Understanding the Enhanced Life Estate

- An Enhanced Life Estate Deed is more informally known as a Lady Bird Deed.
- Lady Bird Deeds are non-statutory in nature and Texas case law is relatively sparse.
- A Lady Bird Deed allows a grantor to transfer his or her property to a beneficiary, but retains a life estate in the property, along with the power to sell, convey, or mortgage the property without the beneficiary’s consent.
- Lady Bird Deed also allows a grantor to occupy and use the property for the grantor’s lifetime with no liability for waste.
- Estate planning professionals generally use this mechanism to avoid probate, Medicaid estate recovery and homestead transfer penalties.
The Transfer on Death Deed Compared to the Lady Bird Deed

TRANSFER ON DEATH DEED

- The Texas Real Property Transfer on Death Act ("TRPTODA"): the Texas version of the Uniform Real Property Transfer on Death Act and the act that introduced Texans to Transfer on Death Deeds ("TODDs"). This act is codified in the Texas Estates Code, Chapter 114.
- TODDs may only “be executed and acknowledged on or after September 1, 2015.”
- The TRPTODA uses the terms transferor and transferee/beneficiary/designated beneficiary rather than the terms grantor and grantee.
- TODDs are revocable.

LADY BIRD DEED

- Again, Lady Bird Deeds are non-statutory in nature and have been used since around 2005, which will be discussed in further detail.
- The typical grantor/grantee terms are used in Lady Bird Deeds.
- Lady Bird Deeds are revocable.

The key difference between a TODD and a Lady Bird Deed is Medicaid.

The Transfer on Death Deed Compared to the Lady Bird Deed – Continued

TRANSFER ON DEATH DEED

- TODDs are nontestamentary in nature. See Tex. Est. Code § 114.053.
- “The capacity required to make or revoke a [TODD] is the same as the capacity required to make a contract.” See Tex. Est. Code § 114.054(a).

LADY BIRD DEED

- Lady Bird Deeds are also nontestamentary in nature. See Tex. Est. Code § 111.052(b).
- The capacity required to make or revoke a Lady Bird Deed has been said to be the same as the capacity to sign a deed - a “[g]rantor must have sufficient mental capacity[,]” meaning sufficient mind and memory to understand the nature and effect of his or her action “at the time of its execution.” Jackson v. Henninger, 482 S.W.2d 323, 324-25 (Tex. App.-Austin 1972, no writ).
  - This is less onerous than what is required for a TODD.
- A Lady Bird Deed may be created through use of a power of attorney.
Benefits of the Lady Bird Deed

• Flexibility;
• Maintaining Exemptions;
• Ability to Transfer Property at a Low Cost;
• Avoiding Probate;
• Protection from a Beneficiary's Creditors;
• Reduction in Gift Taxes;
• Avoiding Capital Gains Taxes for the Beneficiary; and
• Medicaid Purposes (to be discussed in further detail below).


Creating a Lady Bird Deed

As mentioned earlier, Lady Bird Deeds are non-statutory in nature and have been used by Texas attorneys since “2005, the year that the Texas Health & Human Services Commission adopted rules implementing the 2003 Medicaid Estate Recovery statute.” Patricia Flora Sitchler, TODD or Ladybird – Why Not?, Texas Land Title Institute (December 2016).

A Lady Bird Deed is considered a conveyance and “must be in writing and must be subscribed and delivered by the conveyor or by the conveyor’s agent authorized in writing.” Tex. Prop. Code § 5.021.
Example of a Lady Bird Deed

In re Estate of Turner

A 2017 case out of the Texarkana District Court of Appeals wherein an individual, Maggie Williams Turner (the “Grantor”), conveyed by warranty deed to another individual, Markutter McIntosh (the “Beneficiary”), thirteen tracts of real property located in Marion County (the “Property”) in 2009.

This deed (the “2009 Deed”) stated that the Grantor retained “the right to full possession, benefit, and use of the Property, along with any profits stemming from the Property’s use[,]” and further the Grantor “retained the unilateral power of sale of any or all of the Property, with or without [the Beneficiary’s] consent.”

In 2013, the Grantor conveyed the Property to a limited liability company in fee simple without the Beneficiary’s consent.
When the Grantor died, the Beneficiary challenged the Grantor’s fee simple conveyance to the limited liability company. The Executrix filed a motion for partial summary judgment, and the trial court granted such motion, finding that the Beneficiary held no interest in the Property. The Beneficiary appealed.

Despite the Beneficiary’s argument that Grantor’s fee simple “conveyance of the Property was improper in [] Texas,” the appellate court found the conveyance valid because of the 2009 Deed’s unambiguous wording that essentially created a Lady Bird Deed – i.e. that the Grantor retained her “right to full possession, benefit, and use of the Property . . . and the unilateral power of sale of any or all of the Property, with or without [the Beneficiary’s] consent.”

Conveyance in fee simple of the property subject to the Lady Bird Deed without the Lady Bird beneficiary’s consent, as held in In re Turner;

Other Possibilities – Although no Texas case law is on point, the holding in In re Turner seems to indicate that the following actions would likely hold up in court:

- Signing a new Lady Bird Deed expressly revoking a prior Lady Bird Deed;
- Signing a new Lady Bird Deed simply designating another individual as the beneficiary;
- A combination of the above – signing a new Lady Bird Deed expressly revoking any prior Lady Bird Deeds and designating another beneficiary; and
- Executing a warranty deed.
Underwriting Guidelines for Lady Bird Deeds

• Guidelines for underwriting TODDs include:
  o confirmation that a “TODD or revocation of a TODD was filed before the [transferor’s] death”;
  o a close review of any divorce of a TODD transferor and the recording of the divorce decree;
  o confirmation that a disclaimer was not filed by the designated beneficiary;
  o a review of the transferor’s “will for any bequest of the property to a different beneficiary and require a quitclaim deed from the will beneficiary if the [transferor’s] estate is probated”;
  o “confirmation that all debts of the [transferor’s] estate has been paid if” the designated beneficiary decides to sell the property within two years of the transferor’s death;
  o ensuring a title policy is not issued “to a TODD beneficiary prior to the death of the [TODD] transferor”; and
  o when dealing with a joint tenancy, confirmation that the TODD transferor is the last surviving joint tenant, and if not, “the TODD beneficiary will receive nothing.”

• In general, underwriting guidelines “for Lady Bird Deeds are much simpler than for a TODD.” Pamela D. Orsak, *Save Me From Probate: Transfer on Death Deeds*, Stanley M. Johanson Estate Planning Workshop (December 2016). Underwriters will usually only require:
  o “(1) a death certificate; and
  o (2) an affidavit of facts to be filed in the real property records regarding the death and payment of all debts of the decedent’s estate.” Id.

• Lady Bird Deed underwriting guidelines will be different for each title company. Some title companies may have additional requirements, like those mentioned for underwriting TODDs.

Underwriting Guidelines for Lady Bird Deeds – Continued

• Unlike with a TODD, there appears to be no warranty limitations for a Lady Bird Deed, so “a warranty clause will allow the grantee to assert a claim against a grantor and through that claim, access coverage under the grantor’s owner title policy.” Sitchler; Orsak.

• Potential Problems:
  o Title Company Unfamiliarity – if a title company is unfamiliar with Lady Bird Deeds, the company might require that the remainder beneficiary sign off on any document affecting the remainderman’s future interest, potentially causing issues for the Lady Bird grantor.
  o Mortgagee Unfamiliarity – if an outstanding mortgage exists on the property, which is subject to a Lady Bird Deed, the mortgage company could possibly argue that a transfer to a beneficiary other than a spouse or child of the Lady Bird grantor triggers a due-on-sale clause.
  o Inapplicability of the Texas Anti-Lapse Statute – The Texas anti-lapse statute does not apply to a Lady Bird Deed. Orsak. If a Lady Bird grantor leaves property to his or her two children and one child with heirs of his or her own predeceases the grantor, the surviving child will own the property entirely if the Lady Bird Deed is not revoked in some manner. Id. This would leave the predeceasing child’s heirs with nothing. Id.
Dealing with Encumbrances or Transfers Created by the Life Estate Holder

- A Lady Bird Deed will not extinguish a mortgage on the property or any taxes that are due on the property. Estate planning attorneys, Lady Bird grantors (and beneficiaries, if involved in the grantor’s estate planning) must be aware of this fact.

- Additionally, In re Turner demonstrates that if a Lady Bird grantor decides to convey the property in fee simple after execution of the Lady Bird Deed, the Lady Bird beneficiary will have a very difficult time challenging that fee simple conveyance.

Dealing with Medicaid Recovery

- MEDICAID RECOVERY PROGRAM – MERP
- LADY BIRD DEED: PROTECTION FROM MERP
Dealing with Medicaid Recovery – MERP


• Under the Act, “Congress mandated that states recover certain Medicaid expenditures for a recipient over the age of 55.” Sitchler.

• In 2003, Texas passed the Medicaid Estate Recovery Program (the "MERP"). Hale. In 2005, “the Texas Health & Human Services Commission adopted rules implementing the” MERP as “[t]he federal statute does not set out the rules for estate recovery[,]” but rather left that up to the states. Sitchler.

• The MERP is codified at 1 Tex. Admin. Code Chapter 373.

Dealing with Medicaid Recovery – MERP Continued

• “The following . . . services and supports are subject to MERP:
  o Nursing facility services;
  o Intermediate care facility for persons with mental retardation (ICF/MR) services . . ;
  o Medicaid waiver programs such as:
    ▪ Community Living Assistance and Support Services;
    ▪ Deaf Blind with Multiple Disabilities;
    ▪ Home and Community-Based Services;
    ▪ Texas Home Living Program;
    ▪ Consolidated Waiver Program;
    ▪ And Community Based Alternatives; and
  o Community Attendant Services; and
  o Hospital and prescription drug services received while on the above programs.” Hale.

• Additionally, when an individual applies for Medicaid, the government can examine that individual’s asset transfers made within 5 years of the application date (the "Lookback Period"). Tex. Dept. of Aging and Disability Services, *Your Guide to Medicaid Estate Recovery Program* (March 2015). Any asset transfer made for “less than fair market value” during that Lookback Period is subject to penalties. *Id.*
Dealing with Medicaid Recovery – Protection from MERP

• However, the MERP is limited to the “probate estate” of the deceased Medicaid recipient.” Hale.

• For purposes of MERP, the Texas Administrative Code defines estate as: “[t]he real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate” as found in the Texas Estates Code.” 1 Tex. Admin. Code § 373.105(b).

• In 1941, the Texas Supreme Court decided that any property conveyed by a decedent during his or her lifetime is not part of the probate estate, and thus, nontestamentary. Markward v. Murrah, 156 S.W.2d 971, 974 (Tex. 1941).

• Further, the Texas Estates Code provides that a “written instrument effective as a contract, gift, conveyance, or trust,” passing property after a decedent’s death is not invalidated by the Estates Code and is also considered nontestamentary. Texas Estates Code § 111.052(a)(1)(A), (b).

Dealing with Medicaid Recovery – Protection from MERP Continued

• A Lady Bird Deed and the property that is the subject of such a deed is not included in a decedent’s probate estate and is thus protected from asset recovery under the MERP.

• Additionally, the property that is the subject of a Lady Bird Deed is not subject to the Lookback Period because the actual transfer of that property would not be effective until the grantor dies.
  o For example, if a grantor applied for Medicaid on November 29, 2019, any transfers made for less than fair market value within 5 years (November 29, 2014) would be subject to penalties.
  o If that grantor had executed a traditional life estate deed for less than fair market value during that Lookback Period, that transfer would be subject to penalties, reducing the grantor’s Medicaid benefits.
  o However, if the grantor had instead executed a Lady Bird Deed within that same Lookback Period, the transfer is not effective until the grantor dies, and thus not subject to the Lookback Period penalties.
CONCLUSION

• A Lady Bird Deed can be a very useful tool for Texas attorneys, but of course will not be useful for every client.
• Each client situation must be carefully analyzed to determine if utilizing this tool will be the most beneficial and effective in the long run.

SOURCES

• IRC § 2036.
• Markward v. Murrah, 156 S.W.2d 971, 974 (Tex. 1941).
• Jackson v. Henninger, 482 S.W.2d 323, 324-25 (Tex. App.--Austin 1972, no writ).
• Texas Estate Code, Chapters 111 & 114.
• Texas Property Code § 5.021.
• 1 Texas Administrative Code Chapter 373.
• Pamela D. Orsak, Save Me From Probate: Transfer on Death Deeds and Lady Bird Deeds, Stanley M. Johanson Estate Planning Workshop (December 2016).
• Patricia Flora Sitchler, TODD or Ladybird - Why Not?, Texas Land Title Institute (December 2016).
• Tex. Dept. of Aging and Disability Services, Your Guide to the Medicaid Estate Recovery Program (March 2015).