

# Enhanced Life Estates Are Now Standard Practice

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Enhanced life estate deeds, also known as “Lady Bird Deeds,” are deeds wherein the life tenant is either granted or reserves certain powers and control over the remainder interest vested in another person or people. Generally, it is considered sufficient to create an enhanced life estate when the life tenant has the power to “sell, convey, mortgage or otherwise manage and dispose of” the real property without the consent of the remaindermen. The issue, as noted in the comments to all of the uniform title standards to be discussed in this article, is, “although Lady Bird Deeds are used prevalently in Florida for various purposes, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice.” Recognizing the lack of authority available, last year the Uniform Title Standards Committee of the Real Property, Probate and Trust Law Section of The Florida Bar approved three new title standards regarding enhanced life estates to “represent the consensus view of the Real Property, Probate, and Trust Law Section of The Florida Bar.” Each uniform title standard contains the title standard, examples of hypothetical fact patterns illustrating the application of the title standard, and commentary about the title standard.

The first new uniform title standard is Uniform Title Standard 6.10 titled: Enhanced Life Estate: Deed for Non-Homestead Property, which provides:

The holder of a life estate in non-homestead property, coupled with the power to sell, convey, mortgage and otherwise manage the fee simple estate, can convey or encumber the fee simple estate during the lifetime of the holder without the remaindermen.

This first uniform title standard confirms title to non-homestead property can be validly held in an enhanced life estate.

The first problem illustrating the application of the standard is:

A remainder in Blackacre was conveyed by John Doe to Jane Smith with John Doe reserving for himself, without any liability for waste, full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without

joinder of the remaindermen, and full power and authority to retain any and all proceeds generated by such action. John Doe died. Is the conveyance to Jane Smith valid?

The answer is “yes.” This first problem shows, as long as the property is not conveyed during the lifetime of the life tenant, title to non-homestead property held in an enhanced life estate will pass to the remainderman upon the death of the life tenant without anything further.

The second problem illustrating the application of the standard is:

Same facts as in Problem 1, except John Doe, during his lifetime and for his benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

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The answer, again, is “yes.” This problem confirms the life tenant with enhanced powers can convey fee simple title to non-homestead property held in an enhanced life estate to a third-party without the joinder of the remainderman. This is because the remainderman holds a vested interest subject to divestment by the life tenant. It is important to note title insurance underwriters will typically want to confirm the conveyance to Jeffrey Williams was clearly authorized by the powers held by the life tenant with enhanced powers and often make a distinction between the power to “sell” or “dispose of” and the power to “gift.”

The third problem illustrating the application of the standard is:

Same facts as in Problem 1, except John Doe, during his lifetime and for his benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. At the time of the conveyance, Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

The answer is “yes.” This third problem addresses the issue of judgment liens against the remainderman and confirms the life tenant with enhanced powers has the same power to divest judgment liens against the remainderman as the life tenant with enhanced powers does to divest the actual remainderman. The creditor’s lien can only attach to the interest held by the remainderman and, in this case, the life tenant with enhanced powers always had the power to divest the remainderman of her interest, so, the same is true for the Creditor’s judgment lien.

The fourth, and final, problem illustrating the application of this standard is:

Same facts as in Problem 1, except Creditor has a judgment lien against John Doe. However, Creditor does not levy and execute his judgment. John Doe dies without conveying the property. Did Jane Smith acquire title to Blackacre free of the judgment lien of Creditor?

Once again, the answer is “yes.” The final problem addresses the issue of judgment liens against the life tenant with enhanced powers. As stated above, creditors’ liens can only attach to whatever interest the debtor has in the real property. In this case, the life estate held by the life tenant with enhanced powers terminates upon their death, so the life tenant with enhanced powers no longer has an interest in the property. Further, as discussed in the Comments to this uniform title standard, pursuant to Fla. Stat. § 733.706 (2018), judgment creditors cannot enforce their liens against property owned by the debtor at their death without the approval of the court. Instead, the creditor becomes a creditor of the estate of the deceased life tenant and will have to file a claim against the

estate in the same manner as other claims.

Finally, for this uniform title standard, the Comment section makes two important points about how to avoid title issues when there are attempts to divest the remaindermen of their interest by the life tenant with enhanced powers. The first point is to ensure the power to divest the remaindermen is specifically included in the powers retained by/granted to the life tenant in the deed creating the enhanced life estate. The second point is the deed from the life tenant with enhanced powers attempting to divest the remaindermen of their interest should clearly state the life tenant’s intent, whether by reconveying the remainder interest or by conveying the entire fee simple title to a third party.

The second new uniform title standard on enhanced life estates is Uniform Title Standard 6.11: Enhanced Life Estate: Life Tenant and Homestead Property, which states:

A life tenant with an interest in homestead property, coupled with the power to sell, convey, mortgage, and otherwise manage the fee simple estate, can convey or encumber the fee simple estate during the lifetime of the holder without the remainderman.

This uniform title standard holds the title to homestead property, just like the title to non-homestead property, can be validly held in an enhanced life estate.

The first problem illustrating the application of this uniform title standard states:

A remainder in Blackacre was conveyed by John Doe to Jane Smith by John Doe reserving for himself, without any liability for waste, full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration without joinder of the remainderman and full power and authority to retain any and all proceeds generated by such action. During his lifetime and for his own benefit, John Doe by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. John Doe was a single man at the time of the conveyance to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

The answer is “yes.” This problem confirms a single life tenant with enhanced powers can convey fee simple title to homestead property held in an enhanced life estate to a third-party without the joinder of the remainderman. Again, the remainderman has a vested interest subject to divestment by the life tenant with enhanced powers.

The second problem illustrating the application of this uniform title standard states:

Same facts as in Problem 1, except John Doe was married at the time of the conveyance to Jeffrey Williams and his

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spouse joined in the conveyance. Did Jeffrey Williams acquire title to Blackacre fee of the claims of Jane Smith?

The answer is “yes.” The second example demonstrates the restrictions on conveying and encumbering homestead property set forth in Art. X, Sec. 4(c), of the Florida Constitution, still apply to homestead property held in an enhanced life estate and spousal joinder is still be required in those situations.

The third problem illustrating the application of this uniform title standards states:

Same facts as in Problem 1, except at the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre fee of the claims of Jane Smith and Creditor?

Again, the answer is “yes.” This final problem again supports the position the life tenant with enhanced powers can convey fee simple title to the real property held in an enhanced life estate free and clear of the judgment liens against the remainderman.

Finally, for this uniform title standard, the major point made by the Comment section is the restriction on the devise of homestead property may need to be considered after the death of the life tenant with enhanced powers where the homestead property is held in an enhanced life estate. This is because, unlike a standard life estate, the life tenant with enhanced powers retains power and control over the real property, without the joinder of the remainderman, until the moment of the life tenant’s death. If the real property held in the enhanced life estate is homestead property, it is possible for that “power and control” to be interpreted by the courts in

the same manner as homestead property held in a revocable trust. Since the transfer to the remainderman in an enhanced life estate is subject to being divested until the death of the life tenant with enhanced powers, the “transfer” may be considered a “devise” of the homestead property subject to the restrictions contained in Art. X, Sec. 4(c), of the Florida Constitution. If the life tenant is survived by a spouse or minor child, deeds from all of the heirs of the deceased life tenant may be required to convey marketable title.

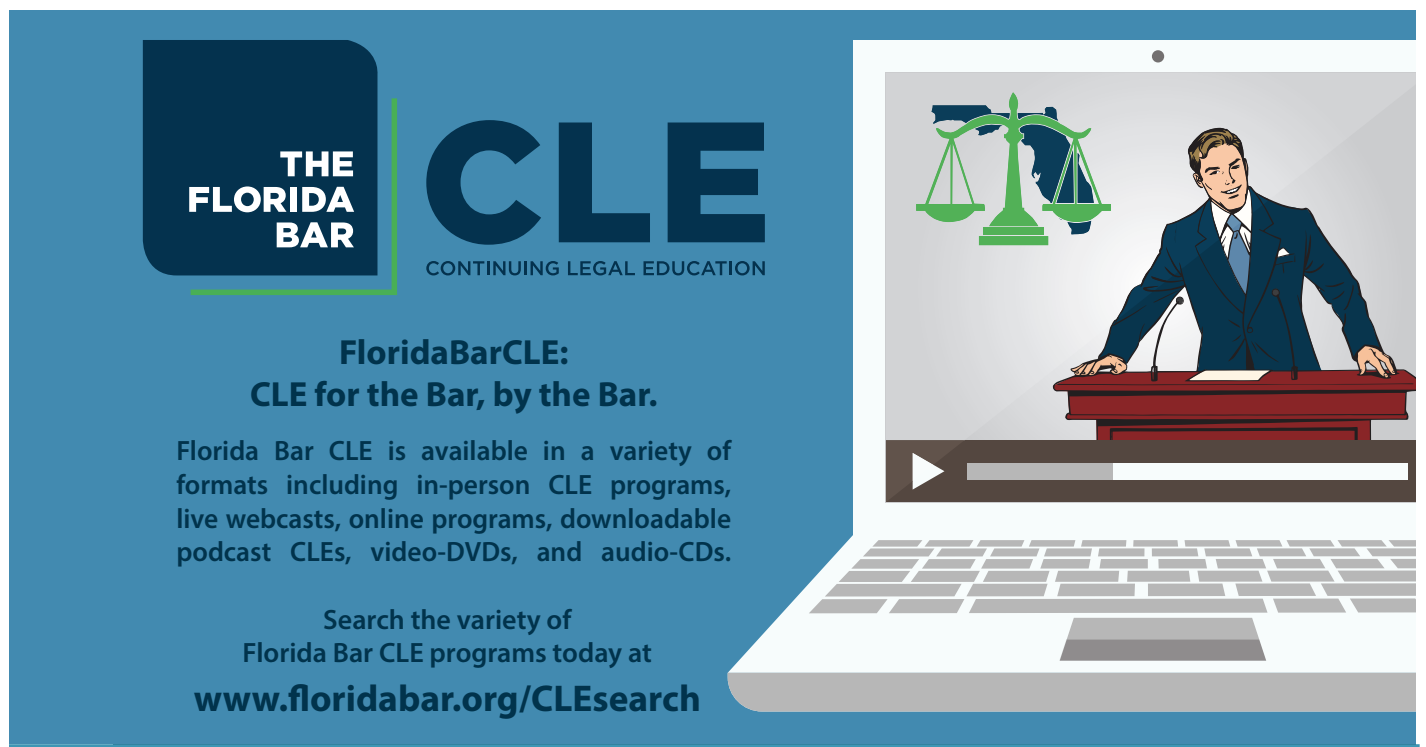
The third uniform title standard on enhanced life estates is Uniform Title Standard 6.12: Enhanced Life Estate: Remainderman and Homestead Property, which states:

The remainderman in homestead property, wherein the life tenant reserved the power to sell, convey, mortgage, and otherwise manage the fee simple estate, acquires the fee simple title upon the death of the life tenant only when not in violation of Constitutional restrictions on devise of homestead.

Pursuant to Article X, Section 4(c), “The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner’s spouse if there be no minor child.” This uniform title standard holds as long as those restrictions are not violated, fee simple title to the homestead property of life tenant held in an enhanced life estate will pass to the remainderman upon the death of the life tenant with enhanced powers.

The first problem illustrating the application of this uniform title standard states:

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A remainder in Blackacre was conveyed by John Doe, a single man, to Jane Smith with John Doe reserving for himself, without any liability for waste, full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration, without joinder of the remainderman, and full power and authority to retain any and all proceeds generated by such action. John Doe died without a spouse or a minor child. Upon the death of John Doe, is fee simple title vested in Jane Smith?

The answer is “yes.” In this problem, since the life tenant with enhanced powers was not survived by a spouse or minor child, there are no restrictions on the devise of homestead property, and fee simple title passes to the remainderman under the terms of the deed creating the enhanced life estate.

The second problem illustrating the application of this uniform title standard states:

Same facts as in Problem 1, except John Doe died while married to Sally Brown. Upon the death of John Doe, is fee simple title vested in Jane Smith?

The answer is “no.” Under these facts, the life tenant with enhanced powers was survived by a spouse but not by a minor child. Pursuant to Art. X, Sec. 4(c), of the Florida Constitution, the only permissible devise of the homestead property is to the surviving spouse. Since the remainderman under the terms of the deed creating the enhanced life estate is not the surviving spouse, the restrictions on devise were violated and marketable title does not pass to the remainderman.

The third problem illustrating the application of this uniform title standard states:

Same facts as in Problem 2, except the deed is executed on or after July 1, 2018, and John Doe’s spouse, Sally Brown, joined in John Doe’s deed to Jane Smith and the deed contained the following statement: “By executing or joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.” John Doe had no minor child at the time of his death. Upon the death of John Doe, is fee simple title vested in Jane Smith?

The answer is “yes.” This problem illustrates Fla. Stat. § 732.7025 (2018), which provides for the statutory waiver by deed procedure, can be used in conjunction with deeds creating enhanced life estates to help resolve homestead issues after the death of the life tenant with enhanced powers in an enhanced life estate. By including the statutory waiver language in the deed creating the enhanced life estate and having the waiving spouse join on the deed, as long as the life tenant with enhanced powers is not survived by a minor child, they are free to devise their homestead property to

whomever they wish. As such, marketable title does pass to the remainderman under the terms of the deed creating the enhanced life estate.

The final problem illustrating the application of this title standard states:

Same facts as in Problem 1, except at the time of the conveyance, and when John Doe died, Jane Smith was his spouse and Jane Smith joined in the deed. John Doe had no minor children at the time of his death. Is the conveyance to Jane Smith valid?

The answer, again, is “yes.” This last problem highlights homestead issues must be considered both when the enhanced life estate is created and when the life tenant with enhanced powers dies. Remember, Art. X, Sec. 4(c), of the Florida Constitution, places restrictions on both conveying or encumbering and devising homestead property. If a married grantor conveys homestead property, reserving an enhanced life estate to themselves, their spouse must also join on the deed. And, as previously discussed, when the life tenant with enhanced powers is survived by a spouse, it must be confirmed the restrictions on the devise of homestead property have not been violated. It should be noted, if the life tenant with enhanced powers is survived by a minor child, there is no permissible devise under Art. X, Sec. 4(c), of the Florida Constitution, and the enhanced life estate deed cannot pass marketable title to the remainderman, even if the remainderman is the surviving spouse of the life tenant.

The purpose of the Florida Uniform Title Standards, as written in the preface thereto, is to “facilitate conveyancing by eliminating needless objections to marketability of title.” Hopefully, these new title standards, their illustrative problems, this commentary to the title standards, and the discussions in this article will help do exactly that.



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