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Lady Bird Deed Practice Points

The Enhanced Life Estate Deed (aka Lady Bird Deed) provides an inexpensive method of transferring property upon death while avoiding probate and the much more expensive costs of preparing a trust. A traditional life estate deed provides a life tenant use and enjoyment of the property for life but upon the life tenant's death it passes to a designated recipient known as a remainderman. A Lady Bird Deed operates similarly in that the property owner ("grantor") reserves to himself a life interest and names a remainderman to receive the property upon the grantor's death. However, the Lady Bird Deed is "enhanced" with a reservation of powers¹ by the grantor which generally includes the ability to sell or otherwise dispose of the real property without anyone else's consent.² Provided the grantor takes no subsequent action (e.g., sale, transfer, conveyance, or gift of the real property), then the real property will automatically transfer to the remainderman upon the grantor's death without probate just like a traditional life estate deed.³ While the Lady Bird Deed offers great benefits,⁴ there are considerations that clients should be made aware of before using the Lady Bird Deed:

- **Homestead property is subject to the devise and descent restrictions where there is a surviving spouse or minor child.** "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."⁵ In this situation where there is a surviving spouse or minor child, it may necessitate a probate to establish the real property as homestead and implement the proper rules for descent of the homestead property.
- **Lenders may be uneasy to lend or refinance on property with this type of deed.** This is due to concern about their ability to enforce the loan after a grantor's death. Generally, this issue is handled by executing a new deed whereby the grantor conveys 100% ownership to himself (no remainderman), proceeding with financing transaction, and then executing a new Lady Bird Deed.
- **Some title insurance companies are uncomfortable insuring title when a property has a Lady Bird Deed in its history.** If this occurs, then the remainderman may need to shop around to find a title insurer that is comfortable providing title insurance for the property.

- **Homeowners insurance policies may not provide extended coverage to the remainderman after the grantor's death.**⁶ Therefore, to avoid a gap in coverage (from the time of death to the time the remainderman takes out a new policy of their own) it is strongly recommended that the grantor add the remainderman as an additional insured under the homeowners policy.⁷
- **The safest method to change the remainderman (add, or remove, or modify in any way) without their participation is a two-deed process.** The first deed conveys 100% ownership back to the grantor⁸ and the second deed makes the new desired conveyance of the property.
- **However, in spite of the clear language contained in the deed, some title insurance companies may still be reluctant to insure title on the property without the joinder of the original remaindermen.** This may cause some delay but usually can be remedied by shopping around for a title company that is comfortable with the transaction.

Joseph M. Percopo, Esq., LL.M., Mateer & Harbert, P.A., practices estate and trust planning, estate and trust administration, asset protection, business, and tax law. He has been a member of the OCBA since 2012.

¹The language used for the reservation of powers is critical for the successful use of the Lady Bird Deed and therefore must be carefully drafted. See *Insuring Title Out of Enhanced Life Estates*, Benjamin T. Jepson, *The Fund Concept* (October 2016). For example language see Joseph M. Percopo, *Lady Bird Deed: An Inexpensive Probate Avoidance Technique*, FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION ACTIONLINE (Spring 2020).

²If homestead property it would still require the consent/participation of any spouse of the grantor. See UNIF. TITLE STANDARD § 6.11 (problem 2 and Comments) (Fla. Bar Real Prop., Prob. & Trust Law Section 2021), available at <https://www.rpptl.org/uploads/UTS%20Updated%203.30.2021.pdf> (last visited May 19, 2021).

³See generally *id.* §§ 6.10 & 6.11.

⁴Such as the ability to maintain homestead creditor protection, homestead tax benefits, and a fair market value date of death tax basis in the property. For a more detailed discussion see Joseph M. Percopo, *Lady Bird Deed: An Inexpensive Probate Avoidance Technique*, FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION ACTIONLINE (Spring 2020).

⁵Benjamin Jepson, *Enhanced Life Estates Are Now Standard Practice*, FLA. BAR REAL PROP., PROB. & TRUST LAW SECTION ACTIONLINE (Fall 2020).

⁶See *Strope-Robinson v. State Farm Fire and Cas. Co.*, No. 20-1147, 2021 WL 406915 (8th Cir. Feb. 05, 2021) (a grantor used a revocable transfer on death deed with his home. After his death his ex-wife set fire to the house. The remainderman filed a claim under the homeowners insurance policy but was denied coverage. The court agreed with the insurance company and concluded that the insurance policy only named the grantor as the insured and his insurable interest disappeared upon death.)

⁷This is also a good idea when real property is being transferred into a trust.

⁸Referred to as a "divestment deed" and such deed should clearly state the intent to divest the remainderman of their interests. See Joseph M. Percopo, *Lady Bird Deed: An Inexpensive Probate Avoidance Technique*, FLA. BAR REAL PROP., PROB. & TRUST LAW SECTION ACTIONLINE (Spring 2020).