



Dear Stewart Partners,

We hope you all have been staying warm during this cold spell that has descended over New England this past week. Some of us here at Stewart (especially the warm weather enthusiasts) are hopeful that Punxsutawney Phil's Groundhog Day prediction comes true and we experience an early Spring.

In this week's update we have included a brief article on common issues we see in Connecticut with transactions involving fiduciaries. In addition, our Vermont underwriting counsel discusses how a transfer using an enhanced life estate deed, pursuant to Vermont statutes, might impact coverage for an insured. Lastly, we've included some information on upcoming webinars that may be of interest.



**Common Issues in Connecticut With Transactions Involving Fiduciaries: Trustees, Administrators, Conservators** By: Nancy Walkley, Esq., Associate Senior Underwriter and CT State Underwriting Counsel

**A. Deed into trust rather than trustee(s)**

Until 2017 when Conn. Gen. Stat. Section 47-36bb was enacted, a trust could not hold title. That statute now allows title to be held in a named trust or the trustee(s) of a trust. When title is conveyed out of a trust, the trustee deed should follow the way title was received. Grantor of the deed would be "The XYZ Trust acting herein by Jane Doe, Trustee" if title was granted to The XYZ Trust. Alternatively, if title went into "Jane Doe, Trustee of The XYZ Trust" the grantor would be Jane Doe, Trustee of the XYZ Trust. If Jane Doe has died or resigned from the trustee position, review of the trust instrument must be done to determine who the successor trustee is and an affidavit of facts per Conn. Gen. Stat. Section 47-12a must be recorded reflecting the change of trustee before any title can be insured involving the successor trustee. This would include a mortgage or sale transaction involving the trust property. If dealing with a testamentary trust, title vests automatically in a successor trustee by operation of law upon his/her appointment by probate court and one must record a certified copy of the appointment of such successor prior to deed out of that trustee.

**B. Deed from Fiduciary to the Fiduciary Him/Herself**

Standard of Title 6.5 provides that without record evidence of the authority of a fiduciary to convey to him/herself, a title examiner should raise a deed from a trustee to himself,

for example, as a voidable transfer. The concern stems from the common law and statutory duties of a fiduciary, which would prohibit self-dealing. This presumption can be overcome, however, with appropriate record title evidence. Record evidence can consist of recording an affidavit of facts pursuant to Conn. Gen. Stat. Section 47-12a reciting the provision of a trust agreement or Will that indicates the fiduciary was the intended beneficiary upon the occurrence of an event to alleviate voidability once it is recorded. If no such evidence is available, the conveyance can be authorized by a court of competent jurisdiction, such as Superior Court other than where the Probate Court is appropriate.

### C. Appeal Periods on Court Orders in a Probate Proceeding

In general there is either a 30 day or 45 day appeal period for aggrieved parties on orders of Probate Court (see Conn. Gen. Stat. Section 45a-186). Types of orders can include approval of sale if not already in a Will or trust powers of fiduciary, approval for conservator sale, approval for admission of Will and appointment of fiduciary, and approval of an administrator to sell a property. If you want or need to close before expiration of the appeal period, waiver of appeal rights by those aggrieved (i.e. heirs) can be obtained and a title company may insure, after satisfactory review, a closing prior to the expiration of the appeal period based on the waivers.

If you are confronted with any of the above situations, our Connecticut team of underwriters are available to help you determine what will be required to issue policies of title insurance in your sale and/or refinance transactions. Please never hesitate to reach out.



### **Coverage Considerations for Enhanced Life Estate Deeds in Vermont** By: Jill Spinelli, Esq. Associate Senior Underwriter and VT State Underwriting Counsel

In 2019 Vermont passed the Enhanced Life Estate Deed Act (hereafter "ELED" Act). The ELED Act establishes the requirements and procedures for creating enhanced life estate deeds whereby a Grantor can reserve a life estate interest in real property while expressly reserving the rights to sell, mortgage, lease, gift, or otherwise convey the fee (with or without consideration) so that the deed creates a contingent remainder interest in the Grantee.

ELED's have been used for decades in Vermont for estate planning purposes but the ELED Act codifies the practice and provides a statutory form and framework for deeds executed after its effective date of July 13, 2020. Similar types of interests can be created in some other New England States, some through practice and custom and others by statute.

In this midweek update, I'm exploring what happens to the title insurance policy under its Continuation of Coverage provisions when, in Vermont, an ELED is executed and whether an Endorsement or a new policy purchase is required. The following are hypotheticals to analyze each type of policy issued. Please note that these are only hypotheticals, and don't provide coverage determination for any specific claim filing, as all claims are fact specific and involve more than just determining whether any particular owner is an insured

under a policy of title insurance. The examples, however, provide insight on a very important provision of the policy for our agents to understand.

### **Hypothetical #1:**

PERSON A purchases a Standard 2021 Owner Policy today and then at some point in the future PERSON A grants an ELED to PERSON B. Does Grantor's coverage continue under a Standard 2021 Owner Policy? In short, the answer is yes. Here's why.

Based on the definitions and continuation of coverage provisions in the Standard 2021 Owner Policy, a life estate is a present interest in land, and when PERSON A transferred the remainder interest, PERSON A retained the life estate interest, and PERSON A is the named insured. Accordingly, PERSON A still has the benefit of the policy.

### **Hypothetical #2:**

Similar to above, but in this hypothetical PERSON A purchases a 2021 Enhanced Homeowner Policy today and then at some point in the future PERSON A grants an ELED to PERSON B. Does GRANTOR's coverage continue under the 2021 Enhanced Homeowner Policy?

Based on the definitions and continuation of coverage provisions in the 2021 Enhanced Homeowner Policy, I believe the answer is still yes. Here's why.

The continuation of coverage section is a bit different than the standard policy and reads as follows:

a. Your coverage under this policy continues as of the Date of Policy, so long as You:

i. own Your Title

ii. own an obligation secured by a purchase money Mortgage given by a purchaser from You; or

iii. have liability for warranties of title given by You in any transfer or conveyance of Your Title.

Under (i.), the policy continues for the Insured so long the Insured owns the Insured Title. You'll note that the "t" in "Title" is capitalized, which means it is a defined term. "Title" is defined in the policy as: "The estate or interest in the Land identified in Item 2 of Schedule A."

In PERSON A's policy, item 2 of Schedule A would have indicated "Fee Simple". And, since PERSON A retains a life estate interest in the property, and the ELED Act allows PERSON A to divest the remainder interest of PERSON B, it is my understanding that the "Fee Simple" estate remains intact. Furthermore, if the ELED contains warranty covenants, as it does in the Vermont Statutory form, the coverage would be continued for the Grantor pursuant to (iii.) as well.

### **Hypothetical #3:**

In this hypothetical PERSON A purchased the Standard 2006 Policy and later conveys an ELED to PERSON B. Does GRANTOR's coverage continue under the 2006 Standard

Owners Policy? Again, the answer is yes. Here's why.

The continuation of coverage in the Standard 2006 Owners Policy reads as follows:

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured **retains an estate or interest in the Land**, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, **or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title**. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

Since PERSON A retains an "interest" (i.e. the life estate) the coverage continues. Furthermore, as with hypothetical #2, if the ELED contains warranty covenants, the coverage would continue pursuant to that provision as well. Please note, however, that ELED's executed prior to the ELED Act may or may not have contained warranty covenants.

#### **Hypothetical #4:**

In this hypothetical PERSON A purchased the Enhanced 2006 Homeowner Policy and later conveys and ELED to PERSON B. Does GRANTOR's coverage continue under the Enhanced 2006 Homeowner Policy? Again, the answer is yes. Here's why.

#### **CONTINUATION OF COVERAGE**

a. **This Policy insures You forever, even after You no longer have Your Title.** You cannot assign this Policy to anyone else.

b. This Policy also insures:

1. anyone who inherits Your Title because of Your death;
2. Your spouse who receives Your Title because of dissolution of Your marriage;
3. the trustee or successor trustee of Your Trust or any Estate Planning Entity created for You to whom or to which You transfer Your Title after the Policy Date;
4. the beneficiaries of Your Trust upon Your death; or
5. anyone who receives Your Title by a transfer effective on Your death as authorized by law.

Here the Continuation of Coverage provision is distinct from our other examples, as this policy insures the Grantor "forever", even after they convey their title.

As you see, under each of the four hypotheticals, the Grantor retains the benefit of the title insurance policy even after executing an ELED in favor of the Grantee. Next, let's look at whether the Grantee has the benefit of the policy upon the death of the surviving Grantor. For purposes of this discussion, I am assuming the Grantor did not exercise their reserved power to appoint to someone other than the Grantee during their lifetime.

With respect to the 2021 and 2006 Standard Policies, there is no continuation of coverage to the Grantee upon the death of the surviving Grantor since neither standard policy continues its coverage in favor of any person or entity that is not the Insured. Accordingly, once the surviving Grantor dies, the Grantee will need to consider purchasing title

insurance once their ownership fully vests. Another option would be to explore the availability of an endorsement to the existing policy. We always recommend reaching out to an underwriting counsel prior to executing deeds changing the ownership interest to effectuate an estate plan.

With respect to the 2021 and 2006 Enhanced Homeowners Policies, the answer as to whether coverage continues is less certain. Those provisions that continue coverage to “trustees” and “beneficiaries” upon the death of the Grantor are inapplicable to ELED’s because the Grantee is a successor in title by virtue of a grant and not by operation of law.

However, the provision in the Enhanced Homeowners Policies that continues coverage to, “anyone who receives Title by a transfer effective upon Your death as provided by law”, could potentially extend coverage under Vermont’s ELED Act. Unique to Vermont’s law is how the legislature defined an enhanced life estate interest as a contingent remainder interest that does not vest prior to the death of the grantor. 27 VSA § 653(2)(C)&(D). As such, one could argue that provision applies. For other New England States, where the ELED vests at the time of execution, it’s unlikely that coverage would continue to the Grantee upon the death of the Grantor.

When issuing an Enhanced Homeowner’s Policy and extending coverage to the Grantee of the ELED is important, one option to consider is to issue the 2021 Homeowner’s Endorsement, which includes the following additional continuation provision:

**2.b. This Policy also insures:** “2.b.vii. Your spouse who receives Your Title by deed from You because You are the sole owner and You transfer with or without consideration Your Title or a portion thereof to him or her, or viii. **Your child or Your grandchild who receives Your Title by gift deed from You without payment of any consideration;** or ix. A limited liability company or other entity to which You transfer Your Title by deed provided that you are the sole owner of that company or other entity; or x. a transferee by a transfer effective on Your death.”

Here, by adding the Homeowner’s Endorsement, a “child” or “grandchild” would get continued coverage upon the death of the surviving Grantor so long as the ELED were a gift. And, even though not all ELED’s are gifts and not all Grantees are the child or grandchild of a Grantor, those are common scenarios.

With the increase in popularity with ELED’s for estate planning purposes, it’s important to consider and discuss with your clients how an ELED will impact coverage under an existing title insurance policy from both the Grantor and Grantee perspectives. Our underwriting team is always available to discuss the particulars of a contemplated estate planning transaction that involves transferring title via a deed or other instrument of conveyance to confirm that current insureds remain insureds.



### Upcoming Webinars and Zoom Meetings:

For our Connecticut practitioners and agents, on February 22, 2024 the Real Property Section of the Connecticut Bar Association is hosting a zoom meeting entitled “Working

With the Corporate Transparency Act” which was effective January 1, 2024. See [events@ctbar.org](mailto:events@ctbar.org) for registration for which section members can register for free.

On March 6, 2024, the New England Land Title Association (NELTA) will present a CLE approved presentation on title searching. CLE credit will be available for ME, VT, CT, NH and RI. Please visit [www.nelta.org](http://www.nelta.org) for more information, including cost and registration



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