

Texas Real Estate Teachers Association
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Constant Questions in Title and TREC Legal Update Issues

Deeds and Conveyances

Material Error

Broadway National Bank v. Yates Energy Corporation No. 19-0334 (Tex. 2021)

Correction instruments may be used to correct both material and non-material errors. The error here is material, and thus the correction instrument must comply with §5.029, which requires that the instrument must be executed by each party to the recorded original instrument or, if applicable, a party's heirs, successors, or assigns.

§5.029 permits an original party's "heirs, successors, or assigns" to sign a correction instrument if the original party is unavailable, the statute plainly does not require that they do so when the original parties all execute the correction. The statute's plain language and the Property Code's encompassing scheme, confirm that §5.029(b)(1) is satisfied when all parties to the original transaction agree to correct a material mistake in the original conveyance.

Covenant of Seisin

Chicago Title Insurance Company v. Cochran Investments, Inc. 602 S.W.3d 895 (Tex. 2020).

England and Garza owned a duplex, subject to a deed of trust to EMC. England conveyed his interest in the duplex to Garza, but in a later involuntary bankruptcy, the conveyance was set aside as a fraudulent conveyance. EMC foreclosed and Cochran bought the duplex at the foreclosure sale.

Cochran and Ayers entered into a residential sales contract regarding the property. In the sales contract, Cochran agreed to sell the property and to give Ayers a general warranty deed. The contract also contained a "survival" clause, which said that all covenants, representations, and warranties survived the closing. At closing, Cochran conveyed the property to Ayers by a special warranty deed.

Four days after the deed was delivered, the bankruptcy trustee sued EMC and Cochran seeking to set aside EMC's foreclosure, claiming that the foreclosure violated the automatic stay. Ayers filed a claim with Chicago Title. Chicago Title paid the trustee and Garza for their interests in the property and, being subrogated to Ayers under the policy, sued Cochran, asserting claims for breach of the implied covenant of seisin and breach of contract. The trial court rendered judgement for Chicago Title.

The court of appeals reversed the holding that the special warranty deed does not imply the covenant of seisin.

On appeal to the Supreme Court, the first issue is whether Chicago Title may recover for Cochran's alleged breach of the implied covenant of seisin. A covenant of seisin is an assurance to the grantee that the grantor owns the very estate in the quantity and quality that she "purports to convey". A covenant in a deed or assignment to the effect that the grantor has good right and authority to sell and convey the same evidences the intention on the part of the grantor to convey the property itself and not merely the grantor's title and interest therein. The covenant of seisin is breached by the grantor at the time the instrument is made if she does not own the estate in the land she undertakes to convey. The measure of damages for breach of the covenant where there is a total failure of title is the consideration paid, with interest.

As a matter of longstanding common law, in the absence of any qualifying expressions, the covenant of seisin is read into every conveyance of land or an interest in land, except in quitclaim deeds. A quitclaim deed merely conveys the grantor's rights in the property, if any. But if a deed, taken as a whole, discloses

a purpose to convey the property itself, as distinguished from the mere right, title, or interest of the grantor, then the instrument is not a quitclaim deed.

The special warranty clause does not strengthen, enlarge, or limit the title conveyed or the title that the deed purports to convey. Thus, the special warranty cannot transform the deed into a quitclaim deed. Instead, the special warranty clause limits the circumstances under which a grantee can recover for a failure of title, allowing it to do so for claims by, through, and under the grantor, but not otherwise. As such, the special warranty clause speaks to the grantor's liability, not its conveyance of property. And unlike a quitclaim deed, a special warranty clause still protects the grantee with respect to a failure or defect of title created by the grantor.

Lawyer Stuff

Landry's, Inc. v. Animal Legal Defense Fund, No. 19-0036 (Tex. May 21, 2021):

Landy's sued Conley, Nasser, and ALDF for defamation, business disparagement, tortious interference, abuse of process, trespass, and civil conspiracy. Conley, ALDF and Naser filed motions to dismiss pursuant to the Texas Citizens Participation Act ("TCPA") claiming, among other things, that the judicial-proceedings privilege barred all claims and that attorney immunity barred Landry's claims against Nasser and ALDF. The trial court granted the defendant's motion to dismiss.

The Supreme Court held that "judicial-proceedings privilege" and "attorney immunity" are "independent defenses serving independent purposes. The judicial-proceedings privilege is straightforward: "Communications in the due course of a judicial proceedings will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made.

The defendants lost the judicial-proceedings privilege's protections when they repeated the Notice Letter's allegations for publicity purposes "outside the protected context within which the statements originally were made."

Haynes and Boone, LLP v. NFTD, LLC No. 20-0066 (Tex. May 21, 2021).

Does attorney immunity apply to actions a lawyer takes on behalf of a client outside of the litigation context? The supreme court held that it does, so long as the lawyer's conduct constitutes the "kind" of conduct the attorney-immunity defense protects.

The attorney-immunity defense is not without its limits. When an attorney personally participates in a fraudulent business scheme with his client, as opposed to on his client's behalf, the attorney will not be heard to deny his liability because "such acts are entirely foreign to the duties of an attorney. Also, an attorney who repeats his client's allegations to the media or the public for publicity purposes is not acting in the unique, lawyerly capacity to which Texas law affords the strong protection of immunity.

Conveyance of Title to Real Property to a Trust

Fugedi v. United Rentals (North America) Inc., et al No. 3:19-CV-00249 (U.S. Dist. Ct. Galveston Division 2021):

A conveyance was made to a trust named as a grantee. The U.S. District Court held that the conveyance was void on its face for lack of a grantee. In Texas, a conveyance requires an existing grantor and grantee. Under Texas law, the term "trust" refers not to a legal entity, but rather to the fiduciary relationship

governing the trustee with respect to the trust property. To acquire real property, legal title must rest in the trustee of the trust. The beneficiary is vested with equitable title to the trust property.

TREC 1-4 Family Form Issues

Para. 2 B seems to include mailbox keys, but it depends on who owns the mail box. If Seller owns it, it goes. If USPS owns it (many suburban developments) the key must be turned in to the posted authority and have another key reissued.

Para. 2 C includes “controls” as defined for access and control and used solely to control _____ and accessories—smart phones?

Para. 18 C—respond to earnest money requests. No objection by one party releases the earnest money.

Para. 9 B (2) funds must be acceptable to the escrow agent.

Addenda

Multiple offers. If the contract includes an Addendum for Sale of Other Property (TREC 10-6) by Buyers. The Seller has the right to ask to remove the contingency, but, the second offer must have the Addendum for Back Up Contract (TREC 11-7) before the Seller can ask the first buyers to waive their contingency.

Addendum Regarding Rental Flood Disclosures effective Jan 1, 2022. TXR created form TXR 2015. Must disclose to prospective residential tenants whether the dwelling is located in a 100-year floodplain or whether the dwelling has flooded during the last five years. NOT required for extension and renewals. Tenant can terminate (see §92.0135 of Property Code) by giving landlord 30 days’ notice after any damage or loss.

Service Animals (HUD v. FAA issues)

Generally same definition:

Service animals in Texas are dogs trained for a needed task related to a disability. Can also include miniature horses in some circumstances. Query: is this animal required because of a disability, and what task has the animal been trained to perform? If yes, no further inquiry or documentation is required. Makes handicap and service animals admissible to all public places because of ADA compliance.

Support Animals (ESA’s) must have written documentation defining a person’s disability and disability related need for that specific animal. Must be animals commonly kept in households (dogs, cats, small birds, fish, gerbils and other small, domestic animals). If health care professional says that the specific animal supports the disability, the animal is valid. Written

proof must come from legitimate, licensed healthcare providers. This documentation is valid for twelve months. Dogs are most common, and can be of any breed. These animals are not protected under the Air Carrier Access Act. Most airlines will have their own rules.

Unique animals require health care provider confirmation. Very rare approvals.

Fair Housing Issues (Oh, boy!)

Law has not changed. FHA of 1968 prohibits housing discrimination based on:

1. Race
2. Color
3. Religion
4. Sex (now includes gender identity and orientation)
5. National origin
6. Familial status
7. Disability

Texas Realtor suggests the following:

- Don't ask questions that could categorize buyers, such as lifestyle interests and priorities
- Don't give opinions when it comes to school or crime information
- Don't make assumptions about where someone will be comfortable living
- Feel free to explain that you can't answer certain questions

amount prorated at closing, the parties shall adjust the prorations when tax statements for the current year are available. If taxes are not paid at or prior to closing, Buyer shall pay taxes for the current year.

- 14. CASUALTY LOSS:** If any part of the Property is damaged or destroyed by fire or other casualty after the Effective Date of this contract, Seller shall restore the Property to its previous condition as soon as reasonably possible, but in any event by the Closing Date. If Seller fails to do so due to factors beyond Seller's control, Buyer may (a) terminate this contract and the earnest money will be refunded to Buyer (b) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (c) accept the Property in its damaged condition with an assignment of insurance proceeds, if permitted by Seller's insurance carrier, and receive credit from Seller at closing in the amount of the deductible under the insurance policy. Seller's obligations under this paragraph are independent of any other obligations of Seller under this contract.
- 15. DEFAULT:** If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If Seller fails to comply with this contract, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.
- 16. MEDIATION:** It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation. Any dispute between Seller and Buyer related to this contract which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.
- 17. ATTORNEY'S FEES:** A Buyer, Seller, Listing Broker, Other Broker, or escrow agent who prevails in any legal proceeding related to this contract is entitled to recover reasonable attorney's fees and all costs of such proceeding.
- 18. ESCROW:**
- A. **ESCROW:** The escrow agent is not (i) a party to this contract and does not have liability for the performance or nonperformance of any party to this contract, (ii) liable for interest on the earnest money and (iii) liable for the loss of any earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent. Escrow agent may require any disbursement made in connection with this contract to be conditioned on escrow agent's collection of good funds acceptable to escrow agent.
 - B. **EXPENSES:** At closing, the earnest money must be applied first to any cash down payment, then to Buyer's Expenses and any excess refunded to Buyer. If no closing occurs, escrow agent may: (i) require a written release of liability of the escrow agent from all parties; and (ii) require payment of unpaid expenses incurred on behalf of a party. Escrow agent may deduct authorized expenses from the earnest money payable to a party. "Authorized expenses" means expenses incurred by escrow agent on behalf of the party entitled to the earnest money that were authorized by this contract or that party.
 - C. **DEMAND:** Upon termination of this contract, either party or the escrow agent may send a release of earnest money to each party and the parties shall execute counterparts of the release and deliver same to the escrow agent. If either party fails to execute the release, either party may make a written demand to the escrow agent for the earnest money. If only one party makes written demand for the earnest money, escrow agent shall promptly provide a copy of the demand to the other party. If escrow agent does not receive written objection to the demand from the other party within 15 days, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursement of the earnest money.
 - D. **DAMAGES:** Any party who wrongfully fails or refuses to sign a release acceptable to the escrow agent within 7 days of receipt of the request will be liable to the other party for (i) damages; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.
 - E. **NOTICES:** Escrow agent's notices will be effective when sent in compliance with Paragraph 21. Notice of objection to the demand will be deemed effective upon receipt by escrow agent.
- 19. REPRESENTATIONS:** All covenants, representations and warranties in this contract survive closing. If any representation of Seller in this contract is untrue on the Closing Date, Seller will be in default. Unless expressly prohibited by written agreement, Seller may continue to show the Property and receive, negotiate and accept back up offers.
- 20. FEDERAL TAX REQUIREMENTS:** If Seller is a "foreign person," as defined by Internal Revenue Code and its regulations, or if Seller fails to deliver an affidavit or a certificate of non-foreign status to Buyer that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the

ESTATE PLANNING

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UPDATED PRIMER ON LADY BIRD DEEDS

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Many people think that the "Lady Bird" deed became known as such because President Johnson once used this type of deed to transfer property to his wife, "Lady Bird" Johnson. In reality, the first Lady Bird deed was drafted by Florida attorney Jerome Ira Solkoff around 1982, nearly ten years after the death of President Johnson. In his elder law book and lecture materials, Solkoff used a fictitious cast of characters with the names Linton, Lady Bird, Lucie, and Lynda in examples explaining the usefulness of this new type of deed, and the names became associated with the deed. Jerome's son, Scott Solkoff, jokes that the Lady Bird deed "could easily have become known as the 'Genghis Khan deed'."

Lady Bird deeds, more formally known as enhanced life estate deeds, or reservation of a life estate with a general power of appointment, allow the grantor to transfer property to beneficiaries while retaining a life estate in the property coupled with the power to sell, convey, or mortgage the property without the beneficiaries' consent. 51 Molly Dear Abshire, H. Clyde Farrell, Patricia Flora Sitchler, & Wesley E. Wright, TEXAS PRACTICE: TEXAS ELDER LAW § 9-103 (2011-2012) [hereinafter "TEXAS ELDER LAW"]. Few states permit Lady Bird deeds, including Texas, and only nine states have specifically adopted Lady Bird deed statutes, including Arizona, Arkansas, Colorado, Kansas, Missouri, Nevada, New Mexico, Ohio, and Wisconsin. Robert C. Anderson, *Comparing Key Strategies in Owning the Home: Estate Planning, Tax and Medicaid Considerations - Part One*, 219 ELDER L. ADVISORY 1 (May 2009).

This article aims to educate estate planning professionals on the basics of Lady Bird deeds in Texas by discussing the different reasons one would want to use a Lady Bird deed and the alternatives to doing so. In addition, this article addresses some of the uncertainty surrounding, and concerns involved with, using Lady Bird deeds as part of an estate plan.

I. SAMPLE LADY BIRD DEED

Below is a sample Lady Bird deed from JEROME IRA SOLKOFF, WEST'S LEGAL FORMS: ELDER LAW § 3.36 (3d ed. 2010):

Linton and Lady Bird, his wife, Grantors, to Linton 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, without joinder by the remaindermen and to retain absolutely any and all proceeds derived therefrom. The life tenant shall also have full power and authority to revoke, amend, divest, replace, change or otherwise alter the designation of remaindermen without joinder by the remaindermen.

Upon death of the life tenants, the remainder if any, to our children, Lynda and Lucie, joint tenants with rights of survivorship.

II. REASONS TO USE LADY BIRD DEEDS

A. For Medicaid Purposes

Solkoff created Lady Bird deeds with Medicaid eligibility as his main concern. Today, Lady Bird deeds are primarily used to avoid Medicaid estate recovery and a Medicaid transfer penalty when transferring a homestead.

1. Medicaid Eligibility During the Grantor's Life

Should the grantor attempt to qualify for Medicaid assistance, the grantor must disclose any asset transfers within the specified look-back period when completing the benefit application. If the execution of a deed is considered a disqualifying transfer, a disqualification period would be triggered, and while the grantor could still be eligible for certain limited Medicaid long term care benefits, the grantor would not be able to receive Medicaid nursing home payments or "waiver" home care services for a certain period of time depending on the value of the property.

The mere execution and recordation of a Lady Bird deed is not considered a transfer for Medicaid purposes because the grantor retains full control over the property, including the right to sell the property or revoke the deed. Thus, the homestead maintains its status as exempt property for Medicaid eligibility purposes as long as the grantor intends to return to the home after his or her stay at the nursing facility. 1 Tex. Admin. Code § 358.348(a)(1).

2. Medicaid Estate Recovery After the Grantor's Death

Medicaid estate recovery is the process by which state governments recover payments made to Medicaid recipients from the estates of the now-deceased recipients. In response to escalating demands on the Medicaid budget, mainly attributable to long term care expenses, Congress passed the Omnibus Budget Reconciliation Act of 1993 which requires states to implement at least a basic estate recovery process. Under OBRA, 42 U.S.C. § 1396p(b)(4) (2010), "estate" for Medicaid estate recovery purposes:

1. Shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and
2. May include, at the option of the State... any other real or personal property and other assets in which the individual had any legal title or interest

at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

As evidenced by this definition, OBRA requires states to enforce an estate recovery program but allows the states to determine how to implement the process, how to define "estate," and whether to employ an expanded estate program that enforces recovery with Tax Equity Fiscal Responsibility Act (TEFRA) pre-death liens. Robert C. Anderson, *Comparing Key Strategies in Owning the Home: Estate Planning, Tax and Medicaid Considerations--Part Two*, 220 ELDER L. ADVISORY 1 (June 2009).

The Texas Medicaid Estate Recovery statute limits estate recovery to a creditor's claim against the probate estate only. TEX. GOV'T. CODE § 531.077. The Texas Legislature did not pass a TEFRA lien statute. Rather, the State becomes an unsecured Class 7 creditor pursuant to Texas Probate Code § 322.

Any of the decedent's property, real or personal, can be subject to a creditor's claim for Medicaid Estate Recovery unless the decedent's estate is exempt from Medicaid Estate Recovery. TEXAS ELDER LAW § 9:62. Typically, a Medicaid beneficiary's home, as a probate asset, could be subject to a Medicaid estate recovery claim unless it is protected for the spouse or certain other close relatives, or is conveyed outside of the State's definition of "estate." TEXAS ELDER LAW §§ 9:80-9:91. Thus, to determine whether a Medicaid beneficiary's home is subject to a probate creditor's claim by the Medicaid Estate Recovery Program in Texas, it must be determined whether the home is included in the beneficiary's estate as defined by Texas estate recovery regulations.

The Texas Medicaid Estate Recovery Program (MERP) became effective on March 1, 2005. Instead of defining estate in a broad context that would enable Texas to recover property that bypasses probate, MERP, 1 Tex. Admin. Code § 373.105(6), defines estate as:

The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in § 3(f), Definitions and Use of Terms, Texas Probate Code.

The Texas Probate Code defines estate similarly and makes it fairly easy to determine what is and what is not included in the probate estate. Thus, Texas must recover from assets comprising the probate estate. Given the history of Medicaid estate recovery in Texas, it appears that only the legislature has the power to alter this definition of estate, which it has chosen not to do thus far.

A transfer by way of a Lady Bird deed is complete upon the grantor's death without any further action by the grantor or the remainder beneficiary. Therefore, the homestead is not included in the probate estate and bypasses the probate process. In applying MERP's definition of estate, the homestead transferred via a Lady Bird deed would not be subject to estate recovery.

B. To Maintain Flexible Rights and Control Over Transferred Property

Unlike the grantor of a traditional life estate, the grantor of a Lady Bird deed retains the right to take the property back, sell it, take out a mortgage, cancel the remainder, and keep all proceeds from the property. In addition, the grantor owes no duties to the holders of the remainder interest, is not subject to liability for waste, and does not need to obtain consent from the beneficiaries for any actions taken relating to the property.

The grantor can revoke a Lady Bird deed at any time by executing an instrument of revocation or a subsequent Lady Bird deed. Changing circumstances in the grantor's life may cause the grantor to rethink his or her dispositive wishes, and Lady Bird deeds can be changed easily to reflect the new circumstances.

For example, if a remainder beneficiary displeases the grantor, the grantor can take away the beneficiary's interest at any time for any, or no, reason.

C. To Transfer Property at a Low Cost

The cost of using a Lady Bird deed is modest, "both at the time of the deed's creation and recordation and at the time of the transfer to the beneficiary occurs." Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 532 (2006) [hereinafter Gary]. In comparison to having a will or trust drafted and assets retitled in the name of a trustee, having a Lady Bird deed prepared is considerably more economical. Upon the grantor's death, fees associated with a Lady Bird deed may be less expensive than a probate proceeding. *Id.* at 542-43. After paying a fee of around \$25 to record the deed in the public records, the transfer is complete. Bryan L. Albers, *Vital Considerations Regarding Estate Planning*, 18867 NBI-CLE 1, 31 (2004) [hereinafter Albers].

D. To Avoid Probate

Although Texas does not have an onerous probate system unlike many other states, some people may still want to avoid the probate process due to concerns about delay, cost, or privacy. Gary at 531. Because the transfer of property is complete upon the donor's death without any further action, there is no requirement for probate of property transferred with a Lady Bird deed. Victor A. Kormeier, Jr., *Medicaid Estate Recovery Program (MERP) Real Estate Issues*, 1, State Bar of Texas: Advanced Elder Law (Mar. 5, 2009) [hereinafter Kormeier].

E. For Creditor Protection

Because the beneficiary has no interest in the property while the grantor is alive, neither do the beneficiary's creditors. If creditors of the beneficiary threaten action affecting the property, the grantor can revoke the deed or transfer the remainder to another beneficiary. As long as the grantor is not a debtor as to these creditors as well, this change in the deed would not be considered a fraudulent transfer. Gary at 550.

F. To Reduce Gift Taxes

The grantor of a Lady Bird deed retains the unilateral right to revoke the beneficiary's remainder interest. As a result, the transfer is not a completed gift and the designation of a remainder beneficiary "is not a taxable event for gift tax purposes." Gary at 549; Kormeier at 1.

G. To Avoid Capital Gains Taxes for the Beneficiary

Because the transfer is not a completed gift, the full value of the property remains in the grantor's estate and will be subject to the federal estate tax upon the grantor's death. The remainder beneficiary may get a stepped-up basis in the property valued at the fair market value of the property on the date of the grantor's death. Thus, if the beneficiary sells the property, the beneficiary will only have to pay capital gains taxes on the gains accrued from the date of the grantor's death. Gary at 549; Kormeier at 1.

H. To Maintain Exemptions

Grantors who use Lady Bird deeds to transfer their homesteads upon death retain full control over the homestead while alive. Thus, the property maintains its homestead status and enables the grantor to preserve the exemptions that apply to homesteads.

In Texas, homeowners age 65 and over qualify for a \$10,000 homestead exemption for the amount of school taxes on the homestead's value in addition to the \$15,000 exemption that all homeowners receive. Further, homeowners age 65 and over get a tax freeze on school taxes, meaning that they will never pay more than the ceiling amount regardless of the rise in school taxes. Unlike an absolute conveyance of property, a transfer using a Lady Bird deed enables the grantor to preserve these tax breaks. H. Clyde Farrell, *Medicaid Transfers*, State Bar of Texas: Advanced Elder Law, 14 (Mar. 10, 2006) [hereinafter Farrell]; Susan Combs, *Window on State Government*, <http://www.window.state.tx.us/taxinfo/proptax/exmptbis.html> (last visited Mar. 5, 2012).

In addition, the grantor retains the broad homestead protection against creditors afforded by Texas law.

III. ALTERNATIVES TO LADY BIRD DEEDS

A. Transfer the Residence, Reserving a Life Estate

Similar to a Lady Bird deed, transferring the residence and reserving a life estate will transfer the property outside of probate at a minimal cost. These transfers avoid probate the same way that Lady Bird deeds do, so there is no Medicaid estate recovery against the property. Property transferred in this manner can also retain tax exemptions associated with the homestead status if the grantor continues to live in the residence. Further, the remainder beneficiary also receives a stepped-up basis in the property valued at the date of death of the grantor for capital gains tax purposes.

Unlike a Lady Bird deed, this transfer is a completed gift, subject to the gift tax, and valued for gift tax purposes pursuant to the IRS life estate/remainder calculation but valued for Medicaid transfer purposes using Social Security actuarial tables based on the age of the grantor. In addition, because the transfer can be valued, the Medicaid transfer penalty will apply, creating a period of ineligibility for the grantor. Another disadvantage of this strategy is that the creditors of the beneficiary might be able to force the sale of the residence by way of a partition order.

Perhaps the biggest disadvantage to this approach is that it imposes restrictions on the grantor's use of the property. The grantor could not commit waste, and disputes regarding responsibility for property expenses may arise. The grantor also could not sell or transfer a fee interest in the property without the joinder of the remainder beneficiary. Albers at 31; Gary at 539-40; Farrell at 14.

B. Joint Tenancy with Right of Survivorship

Property in a joint tenancy with rights of survivorship passes outside of the probate estate. The property passes beyond the scope of Texas Medicaid estate recovery while the grantor's portion of the property still retains its exempt status for Medicaid eligibility.

If the grantor transfers the property from the grantor to the grantor and another person with rights of survivorship, the grantor makes a completed gift of a one-half interest in the property to this person which is subject to the gift tax. In addition, the grantor does not retain the amount of control that he or she would with a Lady Bird deed. A joint tenancy creates immediate rights in the grantee, and the grantor cannot revoke the gift. The grantee's creditors can reach the property while the grantor is alive.

Transferring a one-half interest results in a Medicaid transfer penalty based on the fair market value of half of the fee simple ownership. It also results in a loss of half of the over-65 homestead exemption for school taxes. However, these particular disadvantages can be minimized by giving the beneficiary a small fractional interest instead of half. This strategy results in a much shorter period of Medicaid ineligibility. Gary at 535-36; Farrell at 16. Nonetheless, there is anecdotal evidence from practicing attorneys in Texas that even with an agreement of the parties, Texas Health and Human Services Commission (the Medicaid Agency) is taking the position that the homestead can no longer be sold and has imposed a transfer of asset penalty. Such arbitrary penalty requires the applicant to file an appeal of the denial of eligibility with no guarantee that the appeal will be successful.

C. Revocable Trust

Transferring property to the trustee of a revocable trust avoids the problems associated with making a completed gift. The grantor retains full control over the property, does not incur gift tax liability, and retains property tax exemptions if the grantor reserves a sufficient interest in the property. The transfer occurs without supervision of the probate court, maintaining the grantor's privacy and avoiding Medicaid estate recovery. The property

cannot be reached by the beneficiary's creditors during the grantor's life, but creditors of the grantor can still reach the property.

However, effective January 1, 2008, Texas Medicaid treats residences in revocable trusts as a countable resource. Medicaid for the Elderly and People with Disabilities Handbook, ch. F-3210, available at <http://www.dads.state.tx.us/handbooks/mepd/F/F-3000.htm#secF-3210>.

D. Outright Transfers to Specified People

A transfer of a Medicaid applicant's residence to the following individuals is not subject to a transfer penalty under 42 U.S.C. § 1396p(c)(2):

1. the grantor's spouse,
2. the grantor's child under age 21,
3. the grantor's blind or disabled child of any age,
4. the grantor's brother or sister who has an ownership interest and was residing in the residence for at least a year prior to the grantor's admittance into a nursing home,
5. the trustee of a trust established solely for the benefit of a disabled person under 65 years of age; and
6. a child who resided in the home with the Medicaid applicant and was instrumental in keeping the Medicaid applicant out of the nursing home for at least two years.

While an outright conveyance under an exception to the transfer penalty has similar Medicaid-related benefits as a Lady Bird deed, it does not share most of the other benefits. The grantor is making a completed gift that is subject to the gift tax. The grantor retains no rights over the property and the beneficiary's creditors can reach the property. Without reserving any rights in the property that result in the inclusion of the property in the grantor's estate, the beneficiary will receive the grantor's basis in the property rather than a stepped-up basis. Farrell at 12.

E. Transfer the Property and Wait Out the Lookback Period

Any property that is transferred during the grantor's life that creates a penalty period can avoid estate recovery. After the lookback period is over, the grantor may avoid the transfer penalty and theoretically obtains Medicaid benefits. However, like the other outright conveyances, the grantor does not receive most of the benefits that are afforded by Lady Bird deeds. Farrell at 13.

F. Purchase a Life Estate

If the grantor does not have a residence, he or she may purchase a life estate in a residence. As long as the grantor pays only fair market value for the life estate, this transfer will be treated as a transfer for full consideration, and no penalty will be imposed. Any amount over the fair market value of the life estate will be subject to a transfer penalty. Farrell at 16-17. However, the deficit Reduction Act revised the law to require the grantee to reside in the life estate property for at least one year to avoid treatment of the transaction as a transfer without consideration. TEXAS ELDER LAW § 9:102.

G. Transfer the Residence Shortly Before Death

Estate recovery only applies to property in the grantor's estate at death. Although any transfer must be reported to the Medicaid program, most likely terminating Medicaid eligibility, the property transferred will not be subject to estate recovery. If the grantor's life expectancy is short, paying for private care might be a small price to pay to avoid estate recovery. If a grantor desires to employ this strategy, it would be prudent practice to inform the Medicaid program of the transfer once executed and provide a copy of the transfer document to the Medicaid Agency. Additionally, the grantor should execute a power of attorney authorizing (but not necessarily requiring) an agent to make a gift of the residence near the time of the grantor's death.

IV. CONCERNS SURROUNDING THE USE OF LADY BIRD DEEDS

No state or federal cases were located regarding whether Lady Bird deeds can properly be used as a Medicaid planning device. Lady Bird deeds may be impliedly authorized under Texas Probate Code §§ 322 and 450, but there is no statute or judicial opinion specifically authorizing the practice. It is imperative to monitor the Health and Human Services Commission treatment of Lady Bird deeds as several unfavorable results could occur if they become disfavored. First, any rule change with regard to residences could result in the grantor's residence becoming a countable asset. In that case, the grantor could not qualify for Medicaid benefits until he or she reverses the conveyance or applies another strategy to meet the Medicaid requirements. Some practitioners who use this technique doubt that a transfer penalty will be imposed because of the difficulty of placing a market value on the transferred interest.

Second, the Texas legislature could re-define "estate" more broadly. Many states have done this, enabling Medicaid estate recovery programs to recover property that passes outside of probate. Farrell at 15.

One final concern about Lady Bird deeds is that some title companies take the position that the Medicaid Estate Recovery statute creates superior rights in the State even though the State has only unsecured creditor status. Anecdotal evidence exists that when a title company takes the view that the State has some type of lien right, it does not want to insure a title transferred by a Lady Bird deed without the joinder of the remainder beneficiaries and/or a written release from the State. However, Lady Bird deeds have been utilized since 2005 without need for litigation. Thus, with proper information, it appears that many title companies are willing to insure the title without

requiring these extra precautions. This seems to be the appropriate stance because a title company would not request a release from VISA or any retailer that might be an unsecured creditor of the grantor.

If the grantee sells the property after the death of the grantor of a Lady Bird deed, there would be no recourse against a title company should the property not be used to pay the Medicaid Estate Recovery Claim. The creditor (e.g., the State) would have a right to follow any money improperly paid but would not have a claim on the title to the property—the subject of the title insurance.

A title company may be involved with a sale while the grantor/Medicaid beneficiary is living, and in that case the deed's reservation of the right to sell without liability to the grantee controls. Without a right in the state of Texas to create a lien, the property may be conveyed unencumbered. Of course, the proceeds paid to the Medicaid beneficiary may cause the beneficiary to lose benefits eligibility.

V. CONCLUSION

The effectiveness of Lady Bird deeds is subject to change at any time. The continued growth and popularity of this technique may eventually lead to Texas legislative or judicial developments that will provide more guidance. Until that time, Lady Bird deeds remain an effective way to avoid both transfer penalties and estate recovery. However, these are essentially uncharted waters and clients should be warned about the uncertainty and potential problems associated with Lady Bird deeds.

The authors express their tremendous appreciation to Patricia F. Stiehler, CELA (Schoenbaum, Curphy, & Scanlan, P.C., San Antonio, Texas) for her assistance in the preparation of this article.

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BANKING INVESTMENTS INSURANCE

AN ACT

1
2 relating to quitclaim deeds.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

4 SECTION 1. Section 16.025(b), Civil Practice and Remedies
5 Code, is amended to read as follows:

6 (b) This section does not apply to a claim based on a
7 quitclaim deed, a forged deed, or a deed executed under a forged
8 power of attorney.

9 SECTION 2. Chapter 13, Property Code, is amended by adding
10 Section 13.006 to read as follows:

11 Sec. 13.006. EFFECT OF RECORDING QUITCLAIM DEED. After the
12 fourth anniversary of the date a quitclaim deed for real property is
13 recorded in the deed records of the county in which the real
14 property is located, the quitclaim deed:

15 (1) does not affect the question of the good faith of a
16 subsequent purchaser or creditor; and

17 (2) is not notice to a subsequent purchaser or
18 creditor of any unrecorded conveyance of, transfer of, or
19 encumbrance on the real property.

20 SECTION 3. The change in law made by this Act applies only
21 to a quitclaim deed recorded on or after the effective date of this
22 Act. A quitclaim deed recorded before that date is governed by the
23 law in effect immediately before the effective date of this Act, and
24 that law is continued in effect for that purpose.

1 SECTION 4. This Act takes effect September 1, 2021.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 885 passed the Senate on April 21, 2021, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 885 passed the House on May 8, 2021, by the following vote: Yeas 134, Nays 5, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

BILL ANALYSIS

Senate Research Center

S.B. 885
By: Hughes
State Affairs
5/24/2021
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In Texas, quitclaims negatively impact the chain of title in perpetuity. Texas law does not provide good faith purchaser status for grantees (those receiving the property) for value with no actual or constructive notice of any outside interests or claims to the property if a quitclaim deed appears in the chain of title. According to case law, the existence of a quitclaim in the property records serves as notice of potential additional claims on the property not only for the initial grantee, but also for subsequent transferees.

Texas courts are increasingly construing instruments as quitclaims based on interpretation of certain phrases despite the document appearing to be a deed conveying title. This judicial characterization can blur the lines between quitclaims and conveyances resulting in the purpose of the recording system to foster certainty about status of ownership of real property being diluted.

S.B. 885 seeks to create certainty by providing a statute of limitations for quitclaims in the chain of title that establishes good faith purchaser status for subsequent transferees that take the property without additional or actual notice of unrecorded matters.

(Original Author's/ Sponsor's Statement of Intent)

S.B. 885 amends current law relating to quitclaim deeds.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 16.025(b), Civil Practice and Remedies Code, to provide that Section 16.025 (Adverse Possession: Five-Year Limitations Period) does not apply to a claim based on certain deeds, including a quitclaim deed. Makes a nonsubstantive change.

SECTION 2. Amends Chapter 13, Property Code, by adding Section 13.006, as follows:

Sec. 13.006. EFFECT OF RECORDING QUITCLAIM DEED. Provides that, after the fourth anniversary of the date a quitclaim deed for real property is recorded in the deed records of the county in which the real property is located, the quitclaim deed:

(1) does not affect the question of the good faith of a subsequent purchaser or creditor; and

(2) is not notice to a subsequent purchaser or creditor of any unrecorded conveyance of, transfer of, or encumbrance on the real property.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: September 1, 2021.

**RESTRICTIONS, ENCROACHMENTS, MINERALS ENDORSEMENT –
OWNER'S POLICY (Form T-19.1)****ENDORSEMENT**

Attached to Policy No. _____

Issued By

BLANK TITLE INSURANCE COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only:
 - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
 - b. "Improvement" means a building, structure, road, walkway, driveway, or curb, affixed to either the Land or adjoining land and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.
 - c. "Private Right" means (i) an option to purchase; (ii) a right of first refusal; or (iii) a right of prior approval of a future purchaser or occupant.
3. The Company insures against loss or damage sustained by the Insured by reason of:
 - a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
 - b. Enforced removal of an Improvement located on the Land at Date of Policy as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation;
 - c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation; or
 - d. Enforcement of a Private Right in a Covenant affecting the Title at Date of Policy based on a transfer of Title on or before Date of Policy that causes a loss of the Insured's Title.
4. The Company insures against loss or damage sustained by reason of:
 - a. An encroachment of:
 - i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
 - ii. an Improvement located on adjoining land onto the Land at Date of Policy

Section 2 - Insuring Forms

unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.; or

- b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or
 - c. Damage to an Improvement located on the Land, at Date of Policy that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
 - d. Damage to an Improvement located on the Land on or after Date of Policy, resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
- a. any Covenant contained in an instrument creating a lease;
 - b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
 - c. except as provided in Paragraph 3.c, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;
 - d. contamination, explosion, fire, fracturing, vibration, earthquake, or subsidence; or
 - e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

Revised 1/2014

amount prorated at closing, the parties shall adjust the prorations when tax statements for the current year are available. If taxes are not paid at or prior to closing, Buyer shall pay taxes for the current year.

- 14. CASUALTY LOSS:** If any part of the Property is damaged or destroyed by fire or other casualty after the Effective Date of this contract, Seller shall restore the Property to its previous condition as soon as reasonably possible, but in any event by the Closing Date. If Seller fails to do so due to factors beyond Seller's control, Buyer may (a) terminate this contract and the earnest money will be refunded to Buyer (b) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (c) accept the Property in its damaged condition with an assignment of insurance proceeds, if permitted by Seller's insurance carrier, and receive credit from Seller at closing in the amount of the deductible under the insurance policy. Seller's obligations under this paragraph are independent of any other obligations of Seller under this contract.
- 15. DEFAULT:** If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If Seller fails to comply with this contract, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.
- 16. MEDIATION:** It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation. Any dispute between Seller and Buyer related to this contract which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.
- 17. ATTORNEY'S FEES:** A Buyer, Seller, Listing Broker, Other Broker, or escrow agent who prevails in any legal proceeding related to this contract is entitled to recover reasonable attorney's fees and all costs of such proceeding.
- 18. ESCROW:**
- A. **ESCROW:** The escrow agent is not (i) a party to this contract and does not have liability for the performance or nonperformance of any party to this contract, (ii) liable for interest on the earnest money and (iii) liable for the loss of any earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent. Escrow agent may require any disbursement made in connection with this contract to be conditioned on escrow agent's collection of good funds acceptable to escrow agent.
 - B. **EXPENSES:** At closing, the earnest money must be applied first to any cash down payment, then to Buyer's Expenses and any excess refunded to Buyer. If no closing occurs, escrow agent may: (i) require a written release of liability of the escrow agent from all parties; and (ii) require payment of unpaid expenses incurred on behalf of a party. Escrow agent may deduct authorized expenses from the earnest money payable to a party. "Authorized expenses" means expenses incurred by escrow agent on behalf of the party entitled to the earnest money that were authorized by this contract or that party.
 - C. **DEMAND:** Upon termination of this contract, either party or the escrow agent may send a release of earnest money to each party and the parties shall execute counterparts of the release and deliver same to the escrow agent. If either party fails to execute the release, either party may make a written demand to the escrow agent for the earnest money. If only one party makes written demand for the earnest money, escrow agent shall promptly provide a copy of the demand to the other party. If escrow agent does not receive written objection to the demand from the other party within 15 days, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursement of the earnest money.
 - D. **DAMAGES:** Any party who wrongfully fails or refuses to sign a release acceptable to the escrow agent within 7 days of receipt of the request will be liable to the other party for (i) damages; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.
 - E. **NOTICES:** Escrow agent's notices will be effective when sent in compliance with Paragraph 21. Notice of objection to the demand will be deemed effective upon receipt by escrow agent.
- 19. REPRESENTATIONS:** All covenants, representations and warranties in this contract survive closing. If any representation of Seller in this contract is untrue on the Closing Date, Seller will be in default. Unless expressly prohibited by written agreement, Seller may continue to show the Property and receive, negotiate and accept back up offers.
- 20. FEDERAL TAX REQUIREMENTS:** If Seller is a "foreign person," as defined by Internal Revenue Code and its regulations, or if Seller fails to deliver an affidavit or a certificate of non-foreign status to Buyer that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the