

“I’m Sorry About Your Deed, but Don’t Call Me Worthless”

Lady Bird Deeds

I’ve received a number of questions recently about Lady Bird Deeds and under what circumstances they are insurable. My Real Property professor in law school, the great Jim McLaughlin, had a very succinct and direct way of describing his thoughts on Lady Bird Deeds that I still have written down in my class notes all these years later. Unfortunately, those words aren’t appropriate for publishing here in the hallowed pages of The Beacon, so I’ll do my best to summarize in a different manner: for MOST of my underwriters, we can’t insure an attempt by the life tenant to transfer or encumber the property without the signature of the remaindermen during the life tenancy period.

The explanation is a little more involved. First, let’s answer the question of exactly what a Lady Bird Deed is and what does it supposedly do? Lady Bird (aka “enhanced life estate”) deeds are designed as a legal tool to allow property to pass automatically outside of someone’s estate and keep creditors away from the property – especially creditors of the final expenses of the elderly (such as hospital costs, hospice care, nursing homes, Medicaid, etc.) To accomplish this, the owner grants themselves a life estate in their property with a remainder to their heirs but reserves for themselves a special power of appointment/property interest whereby they can convey the fee title to the property during their lifetime without the joinder of the remaindermen. Essentially, it gives the Grantor in question the best of both worlds: Because the life tenant does not make a full “transfer” of the property (at least by the definition used by Medicaid), their creditors cannot attach to the property and it also simultaneously allows them to retain the ability to sell, commit waste, mortgage, lease, and otherwise dispose of the property without the consent of the remaindermen. It’s cheaper and, if it works the way it is intended, it allows the life tenant to keep control over the property during their lifetime and have it just automatically pass to the designated beneficiaries once they die without passing through their estate and potentially being subject to the liens of creditors – especially Medicaid. They are popular in other states where they are legal by statute (FL and TX off the top of my head), and can be significantly cheaper than a managed trust or other similar Medicaid asset protection methods.

Are they legal? The members of the estate planning section of the NC Bar will likely tell you yes. I think it is more proper to say that they are “not illegal” or that it has not yet been decided. There is no explicit statutory recognition in NC for Lady Bird deeds and a recent attempt to get them codified never went anywhere. A broad reading of the Uniform

Power of Appointment Act and a patchwork of older case law have been cited to me before as the basis for them; I think that's shaky at best, and since there's nothing you can do retroactively once you insure a Lady Bird deed if the law (or interpretation of it) changes later, not many underwriters are looking to get stuck with them solely on the basis that no one has yet said they are illegal.

What exactly are the pitfalls that worry title companies? For starters, there is the general real property principle that one can only convey such interest in the land as they own at the time of conveyance. If the life tenant has reserved for themselves a life estate, how can they convey fee title to the property? Furthermore, I've also read that the protection from Medicaid liens supposedly created by the enhanced life estate may not be as ironclad as originally proposed and is subject to broad interpretation/change in the future. The lack of a statutory basis for the "enhanced life estate" and case law regarding treatment of all potential creditors and the rights of the remaindermen under such a scheme gives our underwriters no comfort that we are not signing ourselves up for future claims. No one is jumping to be a part of litigation on an untested issue where a family member is cut out from their inheritance when granny decided to sell her property at the last minute without telling them, and then all that money was taken by her estate, the nursing home or Medicaid.

So, if you come across a Lady Bird Deed, unfortunately the answer you're going to get from me and the majority of title companies in NC is that we cannot insure a conveyance or attempt to encumber the property without the joinder of those remaindermen. I know that puts many of you in the position of dealing with an unhappy estate attorney who made promises to their client, so if you need help explaining to them or need title counsel to jump on a call I'm happy to do so.

Brad Surles, President & Council

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