

Does a Lady Bird Deed Supersede a Will and avoid Probate?

Dear Mr. Premack: I have questions I would like answered please. I want to know if the Lady Bird Deed supersedes a Will? Does it avoid probate? - B

A Lady Bird Deed is a property ownership arrangement under which two legal actions take place: 1) the property owner (grantor) retains life estate while granting to someone else (grantee) the remainder interest, and 2) the grantor retains the legal right to rescind the remainder interest to recapture full ownership of the property. This right to rescind is what distinguishes a Lady Bird Deed from a standard Life Estate Deed.

The phrase “Lady Bird Deed” is an informal designation that is being used rather loosely. Lady Bird deeds are more properly referred to as “Enhanced Life Estate Deeds” because it is a Life Estate Deed that has been enhanced with the grantor’s right to reclaim ownership.

Enhanced Life Estate Deeds are most often used, under current Texas legal rules, to help avoid a claim from the Medicaid Estate Recovery Program. When a person qualifies for nursing home Medicaid, they are allowed to retain ownership of their home. However, when that patient dies, the state may bring a claim against the home to recovery taxpayer dollars that were spent to support the patient. That claim can only legally be pursued in probate court. An Enhanced Life Estate Deed avoids the claim because the property passes without the need to go through probate.

A properly written, signed and filed Enhanced Life Estate Deed does supersede the terms of the owner’s Will, so long as the grantor has not exercised the retained right to reclaim ownership while living. Superseding the Will means that if the Will leaves the house to Bob but the Deed leaves it to Jeff, then Jeff gets the house. The Will is overcome by the Deed. Further, under the Deed title to the property passes to the grantee without needing to go through probate.

However, if the grantor during life exercises the retained right to reclaim ownership then the Lady Bird deed is canceled. Once canceled, the Will is restored to its role as the primary legal tool for determining ownership of the house. When the owner later dies, transfer of title to the property may require probate of the Will.

It is important to understand that so long as the grantor is alive, the grantee does not yet own the house. Instead, the grantee owns a contingent remainder interest. Because it can be cancelled, it has no monetary value and there is no gift tax when the Enhanced Life Estate Deed is signed. The grantor continues to have Texas homestead protections, including the homestead exemption from judgements and the homestead property tax benefits.

Only after the death of the grantor, assuming the power to reclaim ownership is not used, does the grantee become owner of the property. At that moment, the grantee is treated as having inherited the property from the grantor. As such, for tax purposes, the grantee receives a free step-up in basis.

If avoiding probate is your main goal, an Enhance Life Estate Deed may not be enough. The Deed will avoid probate of the specific real property covered in the Deed, and nothing more. If your estate has more than just a homestead – for instance, a rent house, land in the country, stocks, mineral rights, etc. – then instead of an Enhanced Life Estate Deed you should consider using a Revocable Living Trust.

A Revocable Living Trust can own a wide variety of assets. Unlike an Enhanced Life Estate Deed, a Revocable Living Trust contains specific instructions for the disposition of many assets, and instructions for the care of the grantor while still alive. You should consult with a qualified Elder Law Attorney, who can assess your personal goals and recommend the best legal approach to meet those goals.

Paul Premack is a Certified Elder Law Attorney with offices in San Antonio and Seattle, handling Wills and Trusts, Probate, and Business Entity issues. View past legal columns or submit free questions on legal issues via www.TexasEstateandProbate.com or www.Premack.com.