



A T T O R N E Y S A T L A W

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Lady Bird Deed: an inexpensive probate avoidance technique

- When and why is probate necessary
 - o Assets owned by the individual only without any beneficiary designation
 - Aside from tangible personal property, if the decedent owns any asset titled in his or her name, some form of probate is needed to transfer legal title.
 - o Process to transfer legal ownership
 - In simple terms, a probate administration is the legal method of transferring ownership of property when someone dies.
- Traditional Methods to avoid Probate
 - o Beneficiary designations
 - IRAs/ 401(k)
 - Annuity/Life Insurance
 - Pay on Death or Transfer on Death designations
 - 529 Plans
 - o Trust
 - Asset must be transferred into the trust to avoid probate –
 - real property needs a new deed
 - bank accounts retitled
 - business interests new certificates or assignments
 - personal property assignment to trust
 - generally worth the cost whenever you have real property located outside of Florida (avoids need for double probates)
 - o Joint ownership
 - Tenants in Common (not useful to avoid probate)
 - Joint Tenants with Rights of Survivorship (JTROS)
 - Tenants by the Entirety (only for married couples) (TBE)
 - o Traditional Life Estate
 - Upon execution of a life estate deed, a completed gift has been made to the remainderman.
 - Life tenant
 - Rights/Responsibilities:
 - o Full use and possession (while alive)
 - Sauls v. Crosby, 258 So. 2d 326, 327 (Fla. 1st DCA 1972)

- Responsible for general repairs and upkeep, HOA fees, insurance, interest payments
 - Chapman v. Chapman, 526 So. 2d 131, 135 (Fla. 3d DCA 1988); Schneberger v. Schneberger, 979 So. 2d 981 (Fla. 4th DCA 2008)
 - Responsible for common law waste to property (ex: real property taxes, removal of timber or crops, destruction of property)
 - Sauls v. Crosby, 258 So. 2d 326, 327 (Fla. 1st DCA 1972)
 - Cannot sell or mortgage property without consent of remaindermen
 - Not subject to partition
 - Can rent the home out and keep the rents – does not have to share rent with remainderman – as long as still living
 - Upon death of Life Tenant, his/her interest is extinguished and the property passes by operation of law to the remainderman
- Remainderman
 - Rights/Responsibilities:
 - Upon death of life tenant, the right of possession (but not a moment before)
 - Responsible for principal payments, extraordinary expenses (hurricane damage)
 - Schneberger v. Schneberger, 979 So. 2d 981 (Fla. 4th DCA 2008)
 - May convey remainder interest during life of life tenant
 - Can be TIC or JTWRROS or TBE
 - Application of Homestead
 - Homestead devise restriction not applicable to life tenant since property passes by operation of law at death
 - Life tenant would still need spousal consent to execute any deed pertaining to the homestead – such as a conveyance of the life tenant interest)
 - Life tenant can maintain homestead exemptions
 - Remainderman cannot claim homestead until after death of Life tenant
 - Aetna Insurance Company v. LaGasse, 223 So. 2d 727 (Fla. 1969)
- The Lady Bird Deed (technically known as “Enhanced Life Estate” deed)
 - No Florida statute specifically permits it.
 - One Florida Supreme Court case supporting reserved powers in a life tenant; See Ogleby v. Lee, 73 So. 840 (Fla. 1917)
 - See also Green v. Barrow, 8 So. 2d 283 (Fla. 1942)
 - No statutory form

- No specific language authorized – Every example you see is someone’s creative writing attempt
- Reservation of rights
 - Example Language:
 - Grantor reserves unto herself for and during her lifetime, the exclusive possession, use, and enjoyment of the rents and profits of the property described herein. Grantor further reserves unto herself, for and during her lifetime, the right, without the joinder or consent of the remainderman, 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 Grantee, as Grantor in her sole discretion shall decide, except to dispose of said property, if any, by devise upon death. Grantor further reserves unto herself, the right to cancel and divest this deed by further conveyance which may destroy any and all rights which the Grantee may possess under this deed. Grantee 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 and title to the property remaining shall fully vest in Grantee, subject to such liens and encumbrances existing at that time.
 - NOTE: this is merely suggested language and the author makes no guarantees of effectiveness or acceptance by a court or underwriter
- Intent to divest without consent of remainderman – Divestment Deed
 - Attorney Title Fund considers a Lady Bird Deed to be a “vested remainder subject to divestment”
 - See Insuring Title out of Enhanced Life Estates, Jepson, The Fund Concept, October 2016 Vol. 48
 - If the Grantor no longer desires to have the named remainderman receive the property, then the Grantor may execute a divestment deed in favor of himself or herself, or any other such person or entity, to redirect how the property is transferred upon death.
 - It is recommended, that the Grantor execute a divestment deed transferring the property back to Grantor in fee simple ownership. Then if the grantor wants to name a different remainderman, the Grantor should execute a new Lady Bird Deed
 - Example language to include in divestment deed:
 - Grantor hereby expressly exercises her reserved right, in the prior recorded enhanced life estate warranty deed recorded on _____, 2019, to divest the remainderman, John Smith, by further conveyance and destroy any and all rights which the remainderman may have possessed under the prior recorded deed.

- Homestead
 - Grantor may maintain for creditor protection and tax purposes
 - If Grantor is survived by a spouse or minor child, the homestead devise/descent rules would likely apply and restrict how a Grantor can transfer property that is homestead
 - Incomplete gift (unlike a traditional life estate)
 - In re: Estate of Johnson, 397 So. 2d 970 (Fla. 4th DCA 1981)
 - Aronson v. Aronson, 81 So. 3d 515 (Fla. 3d DCA 2012).
- Benefits of Lady Bird Deed
 - All costs/expenses are bore by the life tenant (because of incomplete gift) with no liability to the remainderman
 - F.S. 738.801(3)(This section [apportionment of expenses for life estates] does not apply to the extent it is inconsistent with the instrument creating the estates, the agreement of the parties, or the specific direction of the taxing or other statutes.)
 - No liability for remaindermen
 - Avoids probate
 - No loss of homestead exemption or re-assessment event for the property
 - F.S. 193.155, 193.1554 and AGO 2001-31 (April 26, 2001)
 - No liability to remainderman
 - Maintain control – can re-convey
 - See Insuring Title out of Enhanced Life Estates, Jepson, The Fund Concept, October 2016 Vol. 48
 - Property gets a basis stepup upon death equal to FMV
 - IRC §2036(a) and §1014
 - No doc stamp tax
 - Letter of Technical Advice No. 00B4-024 addressed to Fund member, Mike Pyle, Esq (2000)
 - DCF does not consider the creation of a Lady Bird deed a transfer of assets
 - Florida ESS Manual 1640.0613.01
- Drawbacks
 - A Lady Bird Deed not properly drafted, such as missing powers, can create issues/difficulties not intended
 - Use of specific, proper language is necessary for in the original lady bird deed and the divestment deed
 - For example: power to “sell and convey” does not include the power to “gift” the property
 - Lenders (Banks) may be nervous to lend or refinance where a lady bird deed exists for fear of the remainderman arguing that the bank knew that upon death the property transferred and at that time any obligation tied to the property would cease.

- Despite the reservation of powers, some title companies will still ask for the remainderman to sign the deed
 - If this is the case, then you can shop around to other title companies who may be more accommodating to your particular situation
- Homestead – if decedent is survived by a spouse or minor child the lady bird deed will fail
 - See *Aronson v. Aronson*, 81 So.3d 515 (Fla. 3d DCA 2012); *In re: Estate of Johnson* 397 So. 2d 970 (Fla. 4th DCA 1981)