately preceding years. A person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007, and only if this subsection applies retroactive to January 1, 2008. For purposes of this subsection, a husband and wife who owned and both permanently resided on a previous homestead shall each be considered to have received the homestead exemption even though only the husband or the wife applied for the homestead exemption on the previous homestead. The assessed value of the newly established homestead shall be determined as provided in this subsection.

(a) If the just value of the new homestead as of January 1 is greater than or equal to the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the difference between the just value and the assessed value of the immediate prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the homestead shall be assessed as provided in this section.

(b) If the just value of the new homestead as of January 1 is less than the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of

the new homestead shall be equal to the just value of the new homestead divided by the just value of the immediate prior homestead and multiplied by the assessed value of the immediate prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this paragraph is greater than $500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this section.

(c) If two or more persons who have each received a homestead exemption as of January 1 of either of the 2 immediately preceding years and who would otherwise be eligible to have a new homestead property assessed under this subsection establish a single new homestead, the reduction from just value is limited to the higher of the difference between the just value and the assessed value of either of the prior eligible homesteads as of January 1 of the year in which either of the eligible prior homesteads was abandoned, but may not exceed $500,000.

(d) If two or more persons abandon jointly owned and jointly titled property that received a homestead exemption as of January 1 of either of the 2 immediately preceding years, and one or more such persons who were entitled to and received a homestead exemption on the abandoned property establish a new homestead that would otherwise be eligible for assessment under this subsection, each such person establishing a new homestead is entitled to a reduction from just value for the new homestead equal to the just value of the prior homestead minus the assessed value of the prior homestead divided by the number of owners of the prior homestead who received a homestead exemption, unless the title of the property contains specific ownership shares, in which case the share of reduction from just value shall be proportionate to the ownership share. In the case of a husband and wife abandoning jointly titled property, the husband and wife may designate the ownership share to be attributed to each spouse by following the procedure in paragraph (f). To qualify to make such a designation, the husband and wife must be married on the date that the jointly owned property is abandoned. In calculating the assessment reduction to be transferred from a prior homestead that has an assessment reduction for living quarters of parents or grandparents pursuant to s. 193.703, the value calculated pursuant to s. 193.703(6) must first be added back to the assessed value of the prior homestead. The total reduction from just value for all new homesteads established under this paragraph may not exceed $500,000. There shall be no reduction from just value of any new homestead unless the prior homestead is reassessed at just value or is reassessed under this subsection as of January 1 after the abandonment occurs.

(e) If one or more persons who previously owned a single homestead and each received the homestead exemption qualify for a new homestead where all persons who qualify for homestead exemption in the new homestead also qualified for homestead exemption in the previous homestead without an additional person qualifying for homestead exemption in the new homestead, the reduction in just value shall be calculated pursuant to paragraph (a) or paragraph (b), without application of paragraph (c) or paragraph (d).

(f) A husband and wife abandoning jointly titled property who wish to designate the ownership share to be attributed to each person for purposes of paragraph (d) must file a form provided by the department with the property appraiser in the county where such property is located. The form must include a sworn statement by each person designating the ownership share to be attributed to each person for purposes of paragraph (d) and must be filed prior to either person filing the form required under paragraph (h) to have a parcel of property assessed under this subsection. Such a designation, once filed with the property appraiser, is irrevocable.

(g) For purposes of receiving an assessment reduction pursuant to this subsection, a person entitled to assessment under this section may abandon his or her homestead even though it remains his or her primary residence by notifying the property appraiser of the county where the homestead is located. This notification must be in writing and delivered at the same time as or before timely filing a new application for homestead exemption on the property.

(h) In order to have his or her homestead property assessed under this subsection, a person must file a form provided by the department as an attachment to the application for homestead exemption, including a copy of the form required to be filed under paragraph (f), if applicable. The form, which must include a sworn statement attesting to the applicant's entitlement to assessment under this subsection, shall be considered sufficient documentation for applying for assessment under this subsection. The department shall require by rule that the required form be

submitted with the application for homestead exemption under the timeframes and processes set forth in chapter 196 to the extent practicable.

(i)1. If the previous homestead was located in a different county than the new homestead, the property appraiser in the county where the new homestead is located must transmit a copy of the completed form together with a completed application for homestead exemption to the property appraiser in the county where the previous homestead was located. If the previous homesteads of applicants for transfer were in more than one county, each applicant from a different county must submit a separate form.

2. The property appraiser in the county where the previous homestead was located must return information to the property appraiser in the county where the new homestead is located by April 1 or within 2 weeks after receipt of the completed application from that property appraiser, whichever is later. As part of the information returned, the property appraiser in the county where the previous homestead was located must provide sufficient information concerning the previous homestead to allow the property appraiser in the county where the new homestead is located to calculate the amount of the assessment limitation difference which may be transferred and must certify whether the previous homestead was abandoned and has been or will be reassessed at just value or reassessed according to the provisions of this subsection as of the January 1 following its abandonment.

3. Based on the information provided on the form from the property appraiser in the county where the previous homestead was located, the property appraiser in the county where the new homestead is located shall calculate the amount of the assessment limitation difference which may be transferred and apply the difference to the January 1 assessment of the new homestead.

4. All property appraisers having information-sharing agreements with the department are authorized to share confidential tax information with each other pursuant to s. 195.084, including social security numbers and linked information on the forms provided pursuant to this section.

5. The transfer of any limitation is not final until any values on the assessment roll on which the transfer is based are final. If such values are final after tax notice bills have been sent, the property appraiser shall make appropriate corrections and a corrected tax notice bill shall be sent. Any values that are under administrative or judicial review shall be noticed to the tribunal or court for accelerated hearing and resolution so that the intent of this subsection may be carried out.

6. If the property appraiser in the county where the previous homestead was located has not provided information sufficient to identify the previous homestead and the assessment limitation difference is transferable, the taxpayer may file an action in circuit court in that county seeking to establish that the property appraiser must provide such information.

7. If the information from the property appraiser in the county where the previous homestead was located is provided after the procedures in this section are exercised, the property appraiser in the county where the new homestead is located shall make appropriate corrections and a corrected tax notice and tax bill shall be sent.

8. This subsection does not authorize the consideration or adjustment of the just, assessed, or taxable value of the previous homestead property.

9. The property appraiser in the county where the new homestead is located shall promptly notify a taxpayer if the information received, or available, is insufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable. Such notification shall be sent on or before July 1 as specified in s. 196.151.

10. The taxpayer may correspond with the property appraiser in the county where the previous homestead was located to further seek to identify the homestead and the amount of the assessment limitation difference which is transferable.

11. If the property appraiser in the county where the previous homestead was located supplies sufficient information to the property appraiser in the county where the new homestead is located, such information shall be considered timely if provided in time for inclusion on the notice of proposed property taxes sent pursuant to ss. 194.011 and 200.065(1).

12. If the property appraiser has not received information sufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable before mailing the notice of proposed property taxes, the taxpayer may file a petition with the value adjustment board in the county where the new homestead is located.

(j) Any person who is qualified to have his or her property assessed under this subsection and who fails to file an application by March 1 may file an application for assessment under this subsection and may, pursuant to s. 194.011 (3), file a petition with the value adjustment board requesting that an assessment under this subsection be granted. Such petition may be filed at any time during the taxable year on or before the 25th day following the mailing of the notice by the property appraiser as provided in s. 194.011(1). Notwithstanding s. 194.013, such person must pay a nonrefundable fee of $15 upon filing the petition. Upon reviewing the petition, if the person is qualified to receive the assessment under this subsection and demonstrates particular extenuating circumstances judged by the property appraiser or the value adjustment board to warrant granting the assessment, the property appraiser or the value adjustment board may grant an assessment under this subsection. For the 2008 assessments, all petitioners for assessment under this subsection shall be considered to have demonstrated particular extenuating circumstances.

(k) Any person who is qualified to have his or her property assessed under this subsection and who fails to timely file an application for his or her new homestead in the first year following eligibility may file in a subsequent year. The assessment reduction shall be applied to assessed value in the year the transfer is first approved, and refunds of tax may not be made for previous years.

(l) The property appraisers of the state shall, as soon as practicable after March 1 of each year and on or before July 1 of that year, carefully consider all applications for assessment under this subsection which have been filed in their respective offices on or before March 1 of that year. If, upon investigation, the property appraiser finds that the applicant is entitled to assessment under this subsection, the property appraiser shall make such entries upon the tax rolls of the county as are necessary to allow the assessment. If, after due consideration, the property appraiser finds that the applicant is not entitled to the assessment under this subsection, the property appraiser shall immediately prepare a notice of such disapproval, giving his or her reasons therefor, and a copy of the notice must be served upon the applicant by the property appraiser by personal delivery or by registered mail to the post office address given by the applicant. The applicant may appeal the decision of the property appraiser refusing to allow the assessment under this subsection to the value adjustment board, and the board shall review the application and evidence presented to the property appraiser upon which the applicant based the claim and hear the applicant in person or by agent on behalf of his or her right to such assessment. Such appeal shall be heard by an attorney special magistrate if the value adjustment board uses special magistrates. The value adjustment board shall reverse the decision of the property appraiser in the cause and grant assessment under this subsection to the applicant if, in its judgment, the applicant is entitled to the assessment or shall affirm the decision of the property appraiser. The action of the board is final in the cause unless the applicant, within 60 days following the date of refusal of the application by the board, files in the circuit court of the county in which the homestead is located a proceeding against the property appraiser for a declaratory judgment as is provided under chapter 86 or other appropriate proceeding. The failure of the taxpayer to appear before the property appraiser or value adjustment board or to file any paper other than the application as provided in this subsection does not constitute a bar to or defense in the proceedings.

(9) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the just value and assessed value must be recalculated for every such year, including the year in which the mistake occurred.

(b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.

(c) If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.

(10) If the property appraiser determines that for any year or years within the prior 10 years a person who was not entitled to the homestead property assessment limitation granted under this section was granted the homestead property assessment limitation, the property appraiser making such determination shall record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property must be identified in the notice of tax lien. Such property that is situated in this state is subject to the unpaid taxes, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum. However, when a person entitled to exemption pursuant to s. 196.031 inadvertently receives the limitation pursuant to this section following a change of ownership, the assessment of such property must be corrected as provided in paragraph (9)(a), and the person need not pay the unpaid taxes, penalties, or interest.

History.—s. 62, ch. 94-353; s. 5, ch. 2001-137; s. 1, ch. 2006-38; s. 1, ch. 2006-311; s. 5, ch. 2007-339; s. 3, ch. 2008-173; s. 1, ch. 2010-109; s. 5, ch. 2012-193; s. 4, ch. 2013-72; s. 2, ch. 2013-77.

[1]Note.—Section 1, ch. 2007-339, provides that:

"(1) The executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, for the purpose of implementing this act.

"(2) In anticipation of implementing this act, the executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, for the purpose of making necessary changes and preparations so that forms, methods, and data records, electronic or otherwise, are ready and in place if sections 3 through 9 and sections 10, 12, and 14 . . . of this act become law.

"(3) Notwithstanding any other provision of law, such emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules."

[2]Note.—Section 8, ch. 2013-77, provides that "[t]his act shall take effect July 1, 2013, and applies to assessments beginning January 1, 2014."

[3]Note.—Section 13, ch. 2008-173, provides that:

"(1) The executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, for the purpose of implementing this act.

"(2) Notwithstanding any other provision of law, such emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules."

The Florida Senate

2013 Florida Statutes

Title XIV	Chapter 193	SECTION 1554
TAXATION AND FINANCE	ASSESSMENTS Entire Chapter	**Assessment of nonhomestead residential property.**

[1]193.1554 **Assessment of nonhomestead residential property.**—

(1) As used in this section, the term "nonhomestead residential property" means residential real property that contains nine or fewer dwelling units, including vacant property zoned and platted for residential use, and that does not receive the exemption under s. 196.031.

(2) For all levies other than school district levies, nonhomestead residential property shall be assessed at just value as of January 1 of the year that the property becomes eligible for assessment pursuant to this section.

(3) Beginning in the year following the year the nonhomestead residential property becomes eligible for assessment pursuant to this section, the property shall be reassessed annually on January 1. Any change resulting from such reassessment may not exceed 10 percent of the assessed value of the property for the prior year.

(4) If the assessed value of the property as calculated under subsection (3) exceeds the just value, the assessed value of the property shall be lowered to the just value of the property.

(5) Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership or control. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (3) and (4). For purpose of this section, a change of ownership or control means any sale, foreclosure, transfer of legal title or beneficial title in equity to any person, or the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value, except as provided in this subsection. There is no change of ownership if:

(a) The transfer of title is to correct an error.

(b) The transfer is between legal and equitable title.

(c) The transfer is between husband and wife, including a transfer to a surviving spouse or a transfer due to a dissolution of marriage.

(d) For a publicly traded company, the cumulative transfer of more than 50 percent of the ownership of the entity that owns the property occurs through the buying and selling of shares of the company on a public exchange. This exception does not apply to a transfer made through a merger with or an acquisition by another company, including an acquisition by acquiring outstanding shares of the company.

(6)[2](a) Except as provided in paragraph (b) and s. 193.624, changes, additions, or improvements to nonhomestead residential property shall be assessed at just value as of the first January 1 after the changes, additions, or improvements are substantially completed.

(b) Changes, additions, or improvements that replace all or a portion of nonhomestead residential property damaged or destroyed by misfortune or calamity shall not increase the property's assessed value when the square footage of the property as changed or improved does not exceed 110 percent of the square footage of the property before the damage or destruction. Additionally, the property's assessed value shall not increase if the total square footage of the property as changed or improved does not exceed 1,500 square feet. Changes, additions, or improvements that do not cause the total to exceed 110 percent of the total square footage of the property before the damage or destruction or that do not cause the total to exceed 1,500 total square feet shall be reassessed as provided under subsection (3). The property's assessed value shall be increased by the just value of that portion of the changed or improved property which is in excess of 110 percent of the square footage of the property before the damage or destruction or of that portion exceeding 1,500 square feet. Property damaged or destroyed by misfortune or calamity

which, after being changed or improved, has a square footage of less than 100 percent of the property's total square footage before the damage or destruction shall be assessed pursuant to subsection (8). This paragraph applies to changes, additions, or improvements commenced within 3 years after the January 1 following the damage or destruction of the property.

(c) Changes, additions, or improvements include improvements made to common areas or other improvements made to property other than to the nonhomestead residential property by the owner or by an owner association, which improvements directly benefit the property. Such changes, additions, or improvements shall be assessed at just value, and the just value shall be apportioned among the parcels benefiting from the improvement.

[3](7) Any increase in the value of property assessed under this section which is attributable to combining or dividing parcels shall be assessed at just value, and the just value shall be apportioned among the parcels created.

(a) For divided parcels, the amount by which the sum of the just values of the divided parcels exceeds what the just value of the parcel would be if undivided shall be attributable to the division. This amount shall be apportioned to the parcels pro rata based on their relative just values.

(b) For combined parcels, the amount by which the just value of the combined parcel exceeds what the sum of the just values of the component parcels would be if they had not been combined shall be attributable to the combination.

(c) A parcel that is combined or divided after January 1 and included as a combined or divided parcel on the tax notice is not considered to be a combined or divided parcel until the January 1 on which it is first assessed as a combined or divided parcel.

(8) When property is destroyed or removed and not replaced, the assessed value of the parcel shall be reduced by the assessed value attributable to the destroyed or removed property.

(9) Erroneous assessments of nonhomestead residential property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the just value and assessed value must be recalculated for every such year, including the year in which the mistake occurred.

(b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.

(c) If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.

(10) If the property appraiser determines that for any year or years within the prior 10 years a person or entity who was not entitled to the property assessment limitation granted under this section was granted the property assessment limitation, the property appraiser making such determination shall record in the public records of the county a notice of tax lien against any property owned by that person or entity in the county, and such property must be identified in the notice of tax lien. Such property that is situated in this state is subject to the unpaid taxes, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum.

History.—ss. 10, 11, ch. 2007-339; s. 4, ch. 2008-173; s. 12, ch. 2009-21; s. 2, ch. 2010-109; ss. 1, 2, ch. 2011-125; s. 6, ch. 2012-193; s. 3, ch. 2013-77.

[1]Note.—Section 1, ch. 2007-339, provides that:

"(1) The executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, for the purpose of implementing this act.

"(2) In anticipation of implementing this act, the executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, for the purpose of making necessary changes and preparations so that forms, methods, and data records, electronic or otherwise, are ready and in place if sections 3 through 9 and sections 10, 12, and 14 . . . of this act become law.

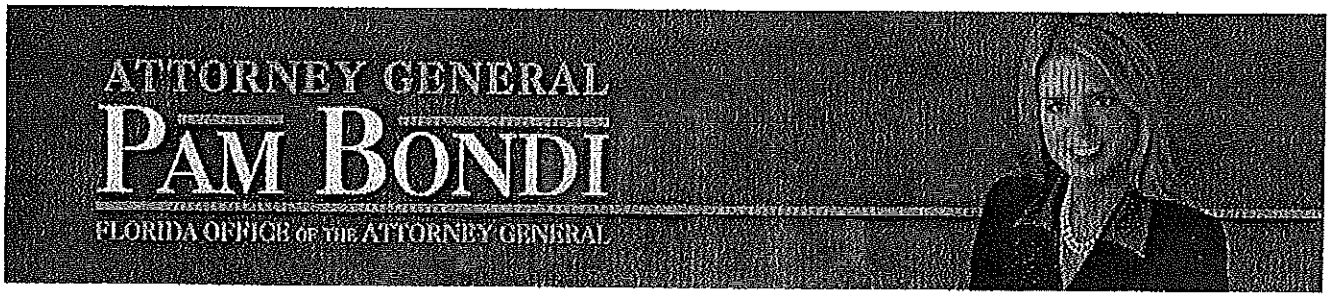
"(3) Notwithstanding any other provision of law, such emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules."

[2]**Note.**—Section 8, ch. 2013-77, provides that "[t]his act shall take effect July 1, 2013, and applies to assessments beginning January 1, 2014."

[3]**Note.**—Section 13, ch. 2008-173, provides that:

"(1) The executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, for the purpose of implementing this act.

"(2) Notwithstanding any other provision of law, such emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules."



Advisory Legal Opinion - AGO 2001-31

Print Version

Number: AGO 2001-31
Date: April 26, 2001
Subject: Homestead exemption, change in ownership

The Honorable V. Frank Desguin
Charlotte County Property Appraiser
18500 Murdock Circle
Port Charlotte, Florida 33948-1076

RE: TAXATION--HOMESTEAD EXEMPTION--PROPERTY APPRAISER--change in ownership requires assessment of property at just value in January of year following change. Art. VII, s. 4(c), Fla. Const.; s. 193.155, Fla. Stat.

Dear Mr. Desguin:

You ask substantially the following question:

If the sole owner of property receiving a homestead exemption changes the ownership of the property to add another individual as co-owner in a manner that does not meet the criteria enumerated in section 193.155(3)(a), (b), (c) or (d), Florida Statutes, should the property's assessed value be returned to just value in its entirety on the following January 1, or should fifty percent of the property's assessed value remain subject to the limitations in section 193.155(1) and (2), Florida Statutes, since the original owner remains an owner and still qualifies for the homestead exemption?

In sum:

If the sole owner of property receiving a homestead exemption changes the ownership of the property to add another individual as co-owner in a manner that does not meet the criteria enumerated in section 193.155(3)(a), (b), (c) or (d), Florida Statutes, the property's assessed value should be returned to just value in its entirety on the following January 1.

In 1992, Florida citizens amended the Florida Constitution by adopting a provision that limited ad valorem taxation on homesteads. The amendment, which became effective January 5, 1993, levied a base year "just value"

assessment for each homestead as of January 1, 1994 (the year following the effective date of the amendment), and restricted subsequent increases in assessments to the lower of either (a) three percent of the prior year's assessment, or (b) a percent change in the Consumer Price Index.[1] The purpose of the amendment was to encourage the preservation of homestead property in the face of ever-increasing opportunities for real estate development, and rising property values and assessments.[2]

Subsection 4(c)3. of Article VII, Florida Constitution, however, provides:

"After *any* change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein." (e.s.)

In 1994, the Legislature enacted legislation implementing the homestead amendment that had been approved by the electorate.[3] This legislation is codified in section 193.155, Florida Statutes. Subsection (3) of the statute provides:

"(3) *Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership.* Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). *For the purpose of this section, a change in ownership means any* sale, foreclosure, or *transfer of legal title or beneficial title in equity to any person, except as provided in this subsection.* There is no change of ownership if:
(a) Subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled *and*:
1. The transfer of title is to correct an error; or
2. The transfer is between legal and equitable title;
(b) The transfer is between husband and wife, including a transfer to a surviving spouse or a transfer due to a dissolution of marriage;
(c) The transfer occurs by operation of law under s. 732.4015; or
(d) Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner." (e.s.)

Section 193.155(3), Florida Statutes, thus reflects the intent of Article VII, section 4(c), Florida Constitution, that a change in ownership requires that the property be reassessed at just value as of January 1 of the year following the change in owner-ship.[4] While the statute recognizes certain exceptions, your inquiry concerns a change in ownership that does not fall within such exceptions.

Neither section 4(c), Article VII, Florida Constitution, nor section 193.155(3), Florida Statutes, provides for a partial reassessment of the property at just value.[5] Rather, both the constitution and the statute refer to a change in ownership as requiring the assessment of the property at just value as of January 1 of the year following the change.

The change in ownership constitutes a triggering event for which the property, not that portion of the property affected by the change in ownership, is to be reassessed at just value.

When the controlling law directs how a thing is to be done, that is, in effect, a prohibition against its being done in any other way.[6]

Accordingly, I am of the opinion that if the sole owner of property receiving a homestead exemption changes the ownership of the property to add another individual as co-owner in a manner that does not meet the criteria enumerated in section 193.155(3)(a), (b), (c) or (d), Florida Statutes, the property's assessed value should be returned to just value in its entirety on the following January 1.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tjw

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[1] *See* Art. VII, s. 4(c), Fla. Const., which provides in part:

"All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.
1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:
(A) three percent (3%) of the assessment for the prior year.
(B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.
2. No assessment shall exceed just value.
3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.
4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.
5. Changes, additions, reductions or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.
6. In the event of a termination of homestead status, the property shall be assessed as provided by general law. . . ."

[2] *See Smith v. Welton*, 710 So. 2d 135 (Fla. 1st DCA 1998), *affirmed on other grounds*, 729 So. 2d 371 (Fla. 1999). *And see Constitutional Amendments on the Florida Ballot, Understanding Florida's Issues* (Fla. Inst. of Gov., Univ. of Fla., Gainesville, Fla.), Oct. 1992, at 9. The "primary advantage" of the amendment, therefore, is the "stabilizing [of] annual increases in property taxes, [and] providing protection to the elderly and poor against losing their property due to high taxes . . . ." *Id.*

[3] *See s.* 62, Ch. 94-353, Laws of Florida.

[4] *And see* Rule 12D-8.0061(2), F.A.C., providing in part:

"Real property shall be assessed at just value as of January 1 of the year following any change of ownership. . . . For purposes of this section, a change of ownership includes any transfer of homestead property receiving the exemption . . . ."

[5] *Compare* s. 193.155(7), Fla. Stat., stating that if a person's homestead exemption is limited to that person's proportionate interest in real property, the provisions of the statute apply only to that interest.

[6] *See Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (when the Legislature has prescribed the mode, that mode must be observed); *Thayer v. State*, 335 So. 2d 815 (Fla. 1976).
