



Law Office of
KEVIN F. JURSI NSKI
& Associates

**TRANSFER OF FLORIDA REAL PROPERTY TO
CHILDREN AS A SIMPLE ESTATE PLANNING TOOL**

BY: KEVIN F. JURSI NSKI, B.C.S.

FLORIDA BAR BOARD CERTIFIED ATTORNEY: REAL ESTATE LAW, BUSINESS LITIGATION
AND CONSTRUCTION LAW

Life Estates and Lady Bird Deeds

I am often approached by clients asking to have their children added to the deeds of their property. A typical example is when our clients have either a primary or secondary home or an investment property in Florida, and it is held in their individual names. They want a simple way to automatically transfer real property in Florida to their children as joint survivors without going through probate, assuming that both Dad and Mom pass before their children. While there are ways to effectively do this, there are a number of factors to consider in regard to such transactions. Here is a short overview of the pros and cons of adding additional parties onto a title.

Here are some considerations.

1. **Concern Over Holding Title in Individual Names: Premises Liability**

Initially, we advise our clients that they probably should *not* be holding second homes and investment properties in their individual names. Holding title to a property, in and of itself, results in premises liability under Florida law:

“Specifically, the owner or operator of the property must maintain it in a reasonably safe condition and correct or warn of dangers that the defendant knew or should have known of, and which the plaintiff did not or should not have known of by the use of reasonable care. This duty likewise extends to social guests of the landowner, whom the law designates as “licensees by invitation.” December, 2009 Volume 83, No. 11 Premises Liability: A Notable Rift in the Law of Foreseeable Crimes by Wilton H. Strickland citing:

Restatement (Second) of Torts §332(2) (1977)). Wood v. Camp, 284 So. 2d 691, 694-95 (Fla. 1973).

If the property is a second home or a rental property, the owner of the property is liable for the activities that take place on the premises, even if such activities are done without the owner charging rent, such as when children, friends or guests utilize the property at no charge.

Notwithstanding the protection of an insurance policy, it is far better to hold the property in a Kevin F. Jursinski, B.C.S. Florida Bar Board Certified Real Estate Law, Business Litigation and Construction Law Attorney ©Law Office of Kevin F. Jursinski & Associates

separate entity, like an LLC, and not in the names of the individuals. In fact, certain of these entities, such as a Florida Land Trust, also allows for the property to still qualify for homestead exemption under Florida law.

See our website for an article regarding the types of entities that can be utilized in Florida for holding property: <https://www.kfjlaw.com/wp-content/uploads/sites/2868/2016/03/Use-of-Business-Entities-and-Acquisition-of-Real-Estate-Investments-10.14.15.pdf>

2. **Placing the Names of Individuals on Title: Unforeseen Consequences**

While it is laudable to make plans for transferring the title of your property to your children, there's a number of considerations to take into account before adding your children to the title.

a. Estate Planning Issues:

We recommend that clients consider discussing their estate plan with an appropriate, qualified estate planning attorney.

b. Federal Tax Planning Issues:

This is another factor to consider when adding parties on title versus utilizing an ownership entity such as a trust or a life estate. As a matter of law, by not conveying full title (such as the use of a life estate as described below), there is not a transfer. Therefore, this not considered a gift, so there is no need to file a gift tax return if the conveyance happens to exceed the gift tax threshold. Under Florida law, there would be no present conveyance if your children are not on title.

c. Judgment Against One Of The Parties Added To The Title:

If there is ever a judgment against those additional parties on title, that judgment acts an attachment to the particular property as to the interest of the title holder. This could create title problems and the inability to clear and convey marketable title.

d. Restriction On Transfer Of Property Or Ability To Refinance:

If additional parties are placed on title, the property cannot be conveyed or refinanced without consent of **all** the joint title holders. Often times, potential disputes arise among family members. Unless a written joint tenancy agreement is in place, there can be a deadlock as to how to address issues such as maintenance, payment of property expenses, repairs, refinance or even the sale of the property or refinance.

e. Issues With Partition Under Florida Statute 64 et seq:

In addition to the possibility that adding members of the family to the title might create future title problems as above described, when you add additional parties to the deed in Florida, those individuals become Tenants in Common or Joint Tenants with a Right of Survivorship, depending on how the conveyance is structured. As a Tenant, their individual rights are now elevated, and under Chapter 64, they have the right to partition the property. In other words,

if there is a dispute between the Joint Tenants, any Joint Tenant on the property can ask the Court to partition the property.

Partition is Old English common law that has been codified in Florida. It essentially allows the Court to appoint a special Magistrate to sell the property and divide (“partition”) the sale proceeds, since, in most instances, the real property in question is indivisible. The Court recognizes that it is impossible to divide a house, condo, townhome, and therefore the Court partitions the proceeds rather than the actual physical property. Partition may not be a desirable result for other family members, so all these matters should be considered.

f. Transfers Of The Grantees Title.

Further, situations may arise in which a person who gains an interest in the property wants to sever a joint tenancy with the right of survivorship or in fact transfer their interest to a third party. That may not be what the parent had in mind when the initial concept of adding the children onto the deed was first considered.

g. Avoidance Of Probate:

The life estate format avoids probate, since simply adding the children onto the deed does not automatically guarantee that the property will transfer to them outside of probate, since the conveyance of title to the children creates numerous scenarios which could work to disrupt that goal

h. Proper Conveyance In The Form Of A Trust Or Life Estate Can Remove The Property From Probate For Medicaid Purposes:

Another consideration for discussion is Medicaid recapture. Properly structured vehicles like trusts of life estates, as described further below, can avoid Medicaid recovery, since the beneficial or remainder interest is not part of the probate estate.

In a situation where a parent has received Medicaid benefits and that parent passes, Federal law allows the state Medicaid agency to recover assets from the deceased person’s “estate” at his or her death. In Florida, a vested trust interest or the remainder interest in a life estate is not considered as property of the decedent’s estate, and therefore not subject to recapture for Medicaid benefits. This is yet another factor to consider when trying to structure a conveyance of the parent’s interest in real estate.

i. Retention of Homestead exemption for Florida real property taxes.

A careful discussion should be had if the parents claim homestead on the property but the added individuals to the title do not intend to use the property as their primary residence. This impacts the annual cap on real estate taxes under the Save Our Homes amendment to the Florida Constitution. In 1992 Florida voters approved an amendment to the Florida Constitution known as Amendment 10, or Save Our Homes (SOH). SOH is an assessment limitation, or “cap”, on increases in the assessed value of a homestead residence. This is an important factor as it limits the increase in taxable value of a home in Florida, especially during time of rapid price increases. Historically, Florida home values on average increase by 6.2% whereas the Save Our Homes amendment caps the annual increase to 3%.

3. **Using a Life Estate Option or a Lady Bird Deed:**

Rather than the parent simply adding their children onto a deed for real property that the parent(s) own in Florida, consideration should be given as to whether the parent(s) want to add their children onto the title or rather do so in the format of a life estate with the remainder interest to the children. There is also a hybrid life estate with remainder interest, which is coupled with revocable powers. This is known as a “Lady Bird Deed”. Both the life estate formats and Lady Bird format are briefly described below.

A. **Life estate with remainder interest**

In its simplest form, a life estate is a present conveyance of the right of the Grantor to retain use and occupancy of the real property for as long as they live with the remainder interest in the property passing to the designated beneficiary or “remainderman”. The owners who hold the identified interest in the property have differing rights of possession.

Again, in the simplest form, the interest of the life tenant is based on the owner’s lifetime and such retained interest is called a “life estate”. The person who holds a life estate retains possession of the property during his/her lifetime. The interest that is conveyed at the owner’s death is called a remainder or remainderman interest. The person who holds a remainder interest (the “Remainderman”) has no right to possess the real property until the death of the life tenant or possibly an event triggering non-use by the owner.

B. **Lady Bird Deed With Revocable Powers vs Life Estate Conveyance:**

There can be permutations of the traditional life estate with remainder interest. The life estate can be predicated on the parents remaining in occupancy of the premises and if they are unable to occupy the premises (they transfer to an adult living facility for example) the right to the real property would then transfer to the Remainderman as opposed to waiting until the life tenant passed.

Florida, along with a handful of other states, recognizes the Lady Bird Deed concept. Many theories exist as to how this deed became known as a “Lady Bird Deed”, but in most instances the following are the features of a Lady Bird Deed:

- a. The owner of the property creates a deed conveying title to himself/herself with a retained right of use during his/her lifetime.
- b. The remaining interest, the “remainder interest”, to the Florida property is transferred upon the owner’s death or as indicated above, possibly the owner’s inability to further use the property such as in a situation in which the life estate owner transfers to an adult-living facility as one example. Upon death, the interest in the real property transfers to a designated Remainderman, who then becomes vested with the title.
- c. The Remainderman can be a natural person or entity and there can be more than one Remainderman.

- d. The life estate interest of the owner can be coupled with a directive that gives the original owner power over the property maintenance, upkeep, etc.
- e. The life estate interest of the owner can also allow such owner to retain a right to revoke the remainder interest or change the remainderman while the life estate owner is alive and competent.
- f. If the remainder interest is not changed, then the real property transfers to the remainderman so identified, either at the death of the life estate owner or the inability of the life estate owner to further make use of the premises.
- g. The legal distinction between a pure life estate with vested remainder and a Lady Bird Deed is that the life estate owner in the former with vested remainder has no right to revoke the remainder interest in the true life estate/remainder interest conveyance. However, by utilizing the Lady Bird feature of revocability, the life estate owner has control over the property to sell, transfer, encumber or eliminate the remainder feature while the owner is alive.

The options of a life estate with vested remainder format and a Lady Bird Deed can be a valuable considerations for an owner of property as opposed to simply placing the name of their children on the deed. The conveyance to a life estate with remainder interest or the creation of a Lady Bird deed also addresses the ultimate transfer of that one particular piece of real property without the necessity and legal expense to create or modify an estate plan.

The goal in the life estate/Lady Bird deed scenario versus simply adding children onto the title is essentially the same, to wit: the transfer the title of the real property to the children. The difference is in the approach, and it takes into consideration a number of factors as outlined above.

Our office is available to discuss with our clients various options for them to consider regarding the transfer of their real estate holdings so as to customize the transfer to their individual needs.

Kevin F. Jursinski, B.C.S.

Note: This article is not intended to provide specific legal advice for any particular client, but rather a general informative discussion of the topic discussed. Any reliance by an individual on the information set forth herein should only be done in conjunction with the individual retaining competent legal advice from a Florida attorney as to that particular client's needs.

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