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Do you need a Lady Bird Deed or a Transfer on Death Deed? Imagine this scenario: An individual, who we will call “Sally,” is someone who travels by plane consistently for work. Sally has an 18-year-old son named Drew, whom she lives with in the Texas home that she owns. As the plane begins to rise into the clouds, BANG! Sally feels an enormous gust of icy wind and hears the screams of her fellow passengers. Sally wonders if she’ll survive this without getting injured. “Drew needs his mother,” she whispers. The plane rapidly descends without further incident and makes an emergency landing back at the airport. Sally is lucky this time. Drew had never lived alone for more than a few days at a time, and Sally wonders if there is any way she can make sure that Drew wouldn’t be homeless if Sally were to pass away. A deed, in general, is a form that allows you to transfer any interest in a home or land that you own to another individual or individuals. A deed can transfer land and/or houses, which is legally called “real property,” in a variety of different ways. When a Texas homeowner dies, their real estate is subject to the probate process in order to transfer title. What many people don’t realize, however, is that real estate can avoid probate with proper planning. The three best ways to accomplish avoiding probate for real property are: (1) Transfer property into a Trust; (2) Transfer on Death Deed; and (3) Lady Bird Deed. Today, we’re discussing the Lady Bird Deed and the Transfer on Death Deed. These types of deeds are used to transfer real property at the death of the real property owner as a tool to avoid the need for probate. Probate is the court process of getting a deceased person’s property to that person’s heirs or beneficiaries. Just as with other estate planning documents, these should be done while your mind and body are in good health, before you become incapacitated and before you pass away. A Lady Bird Deed is a document allowing a property owner to transfer the property owner’s interest in land or houses to one or more beneficiaries upon the property owner’s death. The Texas Transfer on Death Deed Act states that only the homeowner can sign a Transfer on Death Deed, whereas no such restrictions exist for a Lady Bird Deed. Therefore, if the homeowner lacks the capacity to enter into a contract, an agent under a durable power of attorney cannot execute a Transfer on Death Deed. However, an agent under a durable power of attorney will be able to execute a Lady Bird Deed if the durable power of attorney permits the agent to execute such deeds. —See Capacity to Create or Revoke a Transfer on Death Deed – Tex. Estates Code § 114.054 A Transfer on Death Deed is a document which a real property owner may use to transfer the current property owner’s interest in land or houses to one or more beneficiaries. Practically speaking, if the property owner lives in several different houses over their lifetime, then they must execute a new Transfer on Death Deed for each house you own since only current property owners can reap the benefit of Transfer on Death Deeds. This transfer of property is effective at the property owner’s death. —See Definition of Transfer on Death Deed – Tex. Estates Code § 114.051 Transfer on Death Deeds can be created only by the property owner if the property owner is still alive and has the capacity to enter into a contract. Similarly, Transfer on Death Deeds can be revoked, or undone, by the property owner if the property owner is still alive and has the capacity to enter into a contract. An individual has the capacity to enter into a contract if the individual has an ability to understand the nature and effect of the act and the business being performed. The property owner cannot have their designated agent under their power of attorney create or undo a Transfer on Death Deed on the property owner’s behalf. —See Capacity to Create or Revoke a Transfer on Death Deed – Tex. Estates Code § 114.054 To be effective, a transfer on death deed must contain the components of a recordable deed. What this means is that the deed document must describe in writing the name and address of the property owner, the name and address of person or trust receiving the property, which is legally referred to as the “designated beneficiary,” contain the property’s correct legal description, and either be notarized by a notary public or signed by two disinterested witnesses who are over the age of eighteen. —See Instruments Concerning Property – Tex. Property Code § 12.001 In addition to the necessary information described above, a Transfer on Death Deed must state that the transfer of ownership of the real property to the designated beneficiary is to occur at the current property owner’s death. —See Requirements of a Transfer on Death Deed – Tex. Estates Code § 114.055 A Lady Bird Deed does not have to be recorded to be effective; whereas a Transfer on Death Deed must be filed before the current property owner’s death in the deed records of the county where the real property is located. —See Requirements of a Transfer on Death Deed – Tex. Estates Code § 114.055 The designated beneficiary of a Transfer on Death Deed must outlive the current property owner by at least 120 hours. A Lady Bird Deed, on the other hand, does not have a requirement that the designated beneficiary outlive the current property owner by a certain number of hours. This means that, under a Lady Bird Deed, the beneficiary could potentially outlive the current property owner by only mere seconds, but still receive ownership of the real property. – See Effect of Transfer on Death Deed on Transferor’s Death – Tex. Estates Code § 114.103 A Transfer on Death Deed permits a current property owner to name a different beneficiary, known as the alternate beneficiary, who will get ownership of the property if the main beneficiary dies before the current property owner dies. If a Transfer on Death Deed conditions the right of an alternate beneficiary to take ownership of the real property on the alternate beneficiary surviving another person, the beneficiary must survive the other person by 120 hours. A Lady Bird Deed, on the other hand, does not allow the current property owner to designate alternate beneficiaries to take ownership of the property if the primary beneficiary predeceases the current property owner. – See Effect of Transfer on Death Deed on Transferor’s Death – Tex. Estates Code § 114.103; see also Disposition of Property to Certain Devisees Who Predecease Testator – Tex. Estates Code § 255.153 If the current property owner first executes a Lady Bird Deed and then later decides to sell the real property they currently own while the property owner is still alive, title companies have been known to require the designated beneficiary to also sign off on the sale. This requirement can be a hassle for property owners and stems from the fact that Lady Bird Deeds come with warranty of title, which warrants the title of the owner and possibly prior owners. Warranty of title allows the designated beneficiary to sue the current property owner’s estate if the property title has an issue. Alternatively, Transfer on Death Deeds do not have warranty of title, which means that if the current property owner decides to sell the real property in their lifetime, the title company will not require the signatures or consent of the designated beneficiary to effectuate the sale of the property. Always start by speaking to your Estate Planning attorney. Ask them any questions you may have and let them know you want to avoid probate. Your Estate Planning attorney can customize a deed to meet your individual needs. More importantly, your Estate Planning attorney can help you prevent potentially expensive or even harmful errors in filling out these vitally important documents. Knowing that you are protected if the unthinkable happens is the peace of mind you and your loved ones deserve. – Authored by Amanda E. Carter, Esq. Matthew Harris Law, PLLC – Estate Management Division 1101 Broadway, Lubbock, Texas, 79401 Tel: (806) 702-4852 | Fax: (800) 985-9479 FrontDesk@MatthewHarrisLaw.com Both Lady Bird Deeds and Texas Transfer on Death Deeds allow property owners to transfer real estate to heirs without the need for probate. While they share many similarities, they also have important differences. This article will help you understand the similarities, differences, and which deed is best suited for your needs. Below I will discuss: A Texas Transfer on Death Deed is a legal document that allows property owners to transfer real estate directly to designated beneficiaries upon their death, without the need for probate. The deed allows the property owner to retain full control during their lifetime and does not become effective until after their death. To be valid, the deed must be signed, notarized, and recorded before the owner’s death. A Lady Bird Deed, also known as an enhanced life estate deed, is a deed created under common law that allows property owners to transfer real estate outside of probate while retaining full control during their lifetime. The property owner can sell, mortgage, or modify the deed without the consent of the beneficiaries. Both Lady Bird Deeds and Transfer on Death Deeds offer key benefits for estate planning in Texas. These include: Avoiding Probate: Both deeds allow real estate to pass directly to heirs without going through the probate process. No Impact on Gift Taxes: Neither deed counts as a gift for federal gift tax purposes. Homestead Rights Protection: Both deeds preserve homestead rights and tax exemptions during the owner’s lifetime. Flexibility: Both deeds allow the transferor to change beneficiaries at any time. Asset Protection: Both deeds protect property from creditors of the beneficiaries during the owner’s lifetime. Medicaid Eligibility: Both allow the property owner to maintain Medicaid eligibility, which is crucial for many seniors. Step-Up in Basis: Both provide a step-up in the property’s tax basis upon the owner’s death, reducing potential capital gains taxes for heirs. Medicaid Estate Recovery Protection: Both prevent Medicaid estate recovery after the owner’s death. Despite their similarities, Lady Bird Deeds and TOD Deeds differ in several significant ways: Texas recognizes that the use of Transfer on Death Deeds can affect the ability of a decedent’s creditors to recover a deceased person’s debt. Therefore, Section 114.106 of the statute allows the personal representative or creditor of the estate to claw back a piece of property that the homeowner transferred by transfer on death deed back into the estate if the homeowner’s estate is not sufficient to the pay the debts of the estate, related taxes, or allowances to the homeowner’s family. As a result, title companies may hesitate to insure clear title for two years until the claims period expires, or until they receive assurances that the deceased homeowner’s debts have been paid. Ladybird deeds allow homeowners to transfer their interest in the property with warranties, whereas the Texas Transfer on Death Deed statute specifically states that the interest in the property transfers without covenant of warranty of title, even if the deed contains a contrary provision. Therefore, it is not certain whether the grantor’s title policy will cover the beneficiary of a Transfer on Death Deed. The Texas Transfer on Death Deed statute states that only the homeowner can sign a Transfer on Death Deed, whereas no such restrictions exist for a Lady Bird Deed. Therefore, if the homeowner lacks capacity, an agent under a power of attorney cannot execute a Transfer on Death Deed. However, an agent under a power of attorney will be able to execute a Lady Bird Deed if the power of attorney so authorizes. In Texas, most deeds do not need to be recorded to be valid. The grantor only needs to execute the deed and deliver it to the grantee. However, there are several benefits of recording the deed. Doing so provides public notice of the property transfer. This can help avoid disputes and ensure that all relevant parties recognize the transfer. A title company recently refused to accept the validity of a deed my deceased client signed transferring his interest in his home to his trust, arguing that the fact that my client did not record the deed before he died suggested that he may have intended to revoke it. For a Texas Transfer on Death Deed to be valid, the grantor must record it in the property records of the county where the property is located. If the grantor does not record the deed before the Grantor dies, it is as though it does not exist, even if the grantor signed it and delivered it to the Grantee. If there is a possibility that the Grantor will not be able to record the deed before their death, the Ladybird Deed is a better option. Choosing between a Lady Bird Deed and a Transfer on Death Deed depends on your specific circumstances. A Transfer on Death Deed is a great option for most homeowners who want to transfer property outside of probate. However, if the homeowner lacks capacity, there is a concern about future title problems, or a desire to sell the property within the two-year claims period, a Lady Bird Deed may be the better option. While a Lady Bird Deed or a Transfer on Death Deed can effectively transfer real estate without probate, they do not replace the need for a comprehensive estate plan. A valid Texas Will or trust is still essential for several reasons: Covers All Assets: These deeds only transfer real estate. If you have bank accounts, investments, personal property, or other assets, they still require proper estate planning. Provides Backup Protection: If a named beneficiary predeceases you or cannot inherit, a will ensures assets pass according to your wishes. Handles Debts and Expenses: A will provides for the payment of debts, taxes, and administrative costs, which deeds alone cannot address. Appoints Guardians and Executors: If you have minor children, a will allows you to appoint guardians. It also designates an executor to manage your estate. Avoids Unintended Consequences: Without a will, Texas intestacy laws determine asset distribution, which may not align with your wishes. For those with complex estates, blended families, or privacy concerns, a revocable living trust can provide added benefits by allowing you to manage and distribute assets without probate while maintaining control during your lifetime. One thing to watch is whether courts will impose rules that apply to the Transfer of Death Deeds on Lady Bird Deeds. According to legal precedent, if a statute revises the common law, the statute controls. However, the Transfer on Death Deed statute specifically provides that “the statute does not affect any method of transferring real property otherwise permitted under the laws of the state.” So a question remains about whether courts will interpret Lady Bird Deeds as a “method of transferring real property otherwise permitted under the laws” of Texas. If so, the Transfer on Death Deed statute would not control them. If not, then courts may impose the rules that apply to Transfer on Death Deeds on Lady Bird Deeds. For example, the Transfer on Death Deed statute permits allows the personal representative or creditor of the estate to claw a piece of property transferred by Deed, whereas no such rules applies to Lady Bird Deeds. However, I recently learned of a district court case in which a court ruled that a Lady Bird Deed was subject to the claw back provision of the Transfer on Death Deed Statute. There is no appellate court opinion related to this case because the case settled before the appellate court issued a decision. If you are considering incorporating Lady Bird Deeds or Transfer on Death Deeds into your estate plan, consulting with an experienced Texas estate planning attorney can provide valuable guidance, including assistance with Lady Bird Deeds, Transfer on Death Deeds, and other legal matters. This article was published on July 30, 2023, and updated on January 30, 2025. We strive to create a future where our children thrive beyond what we ever had. With this in mind, many parents planning for the future ask us: "What's the simplest way to transfer my home to my children without going through probate?" As board-certified experts in Residential Real Estate Law with a focus on our clients’ estate planning needs, our job is to help you make decisions on how to pass on your home to your children after your death. Two options we frequently discuss are Lady Bird deeds and Transfer-on-Death deeds. While both accomplish similar goals, they work quite differently under Texas law. Let's break down what you need to know about these important estate planning tools.What Is a Texas Transfer-on-Death Deed in Texas?A Texas Transfer-on-Death deed (TODD) is a legal document authorized by the Texas Estates Code that allows property owners to designate one or more beneficiaries to receive real property automatically upon the owner's death. This relatively new estate planning tool enables the property owner to retain complete control during their lifetime while establishing a framework for property transfer that bypasses the probate process.What Is a Lady Bird Deed in Texas?A Lady Bird deed, more formally known as an enhanced life estate deed, is a deed that has been used in Texas for decades. This special warranty deed allows property owners to transfer real property while retaining a life estate interest with enhanced powers. Unlike a traditional life estate, the enhanced features of a Lady Bird deed give the property owner the right to sell, mortgage, or otherwise dispose of the property during their lifetime without obtaining consent from the remainder beneficiaries. The transfer to beneficiaries occurs automatically upon the grantor's death, similar to a TODD, but through different legal mechanisms.Transfer-on-Death Deed vs. Lady Bird Deed: SimilaritiesBoth types of deeds offer several important benefits to Texas property owners:Probate avoidance: These deeds enable direct property transfer to heirs, circumventing lengthy and costly probate.Life estate control: Owners retain full authority during their life, allowing sales, leases, or mortgages.No gift tax: Neither deed triggers gift taxes, as ownership shifts upon the owner's passing.Homestead safeguard: Existing homestead rights and tax breaks remain intact for the living owner.Revocable arrangements: Both deeds grant the owner the ability to alter or cancel the agreement before death.Beneficiary creditor shield: Property is protected from beneficiary creditors while the owner lives, as no present ownership exists.Capital gains tax mitigation: Heirs receive a higher tax basis, potentially lowering capital gains upon future property sales.Texas Transfer-on-Death deed vs. Lady Bird deed: DifferencesThe following key differences between these instruments may significantly impact your estate planning goals. Feature Lady Bird Deed Transfer-on-Death Deed Creditor Claims Not explicitly subject to statutory clawback Subject to 2-year creditor claims period Title Warranty Typically includes warranty provisions Transfers without warranty by statute Signing Authority Can be executed by an agent with proper POA Only the property owner can sign the deed or a revocation of the deed Recording Requirement Recommended but not statutorily required for validity Must be recorded before the owner's death to be valid Legal Basis Created under common law Established by Texas Estates Code Title Insurance Generally smoother title transition May face delays during the 2-year claims period Medicaid Planning Home is not considered a transfer of an asset during a “look back” period and avoids a Medicaid estate recovery lien against the home for Medicaid paid services Does not avoid Medicaid Estate Recovery liens 1. Creditor Claims Period After DeathUnder Texas law, property transferred through a TODD remains subject to the claims of the deceased owner's creditors for two years after death. The Texas Estates Code specifically allows the personal representative or creditors to claim back property transferred by a TODD if the probate estate lacks sufficient assets to cover debts, taxes, and family allowances.This statutory creditor period often causes title companies to hesitate in providing title insurance until the two-year window closes or until they receive proof that the deceased's debts have been satisfied. Lady Bird deeds, by contrast, are not explicitly subject to this statutory provision, potentially offering smoother title transitions.2. Title Protection and Warranty DifferencesLady Bird deeds typically include warranty provisions that protect the title of the remainder beneficiaries. These warranties can be valuable if title issues arise after the transfer. In contrast, the Texas TODD statute specifically states that the interest in property transfers without covenant or warranty of title, even if the deed contains contrary language. This lack of warranty protection creates uncertainty about whether the grantor's title insurance policy will extend coverage to the TODD beneficiary.3. Signature Authority LimitationsThe Texas TODD statute explicitly requires that only the property owner can sign a Transfer-on-Death deed. This means an agent under a power of attorney cannot execute a TODD on behalf of an incapacitated property owner, regardless of how broadly the power of attorney is written. Nor can a TODD deed be revoked or amended using a power of attorney. The property owner must execute the revocation or a new TODD. Lady Bird deeds face no such statutory restriction. An agent under a properly drafted power of attorney can execute a Lady Bird deed if expressly authorized to do so, providing a vital planning advantage for those concerned about potential future incapacity. A Lady Bird Deed can be revoked using a power of attorney.4. Filing RegulationsFor a TODD to be valid in Texas, it must be recorded in the county property records before the grantor's death. If this step is missed, the deed is considered void — even if properly signed and delivered to the beneficiary. While recording is also highly recommended for Lady Bird deeds to provide notice and protect against disputes, the validity of a Lady Bird deed doesn't statutorily depend on recording.Lady Bird Deed or Texas Transfer-on-Death Deed: Which to Choose?Choosing between these probate avoidance deeds depends on your circumstances and estate planning goals. A TODD offers a straightforward option with statutory backing for many property owners wanting to avoid probate. However, a Lady Bird deed might be preferable if you are concerned about:Possible future incapacity where an agent may need to act on your behalfTitle insurance issues during the two-year creditor periodWarranty protections for your beneficiariesPotential recording delays or complicationsPost-death liens against the home for services provided by MedicaidLady Bird Deeds & Transfer-on-Death Deeds: Things to ConsiderWhile property transfer deeds effectively handle real estate, they are just one piece of your estate planning puzzle. A Texas Last Will and Testament remains crucial for several important reasons:Addresses assets beyond real property (investments, accounts, personal belongings)Provides contingency planning if named beneficiaries predecease youManages debt payment, administrative expenses, and tax obligationsAllows appointment of independent executors to handle and manage the estate with minimal court involvement, thereby saving the estate considerable moneyPrevents Texas intestacy laws from determining asset distributionFor more complex situations, a revocable living trust offers valuable benefits:Comprehensive management of diverse assetsDetailed distribution instructionsPrivacy protection is not available with public probate recordsOptions for professional asset managementEnhanced planning for potential incapacitySecure Your Property's Future with Texas Horizons Law GroupBoth Lady Bird deeds and Transfer-on-Death deeds offer valuable solutions for avoiding probate while keeping control of your property during your lifetime. However, choosing the right instrument requires careful consideration of your estate planning needs, potential Medicaid eligibility concerns, and family circumstances.Don't leave your legacy to chance. Contact us today to schedule a consultation with one of our knowledgeable Texas estate planning and probate attorneys who can guide you through the intricacies of property and probate law and create a personalized plan that achieves your goals and provides lasting peace of mind. Of the many tools available to Texans for planning out the distribution of their assets following their deaths, two of the most commonly used are the Lady Bird Deed (more formally known as an Enhanced Life Estate Deed) and the Transfer on Death Deed (TODD). Both tools allow the signer to convey to another person the right to receive full ownership of a piece of real property upon the signer’s death, while retaining the exclusive right to possess and make use of the property during their lifetime. In most situations, the two are interchangeable. However, there are a few ways in which they differ which may favor the use of one over the other, depending on the circumstance. Though there are a number of ways that a Lady Bird Deed and a TODD differ, here are a few of the most salient when it comes to estate planning. Avoiding Medicaid Recovery Both the Lady Bird Deed and the Transfer On Death Deed cause ownership of the subject property to pass directly to the Grantee upon the death of the Grantor, meaning that the property does not pass through the estate of the Grantor and is not subject to seizure by creditors of the estate. This includes the Texas Medicaid Estate Recovery Program (MERP), which seeks reimbursement from the estates of decedents who received medical funding under the Medicaid program. Many Texans who wish to shield their homes or investment properties from potential recovery by the MERP after their death use a Lady Bird Deed or TODD to do so. The source of the Lady Bird Deed’s effectiveness at protecting property from Medicaid recovery is administrative policy; the Texas Health and Human Services Commission, as an internal, self-created rule, recognizes that properties that have been transferred via Lady Bird Deed are off the table for recovery. The TODD, by contrast, has its roots in the Texas Estates Code. Unlikely though it may be, the Commission could change its internal policy at any time, whereas it would take an act of Congress to remove the TODD’s effectiveness at avoiding MERP recovery. Hence, the TODD is the slightly “safer” option if Medicaid avoidance is the primary purpose of the deed. Revocability A Transfer on Death Deed is, by statute, freely revocable by the Grantor during the Grantor’s lifetime. The Grantor can reclaim the property in full by delivering a written revocation to the Grantee, and the Grantee has no recourse. The right of revocation cannot be waived; even if the drafter of the deed inserts language stating that the deed cannot be revoked by the Grantor after delivery, such language will have no effect. A Lady Bird deed is also freely revocable by the Grantor in the absence of language to the contrary. However, a Lady Bird Deed can be made irrevocable after signing by the inclusion of specific terms to that effect. This can be desirable in some specific situations. For example, an older person with a progressive illness like Alzheimer’s may worry that a diminished mental capacity will leave them susceptible to manipulation as they age. While they still have their full faculties, they may wish to make a concrete gift of property that no amount of deceit, forgery, or intimidation by an estranged sibling or child can later undo. Irrevocability is, of course, a double-edged sword. A property owner ought to put serious thought into the choice to sign an irrevocable Lady Bird Deed, as that choice cannot be undone without the cooperation of the Grantee. Designation of Alternate Recipients The provisions of the Texas Estates Code governing the use of Transfer On Death Deeds explicitly allow the Grantor to designate alternate Grantees to receive the property upon the Grantor’s death if the primary Grantee or Grantees are no longer alive. This lets the Grantor name as many backup beneficiaries as it takes to satisfy them that someone of their choosing will receive the property. A Lady Bird Deed, on the other hand, generally does not contain provisions naming alternate beneficiaries. If the Grantee of a Lady Bird Deed dies before the Grantor and the Grantor does not amend the deed prior to their own passing, the subject property will fall back into the estate of the Grantor. This renders the property subject to the probate process and the claims of creditors, frustrating the very purpose of the deed in some cases. Execution by Agent Under Power of Attorney A validly executed Statutory Durable Power of Attorney (colloquially, a “Financial Power of Attorney”) can grant the attorney-in-fact the power to execute a Lady Bird Deed on behalf of the principal, even during the principal’s incapacity (assuming, of course, that the Power of Attorney contains language granting this power and not withholding it). A Transfer On Death Deed, on the other hand, can only be executed by the property owner or owners themselves. Thus, if a property owner has irrecoverably lost the mental or physical capacity to execute a deed, it is too late for their attorney-in-fact to transfer property via TODD. Which One is Better? As mentioned above, the Lady Bird Deed and the Transfer On Death Deed can be used for similar purposes, but the differences between them can make them more or less useful under certain facts. Which one is more appropriate for use in a given case is highly dependent on the specific purposes of the deed and the life circumstances of the Grantor. If you or a family member are considering using one of these tools to transfer property, an experienced estate planning attorney can help you choose the one that best fits your needs and can explain the many other options available to you under Texas law. All information provided on Silblawfirm.com (hereinafter "website") is provided for informational purposes only, and is not intended to be used for legal advice. Users of this website should not take any actions or refrain from taking any actions based upon content or information on this website. Users of this site should contact a licensed Texas attorney for a full and complete review of their legal issues. When it comes to estate planning in Texas, real estate is often one of the most significant assets to address. Two important tools that allow property owners to pass real estate to their beneficiaries outside of probate are the Transfer on Death Deed (TODD) and the Lady Bird Deed (also known as an Enhanced Life Estate Deed). While both deeds can achieve similar goals, they have key differences that property owners should understand when creating a comprehensive estate plan.Benefits of Using a Transfer on Death Deed or a Lady Bird DeedBoth the Texas Transfer on Death Deed and the Lady Bird Deed offer significant advantages for homeowners. These deeds allow property owners to designate real estate as a non-probate asset, meaning that the property passes automatically to a named beneficiary at the owner's death, avoiding the need of filing a probate proceeding.Both deeds allow the grantor (the property owner) to keep complete control over the property during their lifetime and the grantor can sell, lease, or mortgage, without the beneficiaries' permission.Key Differences Between a Transfer on Death Deed and a Lady Bird DeedWhile both documents offer the non-probate transfer of real estate and lifetime control to the grantor, there are essential differences between the two:RevocabilityA Transfer on Death Deed is completely revocable during the lifetime of the grantor. The grantor can cancel, revise, or even create a new TODD without needing the consent of the named beneficiaries. This gives a high degree of flexibility if the grantor's wishes or circumstances change.On the other hand, a Lady Bird Deed is generally irrevocable once signed and delivered. Although the grantor retains full rights over the property during their lifetime—including the right to sell or mortgage the property—the designation of beneficiaries typically cannot be altered without executing a new deed or otherwise dealing with the property.Timing of Beneficiary OwnershipWith a Lady Bird Deed, the beneficiary's interest in the property is created immediately upon execution of the deed, although it is subject to the grantor's retained rights. This means the remainder interest (future ownership) exists now, but the beneficiary has no current control over the property.Under a Transfer on Death Deed, no ownership interest passes until the death of the grantor. This difference can have significant legal and tax consequences.Historical BackgroundThe Transfer on Death Deed is a relatively new legal instrument in Texas, introduced with the Texas Real Property Transfer on Death Act in 2017. The Texas legislation wanted to create a simple way for Texan residents to pass ownership of real estate property to loved ones, without the need of probate. The creation of this instrument would also reduce the amount of clear title issues lower income Texans were facing.The Lady Bird Deed, by contrast, has been around much longer. Although not formally recognized in Texas statutes, it is widely accepted through common law practice. The term "Lady Bird Deed" reportedly originated from an example deed created by a Florida attorney, including President Lyndon B. Johnson and his wife, Lady Bird Johnson.Why You Should Work With an AttorneyGiven the legal complexity involved in drafting either a Transfer on Death Deed or a Lady Bird Deed, working with an experienced Texas real estate or estate planning attorney is crucial. Although these deeds seem straightforward, incorrect language or improper execution can lead to title issues, disputes among heirs, and even invalidate the intended transfer.An attorney can ensure that the deed accurately reflects your wishes, is properly drafted and filed in accordance with Texas law, and considers other important life factors, such as:The grantor's potential need for Medicaid benefitsProtection from creditorsComplex family dynamics (blended families, minor children, etc.)Estate tax planningCoordination with other estate planning documents (wills, trusts, etc.)Every family situation is different, and what works for one property owner may not be the best solution for another. In some cases, another estate planning tool may be more appropriate than a TODD or Lady Bird Deed.ConclusionThe Texas Transfer on Death Deed and the Lady Bird Deed are powerful estate planning tools that can help homeowners pass on real estate without probate. Understanding the differences between these two deeds is critical in choosing the right option for your needs.Consulting with a knowledgeable attorney ensures that your property transfers are made according to your wishes and that your loved ones are protected after your passing. If you are considering adding a TODD or Lady Bird Deed to your estate plan, reach out to an experienced attorney to discuss which option is right for you and your family. Posted at 15:36h in Asset Protection, Beneficiary, End of Life Care Planning, Estate Planning, Home Equity, Lady Bird Deed, Long Term Care, Medicaid Planning, Medicare, Michael Cohen Dallas Elder Lawyer, Nursing Home, Power of Attorney, Probate Administration, Public Benefits Protection, Short Term Care, Taxes, Transfer of Death, Trusts by Michael B. Cohen In a battle of the two most common probate avoidance deeds, it is often (but now always) better in Texas to use a Ladybird Deed (which is an enhanced life estate deed) than a Transfer on Death Deed. In both types of deeds, the owner of the property retains control during life and the property then passes to the named person(s) or trust as set forth in the deed upon death of the owner. The owner of the property can change the names of the beneficiary during the owner’s life. There are numerous reasons why these deeds are commonly used including: 1. Probate avoidance: If one has a Will, then often probate is needed – the judicial process of having the Will approved prior to the transfer of the property to the desired beneficiary or beneficiaries. If one doesn’t have a Will or Trust, then the property will pass according to the laws of the state. This could be particularly burdensome and costly if there are debts owed by the estate or if there are numerous heirs (and possibly unknown heirs). Costs and delays and potential problems of property passing by Will or by intestacy could be avoided by Ladybird Deeds and Transfer on Death Deeds (although beware of title issues with Transfer on Death Deed). 2. Avoidance of Medicaid estate recovery: If probate is avoided, then it should result in avoiding a successful claim by the state (this varies from state to state) for Medicaid payments advanced on behalf of a Medicaid recipient. Both Ladybird Deeds and Transfer on Death Deeds should result in a withdrawal of a claim for Medicaid benefits paid since the homestead would pass outside probate which is an exception under the Texas Medicaid rules. Medicaid often helps pay for long-term care costs (such as nursing home care costs, drugs, care at home, etc.) and many may rely on Medicaid due to lack of coverage by Medicare, long-term care insurance, and/or inadequate income or resources. Although a homestead is a non-countable resource when applying for Medicaid (assuming the equity value is under $603,000 in Texas if single – no limit if married), the state will attempt to make a claim (not a lien) against the property after the Medicaid recipient’s death. 3. Cost of Trusts: It should be noted that although trusts (both revocable and irrevocable) avoid probate, the cost for establishing is often far greater than preparation of either type of deed – although trusts usually provide more planning protection. Also, if a homestead is placed in a revocable living trust, it changes the resource to being countable under the Medicaid rules in Texas. If the homestead is placed in an irrevocable trust, then it is considered a transfer, subject to a 5-year “look-back” period (since Medicaid eligibility is dependent on the amounts of countable resources of the applicant, the government presumes transfers within five (5) years were done on purpose to reduce assets so that the government would pay for care costs). 4. Control during life: Not only do most real estate owners prefer to be in control of their own assets during their life, it is best to retain control for numerous tax reasons: Property taxes: Homestead owners often pay lower property taxes if they have certain exemptions (i.e., over 65, disabled – besides the property being a homestead). No exemptions are lost with Ladybird Deeds or Transfer on Death Deeds. Step up in basis: If the property is controlled by the owner for his or her life, there would not be capital gains tax on the appreciation from acquisition until date of death under current laws. Since the real property owner retains control during life for both Ladybird Deeds and Transfer on Death Deeds, the “step-up” would be retained. Capital gains tax exemption if homestead is sold: If you live in your home for two (2) of the last five (5) years prior to sale of the property during your life, then a person who is single is entitled to a gain (the appreciation) of up to $250,000 without taxation and $500,000 if the homestead is owned by a married couple. Both Ladybird Deeds and Transfer on Death Deeds permit the sale of the homestead. No gift tax: Since control of the property is maintained during life for both Ladybird Deeds and Transfer on Death Deeds, it is not considered a gift and thus there would be no gift tax. Although there is no advantage of using either a Ladybird Deed or Transfer on Death Deed for the four (4) common reasons use as set forth above, there are differences in the deeds (so usage will depend on goals). Some of the major advantages or disadvantages and differences of these types of deeds are as follows: 1. WARRANTY OF TITLE – (Advantage: Ladybird Deed) Ladybird Deeds are generally prepared as either a general warranty deed or special warranty deed. Furthermore, most homeowners have a title policy. If there was a title problem subsequently discovered, the grantees (beneficiaries) of a Ladybird Deed could make a claim for breach of warranty whereas Transfer on Death Deeds have no warranty of title so beneficiaries could not make a claim. 2. POTENTIAL DELAY IN SELLING OR MORTGAGING THE PROPERTY DUE TO POTENTIAL CREDITOR ISSUES – (Advantage: Ladybird Deed) Texas law permits the personal representative of an estate (executor or administrator) to pursue a claim against property transferred by a Transfer on Death Deed if the deceased owner’s estate is unable to pay all the debts of the estate. As a result, many title companies may not insure (issue a title policy) for two (2) years after the deceased property owner’s death if the property passes by a Transfer on Death Deed. This process could be shortened through probate, but probate avoidance was one of the main reasons why a Transfer on Death Deed is often used. If the title company does not require a 2-year wait, they may want various types of proof such as no hospital, funeral bills or credit card bills of the deceased. There is no delay with a Ladybird Deed. 3. NAMING OF CONTINGENT BENEFICIARIES – (Advantage: Transfer on Death Deed) If the property owner wants to name a contingent (alternate) beneficiary, Transfer on Death Deeds allow this by law. Ladybird Deeds do not allow this although one could create a joint tenancy with right of survivorship among the main beneficiaries and name others as beneficiaries at death. However, this could create a problem if applying for Medicaid within five (5) years unless the primary beneficiary who is a joint owner is a spouse. 4. USING POWER OF ATTORNEY TO CREATE OR MAKE CHANGES OR REVOKE – (Advantage: Ladybird Deed) Texas law does not permit the use of powers of attorney to create a Transfer on Death Deed unlike Ladybird Deeds. So, if the homeowner is disabled or is likely to be disabled or if there is a need to revoke the deed and they have a recorded POA, then Ladybird Deeds are clearly the best option. 5. EXIGENT FILING – (Advantage: Ladybird Deed) Transfer on Death Deeds must be recorded during the owner’s life to be effective – unlike Ladybird Deeds. There are other factors that could be considered in deciding which deed is best, but Ladybird Deeds have more advantages as set forth above. If interested in learning more about this article or other estate planning, Medicaid and public benefits planning, probate, etc., attend one of our free upcoming virtual Estate Planning Essentials workshops by clicking here or calling 214-720-0102. We make it simple to attend and it is without obligation. Estate planning can be a complex and overwhelming process. However, with the right tools and knowledge, it can be a relatively straightforward process. Two estate planning tools that are gaining popularity in Texas are the transfer-on-death deed and the ladybird deed. In this blogpost, we will compare and contrast these two tools, providing insight into their differences and benefits.Transfer-on-Death DeedA transfer-on-death deed (TOD deed) is a document that allows an individual to transfer their property to a beneficiary upon their death, without the need for probate. It is also commonly known as a beneficiary deed or a revocable transfer-on-death deed.One of the primary benefits of a TOD deed is that it allows for the transfer of real property without the need for probate. Probate is the legal process of administering a deceased person's estate, which can be time-consuming and expensive. By using a TOD deed, the property can pass to the designated beneficiary without the need for probate.Another benefit of a TOD deed is that it is revocable. This means that the individual who created the TOD deed can change their mind and revoke the transfer at any time. This flexibility can be important if the individual's circumstances change.Ladybird DeedA ladybird deed, also known as an enhanced life estate deed, is a tool that allows an individual to retain control of their property during their lifetime while also providing for the transfer of the property to a designated beneficiary upon their death. The ladybird deed is named after Lady Bird Johnson, who purportedly used this type of deed to transfer property to her children.One of the primary benefits of a ladybird deed is that it allows the individual to retain control of their property during their lifetime. This means that they can continue to use and benefit from the property, and they can sell, mortgage, or transfer the property to someone else if they choose to do so. However, upon their death, the property will pass directly to the designated beneficiary without the need for probate.Another benefit of a ladybird deed is that it is flexible. The individual who creates the deed can change their mind and revoke the transfer at any time. Additionally, the ladybird deed allows for multiple beneficiaries, which can be beneficial if the individual wants to leave the property to more than one person.ComparisonWhile both the TOD deed and the ladybird deed allow for the transfer of property without the need for probate, there are some key differences between the two tools. First, a TOD deed only allows for the transfer of property upon the individual's death. This means that the individual retains control of the property during their lifetime and can sell or mortgage the property as they choose. In contrast, a ladybird deed allows the individual to retain control of the property during their lifetime while also providing for the transfer of the property upon their death.Second, a TOD deed only allows for the transfer of the property to one designated beneficiary. In contrast, a ladybird deed allows for multiple beneficiaries, which can be beneficial if the individual wants to leave the property to more than one person.Title Company Issues and Transfer-on-Death DeedsSome Texas title companies have taken an interesting position on Transfer-on-Death Deeds and potential creditors of the Estate. Some title companies are now not wanting to issue title policies on homes where the conveyance or sale is being finalized less than two years after the date of death of the Decedent (i.e. the person who has passed away and transferred title to the house). This has created an issue with some sales; the better practice would be to select your title company in advance and use a Texas title company that will not raise objections to the use of a Transfer-on-Death Deed. This issue can wholly be avoided by utilizing the Ladybird Deed. Conclusion In conclusion, both the TOD deed and the Ladybird deed are useful estate planning tools that can help individuals avoid probate and transfer property to their beneficiaries. However, they have some key differences, including when the property is transferred and the number of beneficiaries allowed. Therefore, it is important for individuals to carefully consider their estate planning goals and consult with an experienced estate planning attorney before deciding which tool is right for them. Different estate planning products have different benefits and limitations. We can help you sort through which scenario fits your family best. Call or click today to schedule your Peach of Mind Planning Session today!March 13, 2023August 25, 2023 There are many types of deeds out there. Two types of deeds that have been getting a lot of attention in the estate-planning world are (1) the lady bird deed and (2) the transfer on death deed (TODD). In this post I will explain how each type of deed works, the benefits of the deeds, and the drawbacks of the deeds.An enhanced life estate deed, more commonly known as a lady bird deed, allows an individual to transfer property upon their death. Unlike a regular life estate deed, the property owner, who now holds the life estate, retains the right to revoke the deed and sell the property. Essentially, the owner retains the traditional rights we associate with property ownership while efficiently passing property at death.Lady bird deeds are used for a variety of reasons, the most popular reasons are to avoid probate and to avoid the Medicaid Estate Recovery Program (MERP). A lady bird deed avoids probate by transferring title to property through the deed versus through a probate proceeding. Without a deed, real property must go through probate before title is cleared. MERP is how the state of Texas attempts to recapture funds from a decedent that were paid for their care through the Medicaid program. The Texas Health and Human Services Commission’s policy for MERP recovery is to only recover from a decedent’s probate estate. Since a lady bird deed avoids probate, it also avoids MERP. Therefore, if someone qualifies for Medicaid while still owning a home, a lady bird deed is generally needed to avoid MERP. It is important to note that MERP is not a lien statute in Texas. This means that MERP cannot take your home nor can they put a lien against your home to prevent its sale. MERP may recover funds from a probate estate, but they are a lower priority creditor, along with other unsecured debts. If you or a loved one is applying for or on Medicaid and has a home please consult an attorney regarding MERP.The Transf