



## LADY BIRD DEEDS

### Conveyances of a Different Feather

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#### I. What is a "Lady Bird" Deed?

A Lady Bird Deed is an enhanced life estate deed. Basically, it is a conveyance of real property with a reservation of a life estate by the grantor, including the power to sell, mortgage, lease, etc.

#### II. What is the difference between a typical or standard life estate deed and a Lady Bird Deed?

With a standard life estate deed, a beneficiary/grantee ("beneficiary") is named to inherit the property while the grantor retains rights as a life tenant of the property (e.g. A conveys Blackacre to B with a reservation for a life estate by A). "A", life tenant, would not be able to unilaterally sell, mortgage, lease or otherwise encumber the property. The beneficiary, owning the remainderman's interest in the property, would be required to join in any conveyance, mortgage or lease of the property with the life tenant. Life tenant cannot commit waste, therefore, remainderman must join with a life tenant in executing a lease.

The Lady Bird Deed is distinctive because the life estate reserved is coupled with the power to gift, mortgage, sell, lease or otherwise encumber or dispose of the property.

A Lady Bird Deed will specify that the real estate will remain in the grantor's name for so long as the grantor is living, and that during the time the grantor is living, the grantor will continue to enjoy unrestricted ownership, without liability for waste. If something remains of the property upon the grantor's death, the Lady Bird Deed allows the real estate to pass outside of probate to the beneficiaries names in the deed.

A Lady Bird Deed is the rough equivalent of a "payable on death" bank account.

#### III. Sample Language

- A. "The Grantor reserves a life estate for himself/herself during the Grantor's lifetime coupled with an unrestricted power to convey during the Grantor's lifetime, which includes the power to sell, gift, mortgage, lease and otherwise dispose of the property, and to retain the proceeds from the conveyance."

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- B. "Claudia T. Johnson, aka Lady Bird Johnson, a single woman, conveys and warrants Blackacre to herself, for her lifetime, coupled with an unrestricted power to convey the property during her lifetime, pursuant to Michigan Land Title Standard 9.3. This power to convey creates a general intervivos power of appointment, which includes the power to sell, gift, mortgage, and lease (or otherwise dispose of the property) and to retain the proceeds from any conveyance, lease or mortgage. If Claudia T. Johnson has not previously conveyed the property prior to her death, Claudia T. Johnson's entire interest in the property is conveyed to Luci Bains Johnson and Lynda Bird Johnson Robb, as joint tenants with rights of survivorship."
- C. Sample language provided by Jerome Ira Solkoff, the Florida attorney credited with drafting the first Lady Bird Deed in the country in 1982 and with causing these types of conveyances to be named "Lady Bird" Deeds. In his sample, he used a fictitious cast of characters: Lyndon and Lady Bird, his wife, and Lucy and Lynda, their adult daughters.

"Lyndon and Lady Bird, his wife, grantors, to Lyndon 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 and without joinder by the remaindermen, and to keep absolutely any and all proceeds derived therefrom. Further, the grantors reserve the right to change remaindermen at any time without consent of remaindermen. Upon death of the life tenants, title shall be in Lucy and Lynda, as joint tenants."

74 Fla. Prac., Elder Law §9.53 (2014-2015 ed.)

#### **IV. Basis in Law for Lady Bird Deeds**

- A. **No Statute.** There is currently no Michigan statute that specifically authorizes the use of Lady Bird Deeds. Case law has pointed to the Powers of Appointment Act (MCL 556.111, et seq.) as the basis for these types of deeds. Many other states have enacted transfer-on-death deed statutes, but none have yet passed in Michigan.
- B. **Title Standard.** Michigan Land Title Standard 9.3, titled "Life Estate with Power to Convey Fee," confirms that, in Michigan, a donee may transfer a fee interest in the subject property: "The holder of a life estate, coupled with an absolute power to dispose of the fee estate by intervivos conveyance, can convey a fee simple estate during the lifetime of the holder. If the power is not exercised, the gift over becomes effective."

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**C Case Law.** Michigan courts and tribunals have enforced Lady Bird Deeds, citing both Title Standard 9.3 and the Powers of Appointment Act.

Anderson v Township of Chocolay, unpublished, MTT No. 433005 (Dec. 18, 2013)  
(Hon. Paul V. McCord)

Bill & Dena Brown Trust v Garcia, 312 Mich App 684 (2015)

In re Tobias Estates, 2012 WL 1648847 (unreported Michigan Court of Appeals case)

## **V. Why are Lady Bird Deeds popular?**

1. Husband and wife grantors retain tenancy by entireties protection.
2. Avoids probate
3. No need to change house insurance (as compared to trust)
4. Not deemed a transfer for gift tax purposes because the transfer is not considered complete until the death of the grantor. Therefore, it is not a lifetime gift and not subject to gift taxes.
5. Property does not lose step up in basis under IRC 1014 and 2036(a). Basically, the remaindermen can sell the property on the death of the grantor and not pay any capital gains tax.
6. No transfer taxes
7. Grantors keep control during life and can transfer lease, mortgage, etc. WITHOUT THE CONSENT OF REMAINDERMEN.
8. No exposure to future beneficiaries' creditors during life of grantor (maybe).
9. Remaindermen cannot sell or encumber the property during grantors' lifetime.
10. Medicaid estate recovery is limited to recovering assets passing through the probate estate. MCL 400.112h(a).

## **VI. Problems**

1. Minor remaindermen (need conservatorship established)
2. If the grantors are spouses, does the survivor of them retain control to sell, mortgage or convey after death of the first? Where a blended family exists, the one to die first probably would not want the survivor to be able to make changes. Must consider language of the deed.
3. What happens if the remainderman named in the Lady Bird Deed dies before the grantor? At least one attorney says that if the grantor does nothing and does not name a new contingent beneficiary, then the property will pass according to the grantor's Last Will & Testament!
4. What if the Lady Bird Deed is signed by an attorney-in-fact and is in favor of the attorney-in-fact?

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5. No statutory language to guide drafters. Language used may be vague. Best if deed specifically states the grantor may convey "without joinder by the remaindermen."
6. If grantor is a man, there presumably will need to be proof recorded after death to establish that he did not marry or remarry after the deed was granted (to establish that there are no dower rights attached to the property).
7. Uniform Fraudulent Transfer Act (UFTA). There is conflict among various probate courts across the state as to whether real property transferred via a Lady Bird Deed is subject to UFTA. Judge Milton Mack—well-respected Chief Judge of Wayne County Probate Court for nearly 25 years—opined that UFTA does not apply to Lady Bird Deeds but no appellate decision yet on the issue. The concern is that these types of deeds may be set aside as fraudulent to avoid estate recovery under Medicaid rules and regulations.
8. Remaindermen take the property subject to prior liens and encumbrances.

## **VII. With Lady Bird Deeds, don't put all your eggs in one basket!**

Lady Bird Deeds constitute an area of the law where the issues and case law are still emerging in Michigan. It is, therefore, prudent to secure ratifications from the remaindermen of any oil and gas lease granted by the grantor(s) of a Lady Bird Deed.

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