

Estate and Elder Law Planning Using Lady Bird Deeds

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Chapter 1: Lady Bird Deeds Increasing in Popularity

Lady Bird Deeds, also known as Enhanced Life Estate Deeds, have seen an increase in popularity in the last 20 years, primarily in the areas of estate planning and elder law. Along with the increase in the number of attorneys using Lady Bird Deeds, there has been an increase in the creativity of drafting techniques. While “pushing the envelope” is characteristic of attorneys, creative drafting techniques have led to uninsurable titles in some cases. The following video series is to articulate The Fund’s position regarding the use of Lady Bird Deeds, discuss some useful drafting techniques, and lastly raise some issues which are of concern to attorneys who regularly draft Lady Bird Deeds.

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Chapter 2: General Discussion of Lady Bird Deeds

A Lady Bird Deed is a life estate deed which reserves the right in the life tenant to divest the remainderman of his or her interest by conveying title to a third party without joinder of the

remainderman. A Lady Bird Deed can be created by the owner or by a third party by reservation of the right to reconvey the remainder interest to another person or entity. *Oglesby v. Lee* 73 So. 840 (Fla. 1917). The typical advantages of using a Lady Bird Deed are to avoid probate, maintain homestead tax exemption, avoid liability to the remainderman for waste, maintain control, eliminate the requirement for the remainderman to join in a future conveyance or mortgage, and retain all profits from a sale by the life tenant. See TN 2.11.06. Using a Lady Bird Deed will also qualify for a step up in basis under IRC §1014, as a retained lifetime interest under IRC §2036 (a). Furthermore, the Department of Revenue does not consider the creation of a Lady Bird Deed subject to Documentary Stamp Tax. Letter of Technical Advice No. 00B4-024 addressed to Fund member, Mike Pyle, Esq. (2000). There should also not be a loss of homestead exemption or re-assessment of the property value. See F.S. 193,155, F.S. 193.1554, and AGO 2001-31 (April 26, 2001).

Chapter 3: The Funds Position in Estate and Elder Law Planning

The Funds' position regarding judgments against the life tenant or remainderman, death of the remainderman prior to the life tenant, homestead, and elective share are discussed below.

Judgments recorded against the life tenant in the county where the property is located will be insured depending on the circumstances. If a lawsuit has been filed prior to the creation of the Lady Bird Deed and a subsequent judgment is recorded, the judgment must be cleared in all cases. If the lawsuit and judgment come after the creation of the Lady Bird Deed, then title will be insured after the death of the

life tenant for a purchaser from the remainderman. However, if the life tenant conveys the property to a bonafide purchaser for value, the judgment must still be satisfied. If a judgment is recorded against the remainderman, and the life tenant reconveys the remainder interest to another party, the judgment may be disregarded by The Fund on a case by case basis. Issues of fraudulent conveyance will be considered before any decision is made. The open issue here is whether or not the judgment creditor acquires a greater interest than the remainderman. As far as Federal Tax Liens are concerned, in absence of any precedent, all Federal Tax Liens recorded in the county where the property is located against the remainderman must be cleared, and a release by the IRS will be required prior to insuring title. See *United States v. Craft*, 122 S. CT. 1414 (2002), illustrating how aggressive the IRS can be to enforce their liens.

If the remainderman dies before the life tenant, probate will be required if it is determined that the remainderman had a vested interest as opposed to being a contingent remainder. Since there is no specific authority as to which type of remainder interest is created by a Lady Bird Deed, the Fund's position is that it is a vested remainder, thus subjecting the heirs and/or devisees of the deceased remainderman to probate proceedings. If the remainder interest is held by two or more persons, one of whom predeceases the life tenant, probate will be required unless the remainder interest is held as joint tenants with right of survivorship.

The use of a Lady Bird Deed with homestead property creates a problem when the owner is survived by a spouse or minor child. Such property can not be devised to another party, either directly or indirectly. Art X, Sec. 4 (c), Fla. Const. (1968 as amended), *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th DCA 1981). Since there has been no case law determining whether the remainderman's interest is vested or contingent, the possibility of a court determining that the remainderman had a contingent interest, thus being a devise at death in violation of the Florida Constitution, prevents The Fund from insuring title.

For persons dying after October 1, 2001, F.S. 732.2075(2)(a) (1999) of the Elective Share Statute expands the elective share to include property held in revocable trusts. Since the remainderman's interest in a Lady Bird Deed can be revoked by the life tenant, the property would in all likelihood be considered as part of the elective share. The Fund will not insure title in this case without a release or determination of the elective share.

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Chapter 4: Practical Applications in Estate and Elder Law Planning

Some of the typical Lady Bird Deed scenarios include a husband and wife retaining a life estate, with the remainder to children upon their death. The remaindermen can be tenants in common or joint tenants with right of survivorship. If there are several remaindermen and the mechanics of working with such a large family or fear of a judgment against one of the possible remaindermen is an issue, a revocable trust can be established by one of the remainderman who also acts as trustee. The remainderman in that scenario would be "John Jones, as trustee of The John Jones Revocable Trust." The beneficiaries of the trust would be all of the children. At the death of the life tenant, the trustee would be empowered to sell the property without joinder of the other beneficiaries and distribute the proceeds out of the trust, pursuant to the terms of the trust. If one of the beneficiaries has a recorded judgment against him or her in the county where the property is located, the judgment will not become a lien on the property since the beneficiary was not the remaindermen. The judgment debtor can then negotiate with the creditor

prior to distribution of his or her share of the proceeds. Query, will the result be the same if a Federal Tax Lien is involved?

Using a Lady Bird Deed as a testamentary substitute is also possible as long as the remainderman is ascertainable from the four corners of the deed. For example, a Lady Bird Deed that reads, “remainder to my son John Smith, if he survives, and if not, to my daughter, Mary Smith,” acts as a testamentary substitute and should be allowed, since the recording of a death certificate for John Smith is sufficient to vest title in Mary Smith, who is already described in the deed. On the other hand, using the language, “to my son John Smith, per stirpes,” should not be sufficient to pass title without probate proceedings for John Smith. A determination as to the actual takers can not be determined from a reading of the document, but only through probate proceedings. Also, since the term “per stirpes” is a probate term, it would probably be ignored since a deed is not executed with the formalities of a will. The result should be the same, requiring a probate proceeding for John Smith to determine his heirs.

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Chapter 5: Unresolved and Contentious Issues in Estate and Elder Law Planning

Although much has been written about Lady Bird Deeds, there still persist many unresolved issues and differences of opinion. For example, The Fund has been clear about not insuring title when a life tenant under a Lady Bird Deed reconveys the property to himself or herself or to a related party, such as a revocable living trust, without joinder of the remainderman. However, there is no authority one way or

the other, if such reconveyance is valid if the deed contains specific language authorizing such reconveyance. Since a Lady Bird Deed allows gratuitous language in it, such as “without any liability for waste,” why not the power to reconvey? The Fund’s position regarding reconveyance language in a Lady Bird Deed back to the life tenant is to disregard such language and require the remainderman to execute the deed as well. The Fund’s reasoning is based on the potential for litigation by the remainderman and/or a judgment creditor of the remainderman. Also, there is the possibility that the original conveyance or reservation in the conveyance might fail as it is too broad and inconsistent with the grant. Once again there is a lack of legal precedent which creates uncertainty and disagreement among the Fund and its members.

Another issue involves judgments recorded against the remainderman. The Fund’s position is that any judgments recorded against the remainderman will be insured on a “case by case basis.” While nothing has been written to give any guidance, Pat Jones has informally offered some clarification. ‘If it is a simple money judgment, the Fund will insure over it. For larger judgments, the Fund will want to confirm that the sale or mortgage to a third party is truly bona-fide.’”

Those who practice in the area of Elder Law typically use Lady Bird Deeds for single applicants for Medicaid planning with both homestead and non-homestead property. The Department of Children & Families (DCF) does not consider the creation of a Lady Bird Deed as a transfer of assets. See (ESS Manual 1640.0613.01). However, will DCF consider a later transfer of the retained life estate to the remainderman as an uncompensated transfer of assets with an attendant penalty period? Although the ESS Manual 1640.0551 states that life estates are freely transferrable, will this section apply to Lady Bird Deeds? If so, this interpretation would effectively nullify any transfer penalty for real property since a Lady Bird Deed could be used first, followed by a transfer of the life estate.

While The Fund has opined that the nature of a Lady Bird Deed is that of a vested remainder subject to divestment, would the result change if the deed contained the language, “The remainder interest created in this deed shall not vest in the remainderman until the death of the life tenant”? The obvious purpose of this type of planning is to avoid future judgments against the remainderman from attaching to the property as when a revocable living trust is used. Once again, in absence of some authority, the Fund would still probably require the judgment to be cleared prior to insuring title.

CONCLUSION

While the use of Lady Bird Deeds can be effective in certain types of estate and elder law planning, its use has several drawbacks as well as title insurance issues. In the absence of statutory, case law and regulatory authority, several open and contentious issues remain to be resolved. Therefore, practitioners should consider other options before using a Lady Bird Deed. Also, if insurable title is important, an attorney should check with The Fund before drafting a Lady Bird Deed.