A Florida Bar Board Certified Attorney's Overview of the Benefits of an Enhanced Life Estate Deed ("Lady Bird" deed) and a Revocable Living Trust

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The Law Office of Jursinski and Murphy handles hundreds of real estate transactions in a year. Some of those include transfer between family members with the most common transfer being a husband and wife who own their home where they reside but don't have in place a formal estate plan and oftentimes don't have an updated Will. These clients have some modest bank accounts, no other real property or investments and want advice on how they can transfer their home to their children if they pass away. They also inquire as to how they can avoid the expense of probate.

- In situations like this for a Florida husband and wife with a single home, a bank account, and children we recommend the use of a Lady Bird Deed, which is an enhanced life estate deed. We have found that for a number of reasons, this is often the most efficient and cost-effective way to avoid probate and has some additional benefits one of which is the cost savings vs a traditional formal trust and the added benefit that with the use of a Lady Bird Deed, your home transfers directly to a beneficiary and does not become part of your personal estate making it the Lady Bird deeds an effective Medicaid planning tool.

Here is a quick overview of the options available for a husband and wife who own their home and want to create a future transfer to their children.

1. Adding a child (or children) directly on the deed as an additional owner and utilizing a Joint Tenancy with the Rights of Survivorship format. We recommend against this option. See the article we previously published found at https://kevinjjursinskilaw.procurrox.com/wp-content/uploads/sites/2868/2012/05/Transfer-of-Real-Property-to-Children-2.pdf.

2. Creating an Irrevocable Trust. An irrevocable trust is a legal agreement where you (the grantor) permanently transfer assets to a trustee for your beneficiaries. Under Florida Law, once the trust is signed and funded, you generally surrender ownership and cannot unilaterally change, amend, or revoke it. That is a restriction as opposed

to the more flexible Lady Bird Deed with the right to amend along with generally a much higher cost.

3. Creating a Revocable Trust. A revocable trust is a flexible estate planning document that manages your assets during your lifetime. You retain full control to modify or cancel it at any time. Upon your passing, it directs a seamless, private transfer of those assets to your beneficiaries, allowing your estate to bypass the public Florida probate court. Same concept as to more expense than a Lady Bird Deed with the added negative that with a Standard Florida revocable trust it is generally considered part of your estate and may not protect your home from estate recovery. Advanced trust strategies can provide additional protection, but again it requires more expense consultation with an experienced attorney familiar with trust and Medicare planning.

4. Creating a Life Estate. A Life Estate in Florida is a type of legal ownership where the parents, using this example, are considered the Life Tenants who retain the right to live in and use a property for their lifetime. Upon their death, full ownership automatically transfers to designated beneficiaries (the "Remaindermen"). While the Life Estate has the benefit of avoiding probate, it lacks the flexibility of a revocable trust or Lady Bird deed since the creation of the Life Estate is irrevocable without going through the probate process.

5. Creating a Lady Bird Deed as to the single asset: the family home. This approach is highly favored by many Florida residents because it does not require any ongoing annual administration, is less expensive than an irrevocable or revocable trust, requires no ongoing maintenance, and bypasses the probate process entirely upon the death of the surviving spouse.

What our clients like about the Lady Bird Deed format when we are dealing with situations involving only the single-family home as an asset with minimum other assets is that the parents retain full ownership and control of the home during their lifetimes. They can sell, refinance, or mortgage the home without needing their child's permission. This Enhanced Life Estate Powers format, when properly drafted in the Lady Bird Deed, allows the parents to enjoy the home with full control. Upon the death of the surviving spouse, the home passes as a matter of law directly to the named beneficiary ("The Remainderman").

There are some negatives to a Lady Bird Deed, but with proper planning by a competent Real Estate attorney, those negatives can be addressed and avoided:

A. If both parents become incapacitated, then. in such event, the Lady Bird Deed does not provide a mechanism for someone else to sell or manage the home without a separate, valid Power of Attorney. Again, in planning with a Lady Bird Deed, some of our clients will consider and execute a Durable Family Power of Attorney to address that situation.

B. Another issue is if the “Remainderman” (which can be plural and for either man or woman), pass away before the parents. In that case, the home reverts back to the parent’s probate estate. To avoid that there should be identified in the Lady Bird Deed specific contingent beneficiaries. Example: “In the event that (name of Remainderman) should not survive the Life Estate Tenants, then, in such event, the Remainderman’s interest shall pass (per stirpes or per capita) to the Remainderman’s heirs. Consideration of contingent beneficiaries is something we discuss with our clients for their consideration and approval.

This is a short summary of options for planning when the parent’s estate consists of generally only their home with limited other assets which can be addressed via a simple Will and eliminates the main asset, their home, from Probate. We recommend that the client consider speaking with an experienced estate planning attorney for their options. The Law Office of Jursinski and Murphy, PLLC partners with a number of excellent estate planning attorneys who can assist clients with their decisions.

The purpose of this article is to address the client’s consideration of the benefits and whether a Lady Bird Deed may be the better choice for their estate planning options.
In Summary:

A Lady Bird deed tends to work best in simpler situations and examples of those are:

A. As set forth above, the client’s Florida home is the major asset of their overall estate holdings.
B. The client wants to have a simple plan in place to avoid probate.
C. The client wants to have in place some Medicaid planning in place of this primary asset.

As to the Medicaid planning, creating a Lady Bird deed retains your full lifetime control over the property during your lifetime. Because you did not transfer title and you still retain title and legal control, the Department of Children and Families (DCF) does not consider it a gift since title hasn’t vested, and with a Lady Bird deed may never vest.

The Lady Bird deed format means it will not trigger the 5-year look-back period penalty. Further, if you receive Medicaid benefits such as long-term care, the State of Florida has the right to recoup those expenses from the assets of your estate after your death. However, in Florida, generally that recovery is limited only assets that go through probate. In the situation in which a Lady Bird Deed is used, the transfer of the title occurs automatically and transfer title as a matter of law to your heirs upon your death and the recording of a certified copy of your death certificate. Therefor your home is not probated and is typically shielded from a Medicaid claim for recovery against your estate. You should discuss your potential planning needs and discuss potential claims against your estate by the state of Florida with legal counsel in your overall estate planning discussions.

Keep in mind, the Life Estate Tenants (the husband and wife in our example) can always make a decision to convey the home during their lifetime if they so choose, which is another planning advantage. This provides for estate planning in the event of changes to the husband and/or wife’s needs.

Lastly, a Lady Bird Deed may be an excellent tool to also use in conjunction with having a simple trust in place for other assets of the husband and wife. The Lady Bird Deed has the advantage of being able to be used in conjunction with a trust.

The Law Office of Jursinski and Murph, PLLC can assist its clients in considering these various options, which this firm has done for over 40 years for our many satisfied clients.

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