

the Briefs

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Inside this Issue:

President's Message
To Try, or Not to Try
LaShawnda K. Jackson, Esq.

Legal Aid Society GAL Teaching Tips
Special Services for Special Children
Mexcyce C. Roberts, Esq.

Constuction Law Committee
Unbundling Rights: An Overview of TDR
B. Nax Joye, Esq.
Christopher S. Tribbey, Esq.

Estate, Guardianship & Trust Committee
Probate Avoidance Primer
Joseph M. Percopo, Esq., LL.M.

Contents

3

President's Message
To Try, or Not to Try
LaShawnda K. Jackson, Esq.

4

Clerk's Corner
Clerk of Court Services in Our New Normal
The Honorable Tiffany Moore Russell

5

OCBA August Luncheon
2020-2021 Installation of Officers and Awards Luncheon

6

Professionalism Committee
The Year Ahead in Professionalism
Lisa Ann Thomas, Esq.

9

Legal Aid Society Teaching Tips
U Visas for Victims of Crime Create Community Heroes
Ana Bernal Roberts, Esq.

10

Legal Aid Society GAL Teaching Tips
Special Services for Special Children
Mexcy C. Roberts, Esq.

12

Construction Law Committee
Unbundling Rights: An Overview of TDR
B. Nax Joye, Esq.
Christopher S. Tribbey, Esq.

14

Guest Column
A Message to Young Lawyers: Ten Things About the Practice of Law Somebody Should Have Told Me Thirty Years Ago
David W. Henry, Esq.

19

Voluntary Bar News
SideBar
Alena V. Baker, Esq.

20

Estate, Guardianship & Trust Committee
Probate Avoidance Primer
Joseph M. Percopo, Esq., LL.M.

23

Young Lawyers Section News
YLS on the Move
Kimberlee A. Martin, Esq.

27

Paralegal Post
Introduction to the 2020-2021 Paralegal Section Board
Tina Farrington, FRP

28

New Members

30

Classifieds

32

Calendar

the Briefs

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Probate Avoidance Primer



Joseph M. Percopo, Esq., LL.M.

Probate is the process to transfer legal ownership of an individual's assets upon his or her death to the decedent's beneficiaries. There are a few different forms of probate in Florida, but the two most common are (1) Summary Administrations and (2) Formal Administrations. A Summary Administration may be used when the non-exempt¹ assets of the estate are under \$75,000.00 or when the decedent has been deceased for two

or more years.² A Formal Administration is typically used when:

1. the decedent's non-exempt assets exceed \$75,000.00 and the decedent has been deceased for less than two years;
2. there are creditors of the estate;
3. beneficiaries or fiduciaries want to ensure creditor claims are barred before making distributions; or
4. appointment of a personal representative is necessary.³

However, there are pre-planning techniques available that enable most individuals to bypass probate. The traditional methods used to avoid probate in Florida usually involve a combination of beneficiary designations, joint ownership, lady bird deeds, and trusts.⁴

Beneficiary Designations

Perhaps one of the most costly mistakes made by individuals is their failure to add or review beneficiary designations on retirement and other forms of savings accounts. Using a valid beneficiary designation⁵ allows an asset to bypass probate. It is a best practice for estate planners and their clients to review all of the assets and beneficiary designations thereon. However, for those opting not to review, if a designation is not made, is not setup properly, or if the wrong person is named as a beneficiary, there may be an unintended deviation from the estate plan the client had envisioned. The typical assets that beneficiary designation planning applies to include annuities, life insurance, IRAs, 401(k)s, and 529 plans.⁶ Additionally, many financial institutions (banks, credit unions, investment custodians, etc.) allow beneficiaries to be designated on accounts.⁷ Any asset with a valid beneficiary designation will pass outside of probate and directly to the intended beneficiaries.⁸ A client may name any individual or entity, living trust, or testamentary trust as the designated beneficiary.⁹ If the client chooses to use a trust, he or she may also name the trust a beneficiary of assets on a contingent or even primary level.¹⁰

Joint Ownership

There are several forms of joint ownership available for assets, which include tenants in common ("TIC"), joint tenants with rights of survivorship ("JTWROS"),¹¹ tenants by the entirety ("TBE"),¹² and life estate/remainder interests. TIC is a form of joint ownership where two or more people or entities own a certain percentage of an asset. However, TIC does not avoid pro-

bate because the interest owned by a deceased individual does not transfer at death, instead it becomes part of his or her estate. By contrast, JTWROS and TBE accounts are forms of joint ownership where the interest in the asset passes to the other co-owner(s) automatically by operation of law upon the death of a co-owner, thereby avoiding inclusion in the probate estate of the deceased and bypassing probate.¹³ Despite the complex rules surrounding devises and descent of Florida homestead property, if owned as JTWROS or TBE it passes to the co-owner(s) without running afoul (triggering) the Florida Constitution's restrictions.¹⁴

Another form of joint ownership is a "life estate interest." When a life estate is created there are two elements: (1) the life tenant(s) and (2) the remaindermen.¹⁵ Upon the death of all the life tenants, the property ownership passes by operation of law to the remaindermen. During the existence of the life estate, each of the life tenants and remaindermen are subject to certain rights and responsibilities:

- a. Only the life tenant has the right of exclusive possession¹⁶ of the property and is able to maintain the homestead creditor protection and tax exemptions.¹⁷ The remaindermen do not have any possessory rights until the death of the life tenant.¹⁸
- b. The life tenant is responsible for ordinary expenses, which include mortgage interest, general repairs and upkeep, as well as HOA fees, and insurance.¹⁹
- c. The life tenant is permitted to rent the home and keep the rental income.
- d. The life tenant is liable for common law waste to the property.²⁰
- e. Most notably, the ability to sell or encumber the property requires the consent of the life tenant and remaindermen.²¹
- f. The remaindermen are responsible for principal payments on a secured debt, expenses concerning the title to the property, environmental matters (such as hurricane damage), and extraordinary repairs.²²

Lady Bird Deed

The Lady Bird Deed ("LBD") is technically an "Enhanced Life Estate Deed" because it is a life estate deed that also includes a special reservation of powers. The LBD permits the life tenant(s) (the "Grantor") to retain control over the property while living, but upon death of all life tenants the property will pass automatically to the remaindermen without any probate.²³ The reservation of powers is intended to allow the Grantor to maintain absolute control, specifically including the ability to re-convey the real property without the joinder of any remaindermen and even change the identities of the remaindermen.²⁴

Other benefits of the LBD, in addition to the Grantor maintaining control, include:

- a. Maintaining homestead creditor protection and tax exemptions for the Grantor.²⁵
- b. Costs and expenses related to the property are the respon-

sibility of the Grantor²⁶ and not the remaindermen.²⁷

- c. Retaining a full step-up in basis upon the Grantor's death for the real property.²⁸
- d. No federal transfer tax liability arises at the time of the transfer.²⁹
- e. There is no Medicaid penalty because the Department of Children and Families does not consider a LBD a transfer of an asset.³⁰
- f. No documentary stamp tax is due upon recording the LBD.³¹

However, it is also important to consider the LBD disadvantages:

- a. They are likely subject to Florida's Constitutional restriction on devise and descent if it is homestead real property.³²
- b. If drafted improperly, Grantor may not have actually maintained complete control of the property and may not be able to transfer it without the consent of the remaindermen.
- c. Even when drafted properly, some title companies will require the remaindermen to sign any re-conveyance by the Grantor before issuing any title insurance.³³
- d. Lenders may be nervous to lend or refinance real property where a LBD has been recorded.³⁴

Trusts

A trust is a legal document established by a settlor with a designated trustee. The trustee holds legal title to administer and manage the settlor's assets via his or her designated trustee duties. The trustee is subject to the written terms of the trust and any deviation, improper distribution, or failure to properly administer the trust could result in personal liability to the trustee.³⁵ There are many different forms of trusts, but the most common for avoiding probate is a revocable inter vivos trust. This trust allows the settlor to benefit during his or her lifetime with the freedom to amend the terms of the trust at any point and for any reason. Upon the settlor's death, the assets held in trust avoid probate and are subject to distribution by the trustee in compliance with the terms of the trust. Therefore, it is paramount that clients using trusts take the time to re-title assets and/or name the trust as a beneficiary of their accounts.

Conclusion

A probate is not necessarily a bad thing and, sometimes regardless of the pre-planning done, a probate may be necessary or

best for the estate or beneficiaries. However, with proper pre-planning, most individuals can avoid probate altogether by using a combination of the techniques discussed above.

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¹Exempt assets do not count against the Summary Administration asset cap, so technically it is still possible to have a summary administration even when the actual value of all the estate assets exceed \$75,000.00. See Fla. Const. art. X §§(a)-(b) (homestead exemption), Fla. Stat. §732.402 (exempt property) and Fla. Stat. §732.403.

²Fla. Stat. §735.201; see also Fla. Stat. §733.710 (The statute of repose bars creditor claims after two years from the decedent's death, except for claims properly and timely filed within two years of decedent's death).

³For example, to file a wrongful death suit there must be a personal representative of the estate. Another example may be trying to access digital assets/accounts or trying to get information from custodians and financial institutions concerning accounts.

⁴Please note even though the asset avoids probate it will likely still be part of the deceased's gross estate for federal estate and gift tax purposes.

⁵A "beneficiary designation" usually encompasses an account holder specifying an individual, trust, charity, and/or entity to be the recipient of an account upon the holder's death. For a beneficiary designation to be "valid" it must be made in compliance with the requirements of the custodian of the account. For example, if a custodian requires the beneficiary designation form to be notarized and the account holder fails to do so, such beneficiary designation likely will not be considered valid.

⁶The SECURE act was recently enacted with new rules pertaining to qualified retirement accounts. A discussion of the Act is beyond the scope of this article, but it should be taken into consideration with the overall planning.

⁷Also known and referred to as "pay-on-death" or "transfer-on-death" designations. See Fla. Stat. §655.82.

⁸It is important the client understand even if they have a will or a trust which makes a specific gift of an asset, where there is a beneficiary designation it will control over the will or the trust.

⁹Fl. Stat. 733.808 (2020).

¹⁰Generally, it is simpler to name an individual for a qualified retirement account. However, where there are young children or beneficiaries who are irresponsible or have substance abuse issues, it may be best to name the trust as the beneficiary and not the individual.

¹¹It is worth noting it should be explained to a client 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 cut other children out from benefiting from the asset.

¹²This is a form of joint ownership with survivorship rights but only between two married individuals. There are six unities required to form TBE ownership and the details are beyond the scope of this article.

¹³See 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).

¹⁴Fla. Stat. §732.401(5); see also *Marger v. De Rosa*, 57 So. 3d 866 (Fla. 2d DCA 2011).

¹⁵There can be multiple life tenants and/or remaindermen.

¹⁶*Sauls v. Crosby*, 258 So. 2d 326, 327 (Fla. 1st DCA 1972).

¹⁷*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 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").

¹⁸Therefore, a remaindermen is ineligible to claim homestead and avail himself or herself of its protections until

continued page 22



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Legal Aid Society GAL Teaching Tips

continued from page 10

catastrophic in nature, a chronic illness, or a repeated intermittent illness due to a persisting medical problem that confines the student to home or hospital and restricts activities for an extended period of time. Children who meet the criteria receive in-home care with a curriculum designed to meet their specific needs. For information, see Hospital Homebound on the Florida Department of Education website.

These are just a few of the services and programs available to assist medically needy children. I encourage everyone to serve as a guardian ad litem for these extra-special kids. Just like there is a network of resources available to children, if you decide to serve as GAL for a child with special medical needs, you have a network of resources available to you, too. The GAL program staff and attorneys are always here for you. As the developmental disabilities attorney, it is my distinct privilege to assist you in advocating for your special GAL child's best interests. After all, our GALs are pretty special, too!

For more information about advocating for children with developmental disabilities, please contact me at mroberts@legalaidocba.org. If you would like to donate to the Legal Aid Society, please contact our development director, Donna Haynes, at dhaynes@legalaidocba.org.

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Estate, Guardianship & Trust Committee

continued from page 21

the death of the life tenant. See *Aetna Insurance Company v. LaGasse*, 223 So. 2d 727 (Fla. 1969).

¹⁹Fla. 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).

²⁰*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).

²¹Neither the life tenant nor the remaindermen are able to file a partition action to force sale of the property. See Joseph M. Percopo, *The Impact of Co-ownership on Florida Homestead*, Fla. B.J., May 2012 (text accompanying FN 47).

²²Fla. Stat. 738.801(2)(b); *Schneberger v. Schneberger*, 979 So. 2d 981 (Fla. 4th DCA 2008).

²³See Florida Uniform Title Standard 6.10 and 6.11.

²⁴A traditional life estate requires all of the life tenants and remaindermen to agree upon a transfer of the real property. For a more detailed discussion of Lady Bird Deeds, see Joseph M. Percopo, *Lady Bird Deeds: an Inexpensive Probate Avoidance Technique*, Florida Bar Real Property Probate and Trust Law ActionLine (Spring 2020).

²⁵Fla. Stat. §193.155 & 193.1554; see also AGO 2001-31 (April 26, 2001).

²⁶Fla. Stat. §738.801(3) (provides the life estate/remaindermen costs do not apply where inconsistent with the deed).

²⁷Generally, this means the remaindermen do not have any liability related to the property. However, it is possible 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 successfully able to place a lien on the daughter's disclaimed interest).

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²⁸IRC §2036(a) & §1014 (step-up in basis means 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).

²⁹However, at the Grantor's death the value of the property will still be included in the Grantor's federal gross estate. See footnote 27.

³⁰ESS Manual 1640.0613.01.

³¹Documentary Stamp Tax is traditionally due when a transfer of real property is made for money or other consideration (which includes the value of any mortgage calculated based upon the interest being transferred). See Letter of Technical Advice No. 00B4-024 addressed to Fund member, Mike Pyle, Esq (2000).

³²Since the LBD is an incomplete gift it is likely to be considered testamentary disposition to which the homestead restrictions still apply. 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); *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.

³³Despite the concept being permitted by *Ogleby v. Lee*, 73 So. 840 (Fla. 1917) and *Green v. Barrow*, 8 So. 2d 283 (Fla. 1942), title companies are private companies which set their own rules for how and when they will issue a title policy. Should this issue be encountered, the Grantor should consider other title companies that may take a different position on the issue.

³⁴In this situation, the Grantor could re-convey the property to himself or herself in fee simple, then apply for the loan or refinance, and subsequent to the transaction execute a new LBD.

³⁵See Fla. Stat. §736.1002(1); see also 31 U.S. Code §3713 (Priority of Government Claims).