

Lady Bird and Transfer on Death Deeds

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A discussion of two modern types of deeds providing for the non-probate transfer of real property—Lady Bird Deeds and Transfer on Death Deeds, focusing on:

■ How they operate

■ Potential benefits

■ Potential difficulties

INTRODUCTION

A carefully prepared estate plan often contains personal property that passes outside of the probate process, such as beneficiary designations on bank accounts, life insurance, and retirement accounts. With regard to real property (often the family home), inter vivos trusts serve as the traditional non-probate transfer mechanism. Although this technique has many advantages, it adds complexity and cost to the estate planning process, especially for individuals with limited resources. Alternatively, estate planners may decide to use a life estate deed, where the client retains a life estate and transfers the remainder interest to the desired recipient. A life estate deed, however, cannot be changed after execution, creating problems if the client later wishes to undo the action or change the remainder beneficiary. Modern law now provides two alternatives to inter vivos trusts and life estate deeds: Lady Bird Deeds and Transfer on Death Deeds.

LADY BIRD DEEDS

What Are They?

A “Lady Bird Deed” (LBD) is a deed in which the grantor retains a life estate and makes an inter vivos transfer of the remainder interest, while also retaining the ability to revoke or alter the deed without consent of the remainder beneficiary. Although named after Lady Bird Johnson, the LBD is not actually connected to Mrs. Johnson or her husband, President Lyndon Johnson. Instead, the first widespread discussion of the LBD was by Florida attorney Jerome Ira Solkoff around 1982, nearly ten years after the death of President Johnson.² In Solkoff’s elder law book and lecture materials, Solkoff used a fictitious group of characters with the names Linton, Lady Bird, Lucie, and Lynda (names very similar to those of Lady Bird and Lyndon Johnson’s daughters) in examples explaining the utility of this type of instrument. Thus, the LBD could just as easily have been named after anyone in history or fiction had Solkoff chosen the cast of characters differently.

Before beginning our detailed discussion of LBDs, an understanding of their predecessor is important, the traditional life estate-remainder deed. A life estate deed conveys the remainder interest to a beneficiary while allowing the grantor to retain the life estate and thus the right to occupy, use, and reap the benefits of the real property for the grantor’s lifetime. Although life estate deeds avoid probate, the grantor has no right to change the beneficiary designation or revoke the deed. Normally, they will not avoid the Medicaid lookback period or permit the life tenant to sell a fee simple interest in the property without consent of the remainder beneficiary.

LBDs, also known as “enhanced life estate deeds,” “revocable life estate deeds,” or “deeds with a reservation of a life estate with a general power of appointment,” allow the grantor to transfer property to beneficiaries while keeping a life estate

in the property coupled with the power to sell, convey, or mortgage the property without the beneficiary's consent.³ These additional powers to revoke the deed and to sell, convey, or mortgage the property differentiate the enhanced life estate from the traditional life estate. However, the acceptance of an LBD may be problematic in states that do not have a history of their recognition such as Florida, Michigan, and Texas. Thus, local law must be reviewed before using an LBD.

Execution of an LBD

There are no special requirements required to execute an LBD. The grantor follows all of the usual requirements of state law for the execution and recording of a deed.

Sample provision

Below is Mr. Solkoff's "classic" LBD provision.⁴

Linton and Lady Bird, his wife, Grantors, to Linton and Lady Bird, his wife, Grantees, a life estate without any liability for waste, with full power and authority in them to sell, convey, mortgage, lease, and otherwise dispose of the property described below in fee simple, with or without consideration, without joinder by the remaindermen and to retain absolutely any and all proceeds derived therefrom. The life tenant shall also have full power and authority to revoke, amend, divest, replace, change or otherwise alter the designation of remaindermen without joinder by the remaindermen. Upon death of the life tenants, the remainder if any, to our children, Lynda and Lucie, joint tenants with rights of survivorship.

Benefits of LBDs

For Medicaid Purposes

Mr. Solkoff designed LBDs with Medicaid eligibility as his main concern. Today, LBDs are primarily used to avoid Medicaid estate recovery and a Medicaid transfer penalty when transferring a homestead. Because Medicaid is a joint effort of state and federal governments, state rules often vary on key points. The discussion in this section is general in nature, and readers are reminded that it is essential to check the requirements of local law.

Medicaid Eligibility During the Grantor's Life

Should a grantor attempt to qualify for Medicaid assistance, the grantor must disclose any asset transfers for less than fair market value within the specified look-back period (typically, five years) when completing the Medicaid application. If the execution of a deed is considered a disqualifying transfer, a disqualification period would be triggered, and while the grantor still could be eligible for certain limited Medicaid long-term-care benefits, the grantor would not be able to receive Medicaid nursing home payments or "waiver" home care services for a certain period of time, depending on the value of the property.

The mere execution and recordation of an LBD is not considered a transfer for Medicaid purposes because the grantor retains full control over the property, including the right to sell the property or revoke the deed. Thus, the homestead maintains its status as exempt property for Medicaid eligibility.

Medicaid Estate Recovery After the Grantor's Death

Medicaid estate recovery is the process by which state governments recover payments made to Medicaid recipients from the estates of the now-deceased recipients. In response to escalating demands on the Medicaid budget, mainly attributable to long-term-care expenses, Congress passed the Omnibus Budget Reconciliation Act of 1993 (OBRA), which requires states to implement at least a basic estate recovery process. Under OBRA⁵ the "estate," for Medicaid estate recovery purposes:

1. Shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and
2. May include, at the option of the State . . . any other real or personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

As evidenced by this definition, OBRA requires states to enforce an estate recovery program but allows the states to

determine how to implement the process, how to define “estate,” and whether to employ an expanded estate program that enforces recovery with Tax Equity Fiscal Responsibility Act (TEFRA) pre-death liens.⁶ Typically, a Medicaid beneficiary’s home, as a probate asset, could be subject to a Medicaid estate recovery claim unless it is protected for the spouse or certain other close relatives, or is conveyed outside of the state’s definition of “estate.” Thus, to determine whether a Medicaid beneficiary’s home is subject to a probate creditor’s claim by the Medicaid Estate Recovery, it must be determined whether the home is included in the beneficiary’s estate as defined by the state’s estate recovery regulations. Normally, a transfer by way of an LBD is complete upon the grantor’s death without any further action by the grantor’s personal representative or the remainder beneficiary. Therefore, the homestead is not included in the probate estate and bypasses the probate process. Accordingly, in many states the home is protected, and thus the LBD is effective to avoid the recovery process. Of course, it is possible for a state to include non-probate assets, such as property transferred with an LBD, within the scope of the definition of “estate” for recovery purposes.

To Maintain Control Over the Property

Unlike the grantor of a traditional life estate, the grantor of an LBD retains the right to take the property back, sell it, take out a mortgage, cancel the remainder, and keep all proceeds from the property. In addition, because of the express terms of the LBD, the grantor does not owe the normal duties to the holder of the remainder interest such as to prevent waste and to obtain consent to sell a fee simple interest in the property.

The grantor may revoke an LBD at any time by executing an instrument of revocation or a subsequent LBD. Changing circumstances in the grantor’s life may cause the grantor to rethink his or her dispositive wishes, and LBDs can be changed easily to reflect the new circumstances. For example, if a remainder beneficiary displeases the grantor, the grantor can take away the beneficiary’s interest at any time for any, or no, reason.

To Transfer Property at a Low Cost

Normally, an attorney is involved in preparing an LBD. However, the cost of using an LBD is modest compared to a will or a trust, which requires assets to be retitled in the name of a trustee and has costs associated with trust administration.

To Avoid Probate

Property owners in states with an onerous probate system may use LBDs to avoid the probate process due to concerns about delay, cost, or privacy. Because the transfer of property is complete upon the donor’s death without any further action, there is no requirement for the probate of property transferred with an LBD.

For Creditor Protection

Because the remainder beneficiary’s interest in the property is extremely limited by the LBD while the grantor is alive, the beneficiary’s creditors have little if any claim to the property while the grantor is alive. If creditors of the beneficiary threaten action affecting the property, the grantor may revoke the deed or transfer the remainder to another beneficiary. As long as the grantor is not a debtor of these creditors as well, this change in the deed would not be considered a fraudulent transfer.

To Give Beneficiary a Stepped-up Basis

Because the transfer is revocable, the grantor has not made completed gift to the remainder beneficiary. Accordingly, the full value of the property remains in the grantor’s taxable estate. The remainder beneficiary then will get a stepped-up basis in the property; that is, the beneficiary’s basis in the property will be the fair market value of the property on the date of the grantor’s death. Thus, if the beneficiary sells the property, the beneficiary will only have to pay capital gains taxes on the gains accrued after the date of the grantor’s death.

To Maintain Exemptions

Grantors who use LBDs to transfer their homesteads upon death retain full control over the homestead while alive. Thus, local law may permit the property to maintain its homestead status and preserve the exemptions that apply to homesteads.

Usable by Agents

An agent under a durable power of attorney would normally have the authority to execute an LBD for the principal if doing so was a prudent part of an estate plan. However, in some states, the grantor must personally create a TODD; an agent under a power of attorney may lack that ability. Thus, the LBD may be used by individuals without capacity if they have a durable power of attorney in place opening up the benefits of a non-probate deed to a wider range of individuals.

Potential Problems With LBDs

Non-recognition

Many states have yet to address whether they will give effect to deeds in which the grantor retains the right to take back all of the remainder beneficiary's interest. Thus, using an LBD in a jurisdiction without a history of their recognition is problematic.

Title Insurance Issues

Some title companies take the position that the Medicaid Estate Recovery statute creates superior rights in the state, even though the state has only the status of an unsecured creditor in the hierarchy of claims against a decedent's estate. Anecdotal evidence exists that when a title company takes the view that the state has some type of lien right, it does not want to insure a title transferred by an LBD without the joinder of the remainder beneficiaries and/or a written release from the state. On the other hand, many title companies are willing to insure the title without requiring these extra precautions. This seems to be the appropriate stance because a title company would not request a release from VISA or any retailer that might be an unsecured creditor of the grantor.

No Standard Form

Because the LBD is a common-law based deed, no standard form exists, unlike for TODDs where most state statutes provide a recommended form. If an LBD is prepared without the benefit of a lawyer or other professional, this lack of a standard form greatly increases the risk of improperly prepared documents. For example, the use of the LBD has led to some difficulties in recent disaster recovery efforts. Certain families impacted by hurricanes have had to "unwind" LBDs to place ownership of the real property in one person to qualify for recovery assistance.⁷

Possible Triggering of Due-on-Sale/Transfer Clause

An LBD transfers a remainder interest to the beneficiary immediately, although it is "weak" due to the ability of the grantor to revoke the deed. Nonetheless, a creditor holding a mortgage or deed of trust could view the execution of an LBD as triggering a due on sale/transfer clause. This would be quite upsetting to the grantor, who is unlikely to have the funds available to pay off the debt.

TRANSFER ON DEATH DEEDS

What Are They?

A "transfer on death deed" also called a "beneficiary deed" is a statutorily authorized deed that allows a grantor to name a beneficiary who will obtain title to the property upon the owner's death. Although similar to the LBD and sometimes referred to as a "statutory LBD," the two instruments are not the same, with a basic difference being that the beneficiary of the TODD does not own an interest in the property while the grantor is alive, whereas a beneficiary of an LBD owns a remainder interest, albeit it is subject to defeasement.

Twenty-eight states and the District of Columbia have some form of TODD statute: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Indiana, Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Of these states, 15 and the District of Columbia have adopted the Uniform Real Property Transfer on Death Act promulgated in 2009 by the National Conference of Commissioners on Uniform State Laws: Alaska, Hawaii, Illinois, Maine, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia.

Although there are state law differences, the basic functioning of a TODD is as follows: The grantor must execute and record the TODD prior to the grantor's death. As mentioned above, the execution and recording of a TODD does not vest in the beneficiary any legal or equitable title until the grantor's death. Therefore, neither the beneficiary nor the beneficiary's creditors may reach the property until after the grantor dies. The beneficiary has no authority to challenge the grantor's use of the property, nor to stop a sale or conveyance of the property. Assuming that the deed is not revoked or otherwise changed, the beneficiary owns the property upon the grantor's death, subject to all encumbrances and interests affecting title to which the grantor's title was subject.

The grantor may revoke a transfer TODD at any time for any (or no) reason. (In some states, a TODD cannot be made irrevocable even by its express terms.) Revocation occurs when the grantor revokes the deed outright, or records a subsequent deed that either expressly or impliedly revokes the existing TODD. If the grantor transfers the property during his or her lifetime, the TODD also will be deemed revoked. A will or other testamentary instrument will not operate to revoke an existing TODD. If multiple grantors create a TODD, and only one later revokes the deed, the revocation is ineffective as to the non-revoking grantors. A divorce decree recorded in the clerk's office of the same county as the TODD could, depending on state law, revoke a TODD existing between a husband and wife as grantor and grantee.

Under the law of most states, a TODD does not impact the rights of the grantor's or beneficiary's current or future creditors, even if the creditor has actual or constructive notice of the deed. If the grantor's estate is insufficient to cover the existing debts at time of death, state law may allow a personal representative to enforce liability against the property as if the property were actually a part of the probate estate.

Execution of a TODD

The TODD must meet requirements under the enabling state law, which may vary by state. The TODD must provide expressly that the transfer is to occur upon the death of the grantor. This differentiates traditional deeds and LBDs that transfer the real property interest immediately upon delivery to the grantee. Otherwise, the TODD requirements are very similar to those of a standard deed.

The beneficiary does not need to give consideration, receive the deed, or accept the deed. In fact, the grantor normally is not required to give the beneficiary any notice that the grantor has created a TODD in favor of the beneficiary. The beneficiary is, however, required to outlive the grantor, with the length of survival depending on state law. If the beneficiary predeceases the grantor, states vary as to whether the deed fails or an anti-lapse statutory provision applies.

Sample Provision

The sample form at right is the optional language for a TODD recommended in §16 of the Uniform Real Property Transfer on Death Act. The suggested form includes an extensive discussion in plain language of how the TODD operates, set forth in a question and answer format that is not reproduced with the form. The Uniform Act also contains a recommended form for the revocation of a TODD in §17.

Benefits of TODDs

The benefits of a TODD are very similar to those of an LBD. The discussion here reiterates those benefits as well as points out the differences and similarities.

For Medicaid Purposes

Medicaid Eligibility During the Grantor's Life

A TODD is unlikely to impact the grantor's ability to qualify for Medicaid because the TODD does not affect the grantor's interest while the grantor remains alive. The mere execution and recordation of a TODD is not considered a transfer for Medicaid purposes because the grantor retains full control over the property, including the right to revoke the deed. Thus, the homestead maintains its status as exempt property for Medicaid eligibility.

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. *You May Want to Consult a Lawyer Before Using This Form.*

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

Printed name _____ Mailing address _____

Printed name _____ Mailing address _____

Legal description of the property:

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me.

Printed name _____ Mailing address, if available _____

ALTERNATE BENEFICIARY— *Optional*

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

Printed name _____ Mailing address, if available _____

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

Signature _____ [(SEAL)] Date _____

Signature _____ [(SEAL)] Date _____

Medicaid Estate Recovery After the Grantor's Death

Because the property subject to a TODD is not part of the probate estate, it may be unreachable for Medicaid recovery just like property transferred by LBDs. Note that federal law authorizes states to seek recovery from nonprobate assets such as TODDs, and thus protection is not guaranteed.

To Maintain Control Over the Property

The grantor of a TODD has complete control over the property during the grantor's life. The beneficiary has no interest of any type in the property, unlike an LBD where the beneficiary owns a remainder interest albeit subject to defeasement.

To Transfer Property at a Low Cost

Unlike LBDs, which are typically prepared by attorneys, TODDs are designed for lay individual use. Of course, preparation of a deed without legal assistance can lead to unanticipated consequences, and thus the low initial cost may be overshadowed by the legal fees associated with fixing the problems when a non-attorney prepares the TODD.

To Avoid Probate

As with LBDs, the transfer of property is complete upon the donor's death without any further action. Property owners in states with onerous probate systems may use TODDs to avoid the probate process due to concerns about delay, cost, or privacy.

For Creditor Protection

Because the beneficiary of a TODD has no interest, legal or equitable, in the property while the grantor is alive, there is nothing for the beneficiary's creditors to reach until the grantor dies.

To Give Beneficiary a Stepped-up Basis

Like an LBD, the grantor may revoke a TODD. Thus the grantor has not made a completed gift to the beneficiary. Accordingly, the full value of the property remains in the grantor's taxable estate and, just as with an LBD, the remainder beneficiary receives a stepped-up basis in the property.

To Maintain Exemptions

Because no immediate transfer occurs with a TODD, there is no impact on any homestead status, exemptions, or other benefits to which the property was entitled prior to the grantor's execution of a TODD.

Standardized Form

TODD statutes often provide a standardized statutory form that makes it easier to use this technique, which is often the cheapest and simplest solution to avoiding probate for many people. Although this also can have negative consequences, as discussed below, it also can help many more individuals purely because of ease of access.

Unlikely to Trigger Due/Transfer-on-Sale

Unlike an LBD, which transfers a remainder interest immediately upon execution, a TODD does not make a current transfer of an interest. Thus, it is highly unlikely that a TODD would trigger a due/transfer-on-sale provision in a mortgage or deed of trust. Likewise, the grantor of a TODD probably will not be required to comply with disclosure requirements, which normally would be imposed on a transfer of real property.

Potential Problems With TODDs

Unintended Consequences

Legislatures typically design TODDs for lay individual use. Thus, TODDs are fraught with the typical problems that may arise when a non-lawyer attempts to practice law. For instance, a layperson may unknowingly use a TODD when another estate planning technique would be more effective in carrying out intent.

The statutory forms often contain instructions explaining how the TODD operates, its effect, and the proper method of execution. Despite these instructions, lay individuals may not actually understand the ramifications of the TODD or how to execute and record the deed. Thus, preparation of a TODD without legal assistance may lead to unanticipated consequences.

In addition, even if used carefully as part of an attorney-prepared estate plan, problems may nonetheless arise. For example, assume that the grantor uses a TODD to transfer land to his son and daughter-in-law. Years later, they divorce, and the divorce is filed in the county in which the land is located. Under the law of many states, the daughter-in-law remains entitled to one-half of the land upon the grantor's death, unless the grantor remembered to revoke the TODD.

Title Insurance Problems

Title insurance underwriting guidelines still are being developed to deal with TODDs. Because a title company is under no obligation to insure a title, the company may refuse to insure a title, which is perfectly legally acceptable. For example, it has been reported that some title companies require the beneficiary under the grantor's will, who would receive the property but for the TODD, to execute a quitclaim deed to the property before the company will insure the title when the TODD beneficiary later wishes to sell the property.⁸ There is also uncertainty whether the beneficiary of a TODD will be covered by the grantor's title policy. "[W]hile a definite argument can be made that a TODD designated beneficiary should be covered by the [grantor's] title policy, a strict construction view would find that a designated beneficiary is not covered."⁹

Agent Prohibition

In some states, the grantor must personally create the TODD; an agent under a power of attorney may lack that ability. On the other hand, the LBD may be used by individuals otherwise unable to meet contractual or testamentary capacity if they have a durable power of attorney in place. This opens up the benefits of a non-probate deed to a wider range of individuals.

CONCLUSION

Both the LBD and the TODD typically are used by individuals who have only one major real property asset, normally, their home. Individuals with a low income or for whom traditional estate planning techniques would be an economic or practical burden may find these deeds attractive. As typical of many estate planning tools, both instruments may not be contemplated until later in life. However, these instruments may help people of all ages, including young professionals or recently married couples who have yet to acquire significant assets that would require further and more substantial estate planning. Determining which instrument is preferable should be decided on a case-by-case basis because a fact-specific analysis based on applicable state law is needed.

FOOTNOTES

1. Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law, Lubbock, Texas. Prof. Beyer holds a J.D. *summa cum laude* from the Ohio State University and LL.M. and J.S.D. degrees from the University of Illinois. Previously, Prof. Beyer served as a professor or visiting professor at Boston College, La Trobe University (Melbourne, Australia), Ohio State University, Southern Methodist University, St. Mary's University, University of New Mexico, and Santa Clara University. As a state and nationally recognized expert in estate planning and a frequent contributor to both scholarly and practice-oriented publications, Prof. Beyer was inducted into the National Association of Estate Planning Councils' *Estate Planning Hall of Fame* in November 2015. He is a member of the Order of the Coif, an Academic Fellow and Regent of the American College of Trust and Estate Counsel, and a member of the American Law Institute.

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2. Kary C. Frank, *Ladybird Deeds*, MICH. BAR J., June 2016 at 30, 30.

3. 51 MOLLY DEAR ABSHIRE, H. CLYDE FARRELL, PATRICIA FLORA SITCHLER, & WESLEY E. WRIGHT, TEXAS ELDER LAW (51 Tex. Prac.) §9-103 (2011-2012).

4. JEROME IRA SOLKOFF, WEST'S LEGAL FORMS: ELDER LAW §3:36 (3d ed. 2010).

5. 42 U.S.C. §1396p(b)(4).

6. Robert C. Anderson, *Comparing Key Strategies in Owning the Home: Estate Planning, Tax and Medicaid Considerations—Part Two*, 220 ELDER L. ADVISORY 1 (June 2009).

7. Pamela D. Orsak, *Save Me From Probate: Transfer on Death Deeds and Lady Bird Deeds*, STATE BAR OF TEXAS, 40TH ANNUAL ADVANCED ESTATE PLANNING & PROBATE COURSE, ch. 4, at 9 (hereafter "Orsak").

8. See Orsak at 7.

9. Orsak at 7.

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