



ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

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*The Regulatorily Induced Coma of the London
Interbank Offered Rate ("LIBOR")! What now?*

Traction in Client Onboarding



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Lady Bird Deed:

An Inexpensive Probate Avoidance Technique

By Joseph M. Percopo, Esq., Mateer Harbert, Orlando, Florida



Probate is the legal process of transferring ownership of individually owned assets after death. If a decedent died owning an individually titled asset without a beneficiary designation, then that asset is subject to probate. The costs for probate can range between \$2,500 to \$7000 and can last between two months to a year.

Probates with major complications or litigation cost significantly more and last significantly longer. At estate planning conferences, there is an opportunity to counsel clients on methods to accomplish their estate planning objectives and bypass the expense and length of probate.

Traditional Methods to Avoid Probate

Although Lady Bird Deeds are the focus of this article, it is important to discuss the traditional methods of probate avoidance first. The most common probate avoidance techniques encompass beneficiary designations, trusts, and joint ownership. Updating beneficiary designations is a simple and inexpensive method to avoid probate. Beneficiary designations typically apply to assets such as annuities, IRAs, 401(k)s, life insurance policies, and 529 plans. Additionally, many financial institutions (banks, credit unions, investment custodians, etc.) allow beneficiaries to be designated on accounts.¹ Assets with a valid beneficiary designation will bypass probate² and be distributed directly to the designated beneficiaries. Clients should routinely review their assets and any beneficiary designations.

Trusts are a more complex and expensive method to avoid probate. A trust offers an alternative to probate by allowing a grantor to create a legal instrument (the “trust”) which can hold legal title to the grantor’s property. If a grantor retitles all of the grantor’s assets in the trust, then, upon the grantor’s death, the grantor owns no individually owned assets and the need for probate is minimized.³ A simple trust is often less expensive than probate, but will still cost a few thousand dollars to prepare. For clients with complex family situations, complex distributions schemes, or with real property located in multiple states, the trust may make the most sense financially to properly achieve the clients’ goals. The retitling of assets in the trust is critical. Failure to retitle a single asset in the trust could result in probate which means the client paid for the

preparation of a trust and will pay for a probate administration.

Between the simple (beneficiary designations) and complex (trusts) lies joint ownership of assets. Assets, both real and personal, can be owned as tenants in common, joint tenants with rights of survivorship (“JTROS”)⁴, tenants by the entirety (“TBE”)⁵, or as a life estate. Tenants in common ownership does not avoid probate. Tenants in common ownership is where two or more people own a certain percentage of an asset. If any owner dies his or her percentage of the asset will be subject to probate. JTROS and TBE accounts are different forms of joint ownership, where upon the death of an owner, the decedent’s interest in the asset passes to the other owner(s) automatically by operation of law, bypassing probate.⁶ Florida homestead property can be owned as JTROS and TBE, and such ownership does not violate the Florida Constitutional restrictions on devise and descent of homestead property.⁷

A life estate also avoids probate. The Lady Bird Deed is an enhanced version of the life estate. It is important to understand how a traditional life estate works so as to properly appreciate the differences between it and the Lady Bird Deed. A life estate contains two elements: (1) the life tenant(s); and (2) the remaindermen. Upon the death of the last life tenant, the property ownership passes to the remaindermen, which can be one or more persons or entities. Each of the life tenants and remaindermen are subject to certain rights and responsibilities. The life tenant has the right to full and exclusive possession of the property.⁸ Accordingly, the life tenant maintains the life tenant’s homestead creditor protection and tax exemptions.⁹ The life tenant is

a) responsible for ordinary expenses (interest on mortgage, general repairs, general upkeep, HOA fees, and insurance);¹⁰

b) permitted to rent the home and keep the rent (does not need to share with remaindermen);

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- c) liable for common law waste to property;¹¹
- d) not able to sell or encumber the property without the consent of the remaindermen;
- and
- e) unable to file a partition action to force sale of the property.¹² The remaindermen interest may be held as tenants in common, JTWRORS, or TBE and the remaindermen may convey their remainder interest during the life tenant's lifetime. The remaindermen has no right to possess or use the property during the life tenant's lifetime and is responsible for principal payments on a secured debt, expenses related to the title of the property, environmental matters (such as hurricane damage), and extraordinary repairs.¹³ Consequently, a remaindermen is not eligible to claim the property as homestead and receive the homestead benefits until the life tenant's death.¹⁴

The Lady Bird Deed

The name "Lady Bird Deed" is a title that has been applied to the deed and does not denote an actual deed type. The technical name for a Lady Bird Deed is an "Enhanced Life Estate Deed" because it is a life estate deed with specially reserved powers (the enhanced part). The Lady Bird Deed permits the grantor to retain control over the property (including the ability to convey without the joinder of the remaindermen)

but upon the grantor's death, it will pass automatically to the remaindermen, bypassing probate.¹⁵ The Lady Bird Deed is not prescribed or expressly permitted by statute. Instead, the genesis of the authority for the Lady Bird Deed in Florida stems from a Florida Supreme Court Case in 1917 which held a reservation of powers in a life tenant as valid.¹⁶ Therefore, the language and reservation of powers that appear in Lady Bird Deeds are often a reflection of someone's creative writing. It is imperative that the reserved powers be plainly and clearly stated to be effective.¹⁷ For example, a power to "sell and convey" in a Lady Bird Deed is not a retained authority of the grantor to make a gift of property.¹⁸ Here is an example of the reservation of power language that can be included in a Lady Bird Deed:

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

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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.¹⁹


In addition to plainly stating the reserved powers, the Attorneys' Title Fund has strongly suggested that any new deed divesting remaindermen (without their consent) of their interest include language in the divestment deed to that effect.²⁰ Here is an example of proposed language to include in a divestment deed:

Grantor hereby expressly exercises her reserved right, in the prior recorded enhanced life estate warranty deed recorded on July 11, 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.²¹

A properly drafted Lady Bird Deed can be an excellent and inexpensive tool for bypassing probate of a client's real property at death. Of course, if a client has a trust, or after review of their estate plan it is determined that a trust is best for the client, then title to the real property could be retitled in the trust.²² The Lady Bird Deed is very effective for those clients that do not require a trust. For example, it is common for an older client to own homestead property, a retirement account, and receive social security income. These assets would not often warrant the cost and complexity of a trust. Instead, a client could execute a Lady Bird Deed for the homestead and update his or her retirement account beneficiary designation to avoid probate. The previous example incorporated homestead property but failed to include information about whether the grantor has a spouse or minor child. When drafting a Lady Bird Deed with homestead property, it is necessary to consider Florida's Constitutional restriction on devise and descent.²³ Because a Lady Bird Deed is an incomplete gift and is akin to a testamentary disposition, the devise restrictions for homestead still apply.²⁴ This is an important difference from the traditional life estate discussed above and could potentially have a disastrous impact on a client's estate plan.²⁵ However, like a traditional life estate, the grantor can still maintain the grantor's homestead creditor protection and tax benefits.²⁶

Using a Lady Bird Deed also involves some additional differences and benefits beyond probate avoidance that do not all exist with a traditional life estate deed. The first benefit is the complete retained control by the grantor without any liability to the remaindermen. A noticeable difference is that the costs and expenses related to the property are bore solely by the grantor and not the remaindermen.²⁷ This means the remaindermen do not have any liability as it relates to the

property until such time of the grantor's death.²⁸ Secondly, using a Lady Bird Deed (a) results in a step-up to the property's cost basis to fair market value at the grantor's death (which a traditional life estate also provides),²⁹ (b) is not considered a transfer of an asset by the Department of Children and Families, and, therefore, does not cause any Medicaid penalty,³⁰ and (c) does not trigger documentary stamp tax.³¹

The Lady Bird Deed is not without disadvantages which should be considered and explained to clients. The drafting of the deed is critical and the proper powers must be plainly stated in the deed. Failure to include the correct power could cause a problem for the grantor when the grantor attempts to gift, sell, convey, encumber, or otherwise dispose of the real property. However, despite a well-drafted reservation of powers, some title insurance companies may still require the remaindermen to sign off on any transfer before agreeing to provide title insurance. This, of course, is directly contrary to the earlier referenced Florida Supreme Court precedent and hinders a major benefit of using the Lady Bird Deed. Lenders may also be skittish to lend or refinance real property where a Lady Bird Deed has been recorded. This stems from the lenders' fear that the remaindermen will later argue that the note cannot be enforced against the property after the grantor's death. Should a client have an issue with a title company, the client should consider other title companies which may be more inclined to insure the Lady Bird Deed. And if a bank has an issue with the Lady Bird Deed, a client could execute a new deed re-conveying the property to himself or herself in fee simple, and then after the mortgage/loan is approved and processed, re-execute a Lady Bird Deed to avoid probate. 



J. PERCOPO

Joseph M. Percopo, LL.M., practices law in Orlando, Florida with Mateer & Harbert, PA. His practice concentrates on estate & trust planning, estate & trust administration, asset protection planning, business, and tax law. He is a graduate of the Florida State University College of Law with highest honors and earned his Master of Laws (LL.M.) in taxation from the University of Florida Levin College of Law Graduate Tax Program.

Endnotes

- 1 Commonly referred to as "pay-on-death" or "transfer-on-death" designations. See Fla. Stat. 655.82
- 2 This also means because the asset will not be part of the probate estate, any Will or Trust will not govern the transfer of that particular asset.
- 3 Some may still want to open a probate so they can publish the notice to creditors and get the creditor claims period clock to start running.
- 4 It is worth noting that it should be explained to a client that a JTROS account will pass only to the other account owner(s). This is particularly important where a client has only one of several children on an account because the asset will only pass to the joint child owner and not to any of the child's siblings. This is seldom the intent, as usually the purposes for adding only one child is for ease of access and assistance to the client, not to eliminate other children from receiving a portion of the asset.

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5 This is a form of joint ownership with survivorship rights but only between two married individuals. There are 6 unities required to form TBE ownership, the details of which are beyond the scope of this article.

6 See Fla. Stat. §689.15 (pertaining to real and personal property) and §655.79 (creates survivorship presumption for financial accounts); see also *Beal Bank, SSB v. Almand & Associates*, 780 So.2d 45 (provides a presumption of TBE for financial accounts where applicable).

7 Fla. Stat. §732.401(5); see also *Marger v. De Rosa*, 57 So. 3d 866 (Fla. 2d DCA 2011).

8 *Sauls v. Crosby*, 258 So. 2d 326, 327 (Fla. 1st DCA 1972).

9 *Vandiver v. Vincent*, 139 So. 2d 704 (Fla. 2d DCA 1962) (holding an individual "could claim exemption in whatever interest she has in the property as her homestead"); *Souther Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566, 569 (Fla. 5th DCA 2002) (holding that the Florida constitution "does not designate how title to the property is to be held and it does not limit the estate that must be owned, i.e., fee simple, life estate, or some lesser interest").

10 Fla. Stat. 738.801(2)(a); *Chapman v. Chapman*, 526 So. 2d 131, 135 (Fla. 3d DCA 1988); *Schneberger v. Schneberger*, 979 So. 2d 981 (Fla. 4th DCA 2008).

11 *Sauls v. Crosby*, 258 So. 2d 326, 327 (Fla. 1st DCA 1972) (waste includes not paying real property taxes, removal of timber, crops, or minerals, and any destruction to the property).

12 See Joseph M. Percopo, *The Impact of Co-ownership on Florida Homestead*, Fla. B.J., May 2012 (text accompanying FN 47).

13 Fla. Stat. 738.801(2)(b); *Schneberger v. Schneberger*, 979 So. 2d 981 (Fla. 4th DCA 2008).

14 *Aetna Insurance Company v. LaGasse*, 223 So. 2d 727 (Fla. 1969).

15 See Florida Uniform Title Standard 6.10 and 6.11.

16 *Ogleby v. Lee*, 73 So. 840 (Fla. 1917); see also *Green v. Barrow*, 8 So. 2d 283 (Fla. 1942).

17 See *Bloom v. Weiser*, 348 So. 2d 651 (Fla. 3d DCA 1977) (pertaining to plainly stating authority and powers in a power of attorney to be effective); see also Attorney Title Fund Notes TN 4.02.03.

18 *Johnson v. Fraccacreta*, 348 So. 2d 570 (Fla. 4th DCA 1977); *De Bueno v. Castro*, 543 So. 2d 393 (Fla. 4th DCA 1989).

19 Please note, this is merely suggested language and the author makes no guarantee of effectiveness or acceptance by a court or underwriter.

20 *Insuring Title out of Enhanced Life Estates*, Jepson, The Fund Concept, October 2016 Vol. 48.

21 Please note, this is merely suggested language and the author makes no guarantee of effectiveness or acceptance by a court or underwriter.

22 Some planners may want to avoid retitling homestead in the trust (usually because of creditor protection concerns and questions as to whether a trust can be owned as TBE), in such cases a Lady Bird Deed may be employed where the trust is named as the remaindermen.

23 See Fla. Const. Art. VII, §6 and Fla. Const. Art. X, §§4(a), (b), & (c); see also Fla. Stat. §732.4015(1) & §732.401(1); see also Fla. Stat. 732.7025 (waiver of homestead rights through deed) and *Stone v. Stone*, 157 So.3d 295 (Fla. 4th DCA 2014) (holding that a spouse joining in the deed waived homestead rights).

24 *In re: Estate of Johnson*, 397 So. 2d 970 (Fla. 4th DCA 1981); *Aronson v. Aronson*, 81 So. 3d 515 (Fla. 3d DCA 2012); see also Florida Uniform Title Standard 6.12.

25 See *Aronson v. Aronson*, 81 So. 3d 515 (Fla. 3d DCA 2012) (what the grantor intended to happen with the homestead property did not occur because the gift failed the devise and descent restrictions for testamentary transfers of homestead resulting in unintended consequences).

26 Fla. Stat. §193.155 & §193.1554; see also AGO 2001-31 (April 26, 2001).

27 Fla. Stat. §738.801(3) (provides the life estate/remaindermen costs do not apply where inconsistent with the deed).

28 However, it is possible that the IRS may be able to attach a lien on the remainder interest for a debt of the remaindermen. See *Drye v. United States*, 120 S. Ct. 474 (1999) (the decedent's daughter disclaimed a devise, however, the IRS was still able to place a lien on the daughter's disclaimed interest).

29 IRC §2036(a) & §1014 (step-up in basis means that the remaindermen will own the property with a basis (amount considered invested in the asset) equal to the fair market value of the real property at the death of the grantor).

30 ESS Manual 1640.0613.01.

31 Letter of Technical Advice No. 00B4-024 addressed to Fund member, Mike Pyle, Esq (2000).



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