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All About “Lady Bird” Deeds

A “Lady Bird Deed” is a powerful estate planning tool that enables you to convey real estate ownership to your heirs upon your death, without the time and expense of probate and without sacrificing control of your rights to continue using the property as you wish before you pass away.

In Florida, probate can be avoided by naming a beneficiary on a bank account, investment account, retirement account, and insurance policy. But a beneficiary cannot be named for real estate, which means your house and other real estate owned in your name individually will have to go through probate to be inherited by your heirs. Probate can take six months to a year to complete and cost thousands, if not tens of thousands of dollars.

Enter the Lady Bird Deed.

The technical term for a Lady Bird Deed is an “Enhanced Life Estate Deed.” Florida is one of the five states that recognize their use (the others are Michigan, Texas, Vermont, and West Virginia). Several other states have similar “Transfer on Death” deeds in which a beneficiary can be designated to inherit the property upon the owner’s death without the necessity of probate.

In a typical life estate, the owner grants an individual (known as a “life tenant”) the right to possess the real estate for the rest of their life. The person in possession only has the right to live in the property and has no power to sell, mortgage, or lease the property. These powers are retained by the property owner. However, the owner can only sell, mortgage, or lease the property subject to the lifetime rights of the life tenant.

When the life tenant dies, the possessory rights return to the property owner.

With an Enhanced Life Estate, the process and results are quite different. The owner grants himself or herself a life estate, but expressly retains the powers to use, gift, sell, mortgage, and lease the property. He names the person or persons (known as “Remainderman” or “Remaindermen”) to inherit the property when he dies, which happens automatically by operation of law without the necessity of probate.

The Remainderman has no rights to or interest in the property until the enhanced life tenant dies. Therefore, the Remainderman's permission and signature are not required for the property owner to sell, lease, or mortgage the property..

The owner can even change his or her mind and do something completely different with the property, including naming different Remaindermen to inherit the property, simply by signing a new Lady Bird Deed.

Upon the death of the owner, assuming the owner didn't change his or her mind, the property automatically passes to the Remaindermen, thus avoiding probate.

The ability to avoid probate at death while retaining control over the property during the owner's life makes the Lady Bird Deed a popular estate planning tool in Florida.

Advantages:

1. **Probate Avoidance** - Lady Bird deeds avoid the necessity of putting the real estate through the probate process, thus saving money, hassle, and delay.
2. **Retaining Control** - The property owner retains full control over the property while alive, including the ability to change his or her mind about who inherits the property upon death of the property owner. The owner can still sell, lease, convey, gift, or mortgage the property, because the Remainderman has no vested interest in the property unless and until the Grantor's death.
3. **Homestead Exemption** – Property tax and asset protection benefits under the Florida Homestead laws are retained, because a Lady Bird Deed transfer does not take effect until the homeowner's death.
4. **Medicaid Benefits Retained** – Under current laws, a transfer via a Lady Bird Deed is not a countable transfer for purposes of determining Medicaid eligibility, and the property is not considered a part of the estate that is recoverable by the state after the owner's death. The transfer of interest is not subject to the 5-year "look-back" rules.
5. **Capital Gains Tax Savings** – When one gifts property to another during one's lifetime, the recipient usually takes the Grantor's cost basis in the property, thus potentially triggering a taxable gain when the recipient sells the property. By using a Lady Bird Deed, the transfer takes place upon the death of the Grantor, resulting in the cost basis "stepping-up" to the date-of-death value of the property. Since the pre-death appreciation in value has been effectively eliminated, when sold, the tax savings can be significant.
6. **No Gift Tax** – A Lady Bird Deed is not considered a completed gift. Therefore, there is no need to file a gift tax return.
7. **No Mortgage Impact** – The Transfer does not affect your mortgage. It will not trigger a due-on-sale clause, because ownership of the property has not been transferred until your death.

8. **Less Attorney's Fees** – Use of a Lady Bird Deed is generally less expensive than the cost of creating a revocable living trust, when real estate is the primary asset in one's estate (Note: Trusts can provide substantial additional benefits and protections beyond the mere savings of attorney's fees regarding conveyance of property. So, be sure to ask your estate planning attorney about the differences to enable you to make an informed decision as to which method will work best for you).

Disadvantages:

1. **Title Insurance Issues** - Some title insurance companies will not insure conveyances via Lady Bird Deeds if used to exclude a child from inheriting the property while giving the property to another child or children. This problem is solved when all children are included on the deed.
2. **Homestead Law Issues** – Florida Statutes §732.401 provides that, if a deceased person is survived by a spouse and lineal descendants (children, grandchildren, etc.), then the surviving spouse gets a life estate, and the descendants receive a vested remainder interest. In other words, a Lady Bird Deed cannot be used to “disinherit” a spouse or children, unless they join in the conveyance.
3. **Reverse Mortgage Issues** – One client who had executed a Lady Bird Deed was told by a reverse mortgage company that the company would not give her a reverse mortgage loan on the property unless she revoked the Lady Bird Deed.
4. **Equity Line of Credit Issues** - One client who had executed a Lady Bird Deed was told by a bank that they would not give him an equity line of credit on the property unless he revoked the Lady Bird Deed.
5. **Death of the Remainderman before the Grantor** – If the Remainderman predeceases the Grantor, unless there is more than one Remainderman named, there is no one to inherit the property, and the property will go through probate to be distributed to the residual beneficiaries in the Grantor's Last Will and Testament (if there is a Will) or to the Grantor's heirs at law (if there is no Will).
6. **More than one Remainderman** – When the Grantor names more than one Remainderman, care must be given as to whether they are to inherit as “tenants in common” or as “joint tenants with rights of survivorship.” For example, if the Grantor names his three children as joint tenants with rights of survivorship (JTWROS), if one of the children predeceases the Grantor leaving children of their own, the surviving two children would inherit the property, and any children of the deceased child would inherit nothing. On the other hand, if the Grantor names the children as tenants in common, the children of a deceased child would be entitled to inherit the child's share. However, probate of the deceased child's estate would probably be necessary to transfer that child's share of the property to his or her children.

Miscellaneous:

1. A Trust can be named Remainderman. So, if the owner wants to keep the property in his or her name but has a revocable living trust to receive title to the property upon death, this can be accomplished by naming the successor trustee of the trust as the Remainderman.
2. A charity can be named Remainderman. So, if the property owner wants a charity to inherit the property upon his death without the necessity of putting the property through probate, this is an effective tool to save time and expense to the charity. Be sure to let the charity know you have done this while you are still alive; otherwise, how will they know this has been done and when the property owner dies?
3. Derivation of the term “Lady Bird Deed” – There are a couple of versions of the story regarding how the “Lady Bird Deed” got its name:

The first is that President Lyndon B. Johnson used an Enhanced Life Estate Deed to convey title of his property to his wife, Claudia Alta “Lady Bird” Johnson.

The second is that the term comes from a law professor’s teaching materials, in which he used popular characters (in this case, “Lady Bird” Johnson) to illustrate the use of this type of deed.

Whichever version is correct, the name “Lady Bird” Deed became the popular nomenclature to describe this type of deed in place of the technical name “Enhanced Life Estate Deed.”

As you can see, the “Lady Bird Deed” is a useful estate planning tool which is an effective, efficient, and inexpensive.

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