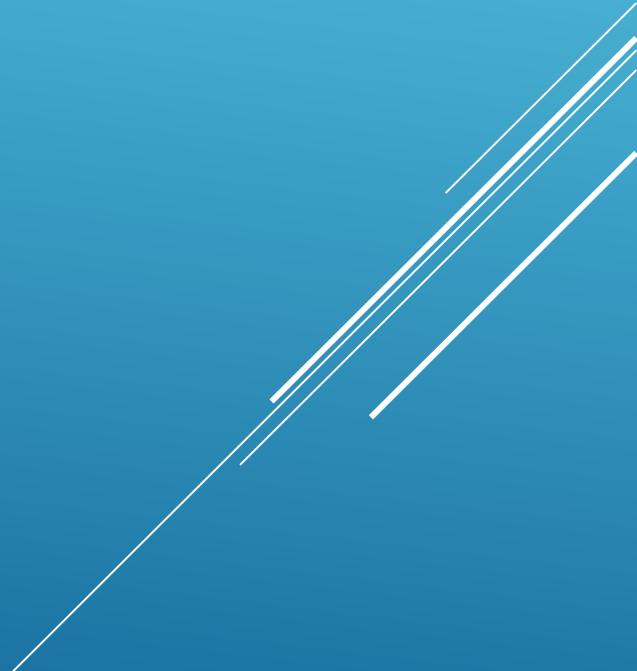


LADY BIRD DEED & OTHER NON-PROBATE TRANSFER TECHNIQUES

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AGENDA

- Probate
 - When and why
 - Traditional probate avoidance techniques
 - Non-traditional probate avoidance technique
 - Traditional life estates
 - Florida Enhanced life estate – aka “lady bird deed”
 - What it is
 - How it works
 - Drawbacks
 - New uniform title standards
 - Revocable transfer on death deed
- 

WHEN AND WHY IS PROBATE NECESSARY?

- 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.
- 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

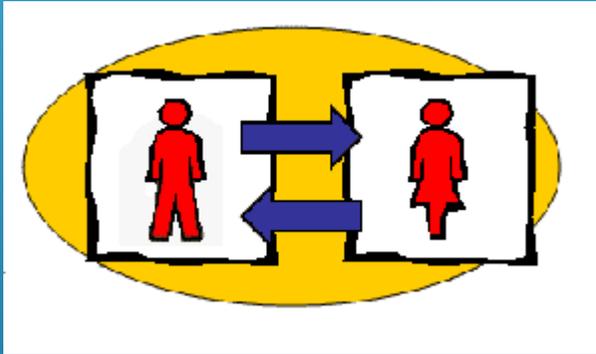
Beneficiary Designations

- IRAs/ 401 (k)
- Annuity/Life Insurance
- Pay on death or transfer on death designations
- 529 Plans



TRADITIONAL METHODS TO AVOID PROBATE

Joint Ownership



- Tenants in Common (not useful to avoid probate)
- Joint Tenants with Rights Of Survivorship (JTROS)
- Tenants by the Entirety (TBE)
 - **only for married couples – 6 unities**
 - **Creditor protection**
 - **Recent Bankruptcy Court case said no TBE Trusts (In re Givans, 623 B.R. 635 (2020))**
- Traditional Life Estate Deeds

TRADITIONAL METHODS TO AVOID PROBATE

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)
- Uncertainty as to whether a joint trust can maintain TBE ownership of assets
 - In re Givans

NON-TRADITIONAL METHOD TO AVOID PROBATE

- ▶ **Blechman v. Estate of Blechman, 160 So.3d 152 (Fla. App. 4th Dist. 2015)**
 - ▶ Member executed an operating agreement whereby his interest in his New Jersey LLC passed to his children upon his death.
 - ▶ Subsequently, member attempted to leave interest to his girlfriend via a specific gift in his revocable trust funded by pour-over will
- ▶ **Issue:** Contract vs. revocable trust
- ▶ **Holding:** by virtue of operating agreement provisions, member's interests immediately vested in his children upon death and never became part of probate estate.
- ▶ **Reasoning:** “As to the construction of the [LLC operating] agreement, the parties have provided no... law to contradict the general principle that express language in a contractual agreement ‘specifically addressing the disposition of [property] upon death’ will defeat a testamentary disposition of said property.” *Murray Van & Storage, Inc. v. Murray*, 364 So.2d 68 (Fla. 4th DCA 1978)

NON-TRADITIONAL METHOD TO AVOID PROBATE

- ▶ **Finlaw v. Finlaw, 2021 WL 1431125 (2nd DCA April 16, 2021)**
 - ▶ Partner executed a partnership agreement in an Ohio partnership whereby she agreed to execute a will leaving her interest to her children.
 - ▶ Subsequently, Partner executed a will leaving her partnership interest to a grandson.
- ▶ **Issue:** Contract vs. Will Devise
- ▶ **Holding:** Where contracting parties expressly agree on the disposition of property upon death, that agreement generally controls over a testamentary disposition of the property.
- ▶ **Reasoning:** Found Ohio and Florida law on the issue substantially the same, and therefore cited *Belchman and Murry Van & Storage, Inc.* as supportive authority, as well as a couple of Ohio cases on the issue.

TRADITIONAL LIFE ESTATE

- ▶ Upon execution of a life estate deed, a completed gift has been made to the remainderman at that time
- ▶ Life tenant
 - ▶ Rights/Responsibilities:
 - ▶ Full use and possession (while alive). See *Sauls v. Crosby*, 258 So. 2d 326, 327 (Fla. 1st DCA 1972)
 - ▶ Responsible for ordinary expenses (general repairs/upkeep, HOA fees, insurance, interest payments)
 - ▶ Fl. Stat. 738.801 (2)(a)
 - ▶ *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; see *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 and keep the rents
 - ▶ Upon death of Life Tenant, his/her interest is extinguished, and the property passes by operation of law to the remainderman

TRADITIONAL LIFE ESTATE

- Remainderman
 - Rights/Responsibilities:
 - Upon death of life tenant, the right of possession (but not a moment before)
 - Responsible for principal payments, expenses related to the title of the property, environmental matters (hurricane damage), and extraordinary expenses
 - Schneberger v. Schneberger, 979 So. 2d 981 (Fla. 4th DCA 2008)
 - Fl. Stat. 738.801 (2)(b)
 - May convey remainder interest during life of life tenant
 - Can be TIC or JTWROS or TBE

TRADITIONAL LIFE ESTATE

- 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 joinder 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)

FLORIDA ENHANCED LIFE ESTATE DEED

AKA

THE “LADY BIRD DEED”

LADY BIRD DEED

- One Florida Supreme Court case supporting reserved powers in a life tenant – relying on this case for support of the Lady Bird Deed
 - See *Ogleby v. Lee*, 73 So. 840 (Fla. 1917)
 - See also *Green v. Barrow*, 8 so. 2d 283 (Fla. 1942)
- Currently No Florida Statute specifically permits this deed
 - RPPTL Section – has been reluctant to try to codify the lady bird deed since there are legal fictions which are ignored and not questioned and there is not a desire to upset or erode how it currently operates
- No specific language authorized
 - Every example you see is someone's creative writing attempt

RESERVATION OF RIGHTS

- Example language:

- Grantor reserves unto herself, **without any liability for waste**, 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 Grantee (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 make a new transfer or name a different remainderman, the Grantor should execute a new deed

INTENT TO DIVEST WITHOUT CONSENT OF REMAINDERMAN – DIVESTMENT 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 October 14, 2020, **to divest the Grantee and remainderman**, John Smith, by further conveyance and **destroy any and all rights which the Grantee remainderman** may have possessed under the prior recorded deed.
 - **Note: this is merely suggested language and the author makes no guarantees of effectiveness or acceptance by a court or underwriter**

LADY BIRD 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).
 - ▶ See also new Uniform Title Standards 6.11 and 6.12

THE UNIFORM TITLE STANDARDS

Standard 6.10 – Enhanced Life Estate: Deed for Non-Homestead Property

STANDARD:

THE HOLDER OF A LIFE ESTATE IN NON-HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.

Problem 3 – Remainderman has judgment creditor. Grantor re-conveys divesting remainderman of her interest. Re-conveyance to new party is free of the claims against the prior remainderman.

Problem 4 – Creditor has judgment lien against grantor but does not levy or execute on the judgment. Upon death of grantor the property passes free of judgment to remainderman.

Comments –

“Life tenant [should] retain the power to divest the remainderman in the vesting deed creating the enhanced life estate.”

“Any conveyance attempting to divest the remainderman should clearly state the life tenant’s intent to do so.”

THE UNIFORM TITLE STANDARDS

Standard 6.11 – Enhanced Life Estate: Life Tenant and Homestead Property

STANDARD:

A LIFE TENANT WITH AN INTEREST IN HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.

Problem 1 – Grantor, unmarried and no minor children, executes lady bird deed with proper reserved powers for his homestead. He may validly divest the original remainderman and re-convey the homestead to a new party.

Problem 2 – Same as above except Grantor is married. Grantor's spouse must join in the new deed.

Comments –

“A conveyance of a homestead residence by the life tenant is subject to the spousal joinder requirements of Art. X, Section 4(c).”

“The restriction on the devise of homestead contained in Art. X, Sec. 4(c), of the Florida Constitution, must be considered after the death of the life tenant if they were survived by a spouse or minor child.”

THE UNIFORM TITLE STANDARDS

Standard 6.12 – Enhanced Life Estate: Remainderman and Homestead Property

STANDARD:

THE REMAINDERMAN IN HOMESTEAD PROPERTY, WHEREIN THE LIFE TENANT RESERVED THE POWER TO SELL, CONVEY MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, ACQUIRES FEE SIMPLE TITLE UPON THE DEATH OF THE LIFE TENANT ONLY WHEN NOT IN VIOLATION OF CONSTITUTIONAL RESTRICTION ON DEVISE OF HOMESTEAD.

Problem 2 – Grantor executes lady bird deed while married, without spouse's joinder, leaving to 3rd party. Upon grantor's death, title does not vest in the remainderman.

Problem 3 – Grantor executes lady bird deed and joined by spouse which includes “by executing or joining in this deed, I intent to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.” Grantor had no minor children, therefore upon grantor's death fee simple title passes to remainderman.

Problem 4 – At the time of conveyance and when grantor died remainderman was grantor's spouse and had joined in the deed. Grantor had no minor children, therefore upon grantor's death fee simple title passes to spouse/remainderman.

BENEFITS OF LADY BIRD DEEDS

- ▶ All costs/expenses are bore by the life tenant (because incomplete gift)
 - ▶ 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.)
- ▶ Avoids probate at death
- ▶ No loss of homestead exemption or re-assessment event for the property
 - ▶ Fla. Stat. 193.155 & 193.1554 and AGO 2001-31 (April 26, 2001)
- ▶ No liability to remainderman (i.e. waste)
- ▶ 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 step-up 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)
 - ▶ Email me if you would like a copy of the letter
- ▶ Currently, DCF does not consider the creation of a Lady Bird Deed a transfer of assets
 - ▶ Florida ESS Manual 1640.0613.01

DRAWBACKS OF LADY BIRD DEEDS

- Proper drafting of reservation of powers is critical for effective lady bird deed. Missing powers may create issues/difficulties not intended
 - i.e. power to “sell and convey” does not include the power to “gift” the property
- Homestead property is subject to the devise and decent restrictions where there is a surviving spouse or minor child.
 - This may also necessitate a probate to have court establish homestead status
- Lenders may be nervous to lend or refinance where a lady bird deed exists for fear of the remainderman arguing that the bank was aware that upon death the property transferred and at that time any obligation tied to the property would cease.
 - Usually handled by executing deed conveying back 100% fee simple ownership
- Despite the reservation of powers, some title companies will still ask for the remainderman to sign the deed and/or be reluctant to provide title insurance
 - If this is the case, then you can shop around to other title companies who may be more accommodating to your particular situation.

DRAWBACKS OF LADY BIRD DEEDS

- 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 grantor and the second deed makes the new desired conveyance of the property
- Homeowners insurance policies may not provide extended coverage to the remainderman after the grantor's death.
 - See *Strope-Robinson v. State Farm Fire and Casualty Company*, 2021 WL 406915 (U.S. Ct. of App. 8th Cir) (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.)
 - Therefore, to avoid a gap in coverage (from the time of death to the time the remainderman take 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
 - Good idea to consider this for any transfers to trust as well

LADY BIRD DEED – WHEN OR WHEN NOT TO USE?

- A great inexpensive tool to avoid probate for those older clients who do not require a trust
 - Typical situation is a retired individual that has a home, bank accounts, retirement accounts, and social security benefits. A trust could be overkill for someone like this and add a layer of complexity that they don't fully understand. Instead, using the techniques discussed – lady bird Deed and Beneficiary Designations – the client can avoid probate and the trust complexities
 - The potential drawbacks should be discussed with the client and it's a good practice point to provide them a letter reiterating the same
- If client already has a trust but you are apprehensive about transferring their homestead into the trust while they're alive
 - Can name the trust as the Grantee (remainder beneficiary) of a lady bird deed
- Younger clients and those that have known family turmoil are not ideal candidates for the Lady Bird deed

REVOCAABLE TRANSFER OF DEATH DEED

(Different Than the Lady Bird Deed)

- New RPPTL committee with Real Property & Probate people being formed
- This comes from the Uniform Law Commission, and is intended to be an alternative method for transfer of property upon death without probate
 - Provides that a grantor may record a deed during life to become effective only at death
 - Grantor maintains fee simple ownership with the right to revoke conveyance or replace the transferee
- Sample Statutory Forms
 - RTOD deed
 - Acceptance of RTOD deed (must be filed accompanying the RTOD deed)
 - Revocation of RTOD Deed