

The Lady Bird Deed- Has the Remainderman Interest Nested or Vested? A Discussion on Lady Bird Deeds in the Carolinas

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In preparation for the end of life many people ask the question: how can my family avoid probate and liens against my property when I die? A quick internet search may prompt a client to ask about lady bird deeds. A lady bird deed (often called an “enhanced life estate deed”) is a type of life estate deed that purports to allow the grantor to maintain complete control of the property.¹ A lady bird deed transfers the property to remaindermen outside of the deceased life tenant’s probate estate.²

Attorneys are faced with two conflicting views when considering lady bird deeds: one through the lens of estate planning, and one through the lens of real estate title. While not all attorneys who regularly practice in estates are versed in real property title issues, and vice versa, it is imperative that we consider the broad consequences of our legal advice. A practitioner may recommend a lady bird deed to accomplish certain estate planning goals, but must also be wary of creating other practical or substantive real estate problems. This article will discuss some of the real estate concerns posed by lady bird deeds – including the paucity of modern law governing ladybird deeds in the Carolinas, and insurability of a ladybird deed in the chain of title.

I. Recognizing a Lady Bird Deed

A lady bird deed contains enhancement language explicitly reserving all rights of ownership to the grantor or life tenant, until their death, at which time a fee interest is conveyed to the remainderman grantee.³ The enhancement typically states:

Grantor reserves unto himself, for and during his lifetime, exclusive possession, use, and enjoyment, right to income of the property, and Grantor further reserves the right to sell, lease, encumber by mortgage or deed of trust, pledge, lien or otherwise maintain and dispose of, in whole or in part, or grant any interest thereon, of the property by gift, sale, or otherwise, without consent or joinder of the Grantee, which may terminate the interest of Grantee. Grantee shall be a remainderman in the property described herein and upon the death of Grantor, if the property described herein has not been previously disposed of prior to the death of Grantor, all right and title to the property, then remaining, shall fully vest in Grantee as fee simple subject to such liens and encumbrances which may exist at the time of Grantor’s death.

This enhancement purports to allow the life tenant full control of the property, including the ability to sell, mortgage, and to retain any proceeds from the sale of the property. The remaindermen’s interests are revocable, and the life tenant has no obligation to maintain the property for the remaindermen. This language also evidences the intention for the remaindermen’s interests to vest after the life tenant’s death. It is as if the grantor maintains a *fee interest* for life. This may be an effective reservation of power in other states,⁴ but in the Carolinas it creates a nest⁵ of remaindermen whose rights must be accounted for in a real estate closing.

II. History and Use of Lady Bird Deeds

Life estate deeds can effectively pass title to the remaindermen outside of probate, but for the life tenant's life they are left with little control over their property.⁶ For example, if they want to make upfits to the real property, refinance or sell, they cannot do so without the remainderman's consent. Perhaps this is why a Florida attorney in the 1980s sought an alternative.

Jerome Ira Solkoff, a Florida attorney, created the lady bird deed.⁷ The name "lady bird" comes from the First Lady, Claudia Alta "Lady Bird" Johnson. Although the historical accuracy is questionable, it is generally believed to be named as such because, anecdotally, President Lyndon B. Johnson went to great lengths to avoid probate transfers of his assets to his wife.⁸ Additionally, Medicaid was implemented during the Johnson Administration so the name possibly has some historical reference to its effect for avoiding Medicaid liens.⁹

Navigating the best estate plan for our clients requires us to ask questions about their family relationships, financial security, and long-term plans. A triggering word for asset and estate planning is "Medicaid." Chances are that if you practice in real estate or estates, you will meet a client that is planning for the end of life with the probability of needing Medicaid benefits. Lady bird deeds are used in other states to avoid probate and the consequences of Medicaid-funded long-term care.¹⁰ Medicaid application requirements and Medicaid expenditure liens should be considered when giving legal advice.

There is a timeframe in which an applicant for Medicaid benefits will have financial records reviewed to determine eligibility for care; this is called the Five-Year Lookback¹¹. In that timeframe, any gift transfer of assets (including real property) is subject to the penalty.¹² The penalty could mean that a person in need of care is delayed in receiving Medicaid benefits. Additionally, Medicaid has the authority to seek recovery of payments made for an individual's care, including liens that will be paid after the person dies.¹³ A lady bird deed may accomplish the desired effect of avoiding these concerns with Medicaid.¹⁴ While a primary residence is generally exempt from a Medicaid recipient's asset limits, it is not exempt from the Estate Recovery Program which allows Medicaid agents to seek reimbursement from a decedent's estate.¹⁵ Clients must be advised that while a lady bird deed may avoid Medicaid liens or ineligibility for Medicaid long term care, the unintended consequence may be marketability issues with the real property in the Carolinas.

III. Marketable Title – Practical and Substantive Concerns

Marketable title deals with the buyer's ability to sell the property in the future at fair market value.¹⁶ Title insurance companies never insure marketability of the property.¹⁷ Insurable title deals with the risk a title company is willing to take in the event a person asserts a title claim.¹⁸ It is in the title insurance company's sole discretion to provide insurance for title issues or, alternatively, to make them an exception to a policy.¹⁹ To ascertain the risk, the title insurance company will look to the contract structure and the legal authority in the state.

In a real estate transaction, the standard contracts used in the Carolinas warrant that the seller conveys marketable and insurable title. Title insurance companies in both states require *all*

remaindermen in a life estate to sign for any sale or mortgage. Additionally, because of North Carolina's recognition of marital interests, spouses of the grantor and all remaindermen must also sign to obtain title insurance in that state. This condition presents a few complications with ladybird deeds - both practical and substantive.

From a practical perspective, no well-intentioned estate planning attorney envisions tracking down remaindermen (and their spouses in NC) for a simple real estate conveyance or loan. After all, the practical implications are contrary to the language of the deed. Substantively, if an interested party refuses to sign, the enhancement has the effect of freezing the property for the life tenant. The threat of a disgruntled remainderman is not remote or hypothetical: remaindermen, after all, have a natural conflict with disposition of the property as they would benefit from its preservation. Thus, a ladybird deed is a cloud on marketable title despite the well-intentioned estate plan.

IV. South Carolina Legal Authority

If you were to search "lady bird deed" in SC case law and statutes, you would find no reference to it.²⁰ However, case law does discuss enhanced life estates created by a last will and testament where the enhancement is referred to as the power of disposition.²¹ The enhancement effect is that the life tenant is not required to preserve the property for the remaindermen and therefore the remaindermen only receive what is left, if anything, after the life tenant dies.

In the early 2000s, the issue came before the SC appellate court to discuss whether a life tenant has the ability to dispose of property without the joinder of remaindermen when a will includes the power to do so.²² The decedent, J.B., owned property called "White Plains" that had been purchased by J.B.'s grandfather in 1937.²³ White Plains was where J.B. grew up and by all accounts he had "great fondness for the property."²⁴ When J.B. died he included in his last will and testament the following provisions:

"Second: I give, devise and bequeath all of my property whether real, personal or mixed, whatsoever and wheresoever situate, whether now owned by me or to me or hereafter acquired by me, to my wife, Lana Odom Blackmon for and during her natural life or until such time as she no longer desires the property.

*Sixth: That if the desire of my wife to sell any or all of my property and assets then my wife, Mary B. Heath, J.B. Blackmon, III and Jennifer B. Weaver, shall share equally in the sale of such assets or proceeds from the sale of such assets.*²⁵

After his death some family tension between his children and his spouse, Lana, was apparent.²⁶ Lana wished to dispose of property, and his children wished to remove her as personal representative of his estate.²⁷ The trial court determined that Lana was not able to sell the property because she was not a fee simple owner.²⁸ She requested the appellate court find she had a life estate with the rights of disposition which would have allowed her to sell the assets of the estate without the children's permission.²⁹

The court opined that "there is no special language required for the creation of a life estate; courts will look to the intention of the creator of the estate."³⁰ The court discussed whether J.B.

intended to allow Lana to dispose of his valuable and beloved property instead of preserving it for his children.³¹ Ultimately, Lana was given authority to dispose of property by the language: “*until such time as she no longer desires the property...*” and “*if the desire of my wife to sell any or all of my property and assets then...*”³² thereby creating a life estate with the power of disposition. The majority opinion held specifically, “to hold, in the face of this language, that Lana was not given the right to dispose of the property would require us to completely ignore this provision as it is written.”³³ SC law has therefore recognized here that if the testator so intends, an enhanced life estate may be created.³⁴

Similarly, in the case *Johnson v. Waldrop*, the court was asked to construe the decedent’s last will and testament for a life estate with a power of disposition. The decedent, E.P. Waldrop, ’s will included the following:

*“I give and bequeath and devise to my wife, Leona J. Waldrop, in complete perfect ownership, all my rights and property of every nature, whether real, personal or mixed, wherever situated, appointing her executrix without bond. Upon the death of my wife it is to be divided equally between my sister Mrs. Mamie Waldrop Waldrop and my brother Ernest L. Waldrop.” (emphasis added)*³⁵

The court determined the decedent’s wife had the power to sell or consume the estate assets with whatever remained to go to the decedent’s sisters, if any remainder assets exists, because of the phrase “*in complete perfect ownership*”.³⁶ The court opined that there was a fee simple interest to his wife, and that the testator’s intent was clear- his brother and sister would be entitled to assets that the wife did not use.³⁷ This case highlights the fundamental effect of the power of disposition – that there may be no assets left to the remaindermen at all.

These cases may give some justification for a lady bird deed, but the facts are distinguishable because in both cases the enhancement was created by a will, and the life tenant was the grantor, not the surviving spouse. Perhaps a court would determine a different outcome if the grantor reserved the life estate for himself instead of a surviving spouse or if the conveyance was an inter vivos transfer of title. Since there is a limited measure of the authority to use a life estate enhancement, whether a court will accept a lady bird deed remains an unanswered question.

V. North Carolina Legal Authority

As in South Carolina, you would not find the term, “lady bird deed”, in NC law. However, NC has authorized the ability to dispose of property for a life estate as it applies to testamentary grants and *inter vivos* conveyances. There has been no determination that a lady bird deed is a valid instrument to convey title, and certainly no specific authorization for this type of deed.³⁸

In 2015, NC adopted the Uniform Powers of Appointment Act.³⁹ Power of appointment and power of disposition are synonymous, but the Act defines power of appointment as “power that enables a power holder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property.”⁴⁰ Essentially a person may be able to use or dispose of property if the instrument specifically states the power

to do so. This assertion is supported by the existing case law and accordingly, it is generally recognized in NC that lady bird deeds are valid transfers of title. However, title insurance companies proceed with caution as to insuring the enhancement.

The courts have most commonly and recently analyzed the effect of the power of appointment in a will instead of a deed.⁴¹ The enhancement's validity in a will is not dispositive of the enhancement's validity in a deed transfer, although it may offer insight to a Court's proper interpretation if the question arose. Since there is no statutory or case law authorization for this power to be effectuated by a deed, it leaves NC title attorneys speculating the effects of the transfer.

VI. Title Insurance Company Requirements

We have found that title insurance companies will insure the transfer of title, but they will not insure the enhancement. Therefore, attorneys should be aware the life tenant is not the only required signor for a sale or mortgage.

There is some concern as to how to approach a lady bird deed when any of the following occur: (1) either the remaindermen or the life tenant have judgments; (2) a remainderman has died before the life tenant; or (3) the remainderman seeks rights of entry or partition. It would be a serious consequence if the remainderman refuses to cooperate when the life tenant wishes to sell or mortgage the property to obtain funds for their own support and maintenance. As the courts have not determined a clear legal avenue, we expect a title company would treat these scenarios as if the deed were a life estate without the enhancement. It would certainly be an interesting case should these issues ever arise.

VII. Lady Bird Deeds in Practice

Unfortunately, the full legal status of a lady bird deed in the Carolinas is undetermined until a court or legislature creates law because there is a lack of statutory or modern case law, and any direct legal authority over the lady bird deed form. As such, it is imperative that attorneys are forthcoming with their clients about the potential difficulties in using this type of deed. "As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications."⁴² If a client believes that they can sell or mortgage their property without the joinder of their remaindermen, that could present issues for them later.

Closing attorneys that encounter a lady bird deed should seek cooperation from a title insurance company to determine their procedures. Even if the deed is deemed insurable, the buyer must be advised that the safest course of action is to have all interested parties execute the deed. While the remaindermen may be reluctant to sign in a transaction which they feel they do not have an interest in, it is the only way to surely dispose of their vested or future interest. It is unlikely that a court would make a lady bird deed an entirely void transfer based on the precedent for a power of disposition. In fact, it would be unjust and improper for a court to do so. However, it may be more prudent to use other well-established estate planning tools, given the uncertainty in the law.

¹ See Lady Bird Deed, Black's Law Dictionary 522 (11th ed. 2019).

² See McIntyre, Greg, *Saving the Farm: A Practical Guide to the legal maze of aging in America* (2016) Page 113.

³ See *Id.* at 112.

⁴ Currently, Florida, Michigan, Texas, Vermont, and West Virginia allow lady bird deeds. See [Florida is One of 5 States that Allow a Lady Bird Deed, July 19, 2021, https://www.korshaklaw.com/blog/2021/07/florida-is-one-of-5-states-that-allow-a-lady-bird-deed/](https://www.korshaklaw.com/blog/2021/07/florida-is-one-of-5-states-that-allow-a-lady-bird-deed/).

⁵ Relying on the dictionary definition of nest- “a place filled with or frequented by undesirable people or things.” Nest definition, encyclopedia.com, <https://www.encyclopedia.com/plants-and-animals/zoology-and-veterinary-medicine/zoology-general/nest> (last visited April 20, 2023).

⁶ See McIntyre, *supra*, at 111.

⁷ See Gilbert, Randy, *Giving the Bird, The Lady Bird Deed*, FTIC (June 1, 2021), <https://ftic.net/2021/06/01/giving-the-bird-lady-bird-deeds/?fbclid=IwAR3bQ3qd9IRqB4M0Hxn0DB7XXXzhnRy8FjL8jrl2fr14lZwyOQ-nUGolCoo>. citing 14 Fla. Prac., Elder Law § 9:53 “Lady Bird” life estate deeds—Life estate deed to convey future title to heirs (2020-2021 ed.).

⁸ See Gerry W. Beyer & Kerri M. Griffin, *Lady Bird Deeds: A Primer for the Texas Practitioner, Estate Planning Developments For Texas Professionals*, (Jan. 2011).

⁹ Authorized by Title XIX of the Social Security Act, Medicaid was signed into law in 1965. 42 USCS, Ch. 7, XIX USCS.

¹⁰ See McIntyre, *supra*, at 112-113.

¹¹ See *Id.* at 115.

¹² See *Id.*

¹³ See *Medicaid Liens*, ASPE: Office of the Assistant Secretary for Planning and Evaluation, March 31, 2005, <https://aspe.hhs.gov/reports/medicaid-liens-0> (last visited May 8, 2023).

¹⁴ See generally, McIntyre, *supra*, at 112-113.

¹⁵ See *Medicaid Liens*, ASPE: Office of the Assistant Secretary for Planning and Evaluation, March 31, 2005, <https://aspe.hhs.gov/reports/medicaid-liens-0> (last visited May 8, 2023).

¹⁶ See generally Claire T. Manning, *Handbook for South Carolina Dirt Lawyers*, 33-35 (2006).

¹⁷ See *Id.*

¹⁸ See *Id.*

¹⁹ See *Id.*

²⁰ See generally *Lady Bird Deed*, King L. Blog <https://kinglawoffices.com/blog/elder-law/lady-bird-deed/> (last visited April 20, 2023).

²¹ See *Hamrick v. Marion*, 176 S.C. 361, 366 (S.C. 1935).

²² See *Blackmon v. Weaver*, 621 S.E.2d 42, 366 S.C. 245, 245 (S.C. 2005).

²³ See *Id.* at 255.

²⁴ See *Id.*

²⁵ See *Id.* at 248.

²⁶ See *Id.* at 250.

²⁷ See *Id.* at 255.

²⁸ See *Id.* at 250.

²⁹ Among issues of the removal of the personal representative, the question before the court was whether the wife could sell without the permission of the remaindermen, even if she is required to distribute half of the proceeds to the children. See *Id.*

³⁰ *Id.* at 249.

³¹ See *Id.* at 250.

³² *Id.* at 248.

³³ *Id.* at 250.

³⁴ The minority opinion disagreed stating that it was a misapplication of the intent of the testator to allow her to sell White Plains because it was clearly intended that she could live there for her life, and then if she chose to give it up, then it would go to the children. *Id.* at 255.

³⁵ *Johnson v. Waldrop*, 256 S.C. 372, 372 (1971).

³⁶ *Id.* at 374.

³⁷ See *Id.* at 376.

³⁸ See generally Chris Burti, *Reserved Powers of Appointment*, Newsletter and Legal Memorandum Issue (April 1, 2016), <https://www.statewidetitle.com/newsletterarticle.asp?Article=367>. “There does not appear to be clear modern authority addressing the validity of these instruments.” *Id.*

³⁹ The North Carolina Uniform Powers of Appointment Act § 31D-2-201 states that the power of appointment is created when (1) the instrument is valid and (2) the terms of the instrument creating the power manifest the donor's intent to create in a power holder a power of appointment over the appointive property exercisable in favor of a permissible appointee. N.C. Gen. Stat. § 31D-2-201.

⁴⁰ N.C. Gen. Stat. § 31D-1-102.

⁴¹ See generally Chris Burti, *Reserved Powers of Appointment*, Newsletter and Legal Memorandum Issue (April 1, 2016), <https://www.statewidetitle.com/newsletterarticle.asp?Article=367>.

⁴² Preamble, RPC, Rule 407, SCARC.

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