

Uniform Law Commission develops transfer-on-death deeds

By Susan N. Gary

Background

In 2006 the Uniform Law Commission appointed a drafting committee to develop a uniform act creating transfer-on-death (TOD) deeds. The committee has developed a draft of an act and expects to present the act for final approval in the summer of 2009. The committee includes practicing lawyers and academics and the active observers and advisors include representatives from title companies, the AARP, the American Bar Association's Commission on Law and Aging, the American Bankers' Association, and the American Bar Association. I am an advisor from the Real Property, Trust, and Estate Law Section of the ABA.

Before the act becomes final, the committee working on the uniform act will discuss and address many issues and questions involved with TOD deeds. The final version of the act will have taken into consideration the concerns of elder advisors, title companies, and lawyers.

General information

A TOD deed, known in some states as a beneficiary deed, allows the owner of real property to execute a deed that names the beneficiary who will succeed to ownership at the owner's death. Ten states (Arizona, Arkansas, Colorado, Kansas, Missouri, Montana, Nevada, New Mexico, Ohio, and Wisconsin) have passed TOD deed statutes.¹ California is considering a bill this session.

At death, a person's probate property transfers to his or her beneficiaries by will or through intestacy if the decedent left no will. These days, much property transfers outside the probate process, through trusts or contractual arrangements. Insurance proceeds transfer to the person named as beneficiary under the policy, bank accounts and stock accounts may designate beneficiaries, and revocable trusts have become a popular will substitute. Many people prefer to avoid the probate process, because of concerns about delays and cost or due to a desire for privacy.

If a person owns real property, he or she can avoid probate by using a revocable trust, but a revocable trust may not be appropriate if the person's only significant asset is a house. The only other option for a property owner is to transfer the title of the property into a form of joint ownership with a right of survivorship. In some states husbands and wives use tenancy by the entirety to create joint ownership with survivorship. Persons other than a married couple, and in some states married persons as well, use joint tenancy with right of survivorship. In either case, by adding the other person to the title, the original property owner makes an irrevocable gift of half the property. The irrevocable nature of the gift means that if the original owner later changes his or her mind, undoing the transaction will be difficult if the other owner does not agree. Further, the transfer will be a completed gift for gift tax purposes and may generate a gift tax. Finally, because the person added to the title has rights in the property, the creditors of the added person may be able to reach the asset.

To facilitate the transfer of property on death, many states have enacted transfer-on-death statutes for bank accounts and stock accounts. The statutes permit a person to designate a beneficiary to take the account at death without giving the named beneficiary any current rights in the property. The ten states identified above now use TOD deeds to

¹ See Ariz. Rev. Stat. § 33-405; Ark. Code Ann. § 18-12-608; Colo. Rev. Stat. § 15-15-401(1); Kan. Stat. Ann. § 59-3501; Mo. Rev. Stat. § 461.025; Mont. Code Ann § 72-6-121; Nev. Rev. Stat. § 111.109.1; N.M. Stat. Ann. § 45-6-401; Ohio Rev. Code Ann. § 5302.22; Wisc. Stat. § 705.15.

accomplish the same end for real property. TOD deeds allow a property owner to designate a beneficiary without making a current gift of the property. The designation is subject to revocation by the owner, but if the owner records the deed and does not revoke it, on the owner's death the beneficiary will be able to obtain title to the property without going through probate. For persons of modest means, the TOD deed will reduce the cost of estate planning and estate administration.

Specifics of a TOD deed statute

Statutes that authorize TOD deeds vary in some respects, although states apply many of the same rules to the deeds. The description that follows tracks rules set forth in the March 2008 draft of the Uniform Act.

Recording requirement. To be effective, a TOD deed must be recorded before the death of the owner.

Multiple deeds. If multiple TOD deeds are recorded, the most recently executed and acknowledged TOD deed controls, regardless of the order of recording.

Owner's rights. During the owner's lifetime, the owner retains full power and control over the property. The owner owes no duties to the beneficiary and need not provide notice to or obtain consent from the beneficiary for any actions taken with respect to the property.

Revocation. The owner of property can revoke a TOD deed at any time by execution and recording of a subsequent TOD deed or an instrument of revocation. A will cannot revoke the designation of a beneficiary on a TOD deed. If a creditor of the owner executes a claim on the property and acquires it, the TOD designation is revoked.

Capacity for execution. The level of capacity required to execute a TOD deed is the same as the level of capacity required to execute a will.

Tax considerations. The execution of a TOD deed has no tax consequences. It is not a completed gift and remains revocable. The full value of the property remains in the estate of the owner for estate tax purposes.

Beneficiary's interest. The beneficiary has no interest in the property until the death of the owner. The creditors of the beneficiary cannot reach the property while the owner is alive. The owner need not notify the beneficiary when the owner creates or revokes the deed. Delivery and acceptance of the deed by the beneficiary are not required. If foreclosure is initiated against property, the beneficiary is not entitled to notice.

Interest contingent on survival by beneficiary. The beneficiary must survive the owner in order to take the property. In Oregon, the beneficiary must survive by 120 hours. The anti-lapse statute, which provides a substitute gift to the descendants of a beneficiary who is related to the owner, does not apply to TOD deeds.

Omitted spouse or child. A spouse or child unintentionally disinherited by a TOD deed is not protected. Marriage or the birth of a child after the execution of a TOD deed does not affect the validity of the TOD designation.

Multiple beneficiaries. If the deed names multiple beneficiaries, the deed should indicate how the beneficiaries will take title to the property. If the deed does not indicate, then tenancy in common will be presumed unless the beneficiaries are married to each other, in which case tenancy by the entirety will be presumed.

Contingent beneficiaries. The deed may provide for an alternate beneficiary if the first-named beneficiary predeceases the owner.

Vesting of ownership. Title vests in the beneficiary on the death of the owner. The beneficiary takes the interest subject to all encumbrances, mortgages, liens, and other interests to which the property was subject at the owner's death.

Proof of death. The beneficiary establishes proof of death in the same manner that a surviving tenant by the entirety establishes the death of the decedent tenant.

Multiple owners. Owners who hold property as joint tenants with right of survivorship or as tenants in the entirety can use a TOD deed to transfer the property on

the death of the last owner to die. If only one of the owners executes the deed, the deed will be effective only if that owner is the last to die. If two owners execute a TOD deed and one owner then revokes the deed, the revocation will be effective only if that owner is the last to die. If two owners execute a TOD deed and one owner dies, the surviving owner can subsequently revoke the TOD deed.

Owners who hold property as tenants in common without survivorship rights can also use TOD deeds. Each owner can use a TOD deed to convey that owner's individual property interest.

Creditors of the owner. The execution and recording of a TOD deed does not affect any rights the creditors of the owner may have during the owner's lifetime. After the owner's death, if other assets of the probate estate are insufficient to pay all claims and all statutory family allowances, the claims may be brought against the property. A creditor must bring the claim in a proceeding to administer the estate, within one year after the owner's death.

Creditors of the beneficiary. If the beneficiary files for bankruptcy, the automatic stay in the bankruptcy proceeding does not bar the owner from revoking the deed. A lien creditor of the beneficiary cannot execute a claim on the beneficiary's interest in the real property until after the owner's death.

Limitations on actions against beneficiaries. Claims of a creditor of the owner are barred one year after the owner's death. A proceeding to contest the TOD deed is barred at the earlier of three years after the owner's death or one year after proof of the owner's death is established in the manner it would be established in connection with a deed in joint tenancy with right of survivorship.

Medicaid recovery. If a person who has received medical assistance dies with a TOD deed in effect, the beneficiary's interest will be subject to a claim by the state for recovery of any medical assistance payments made on behalf of the owner.

Bona fide purchasers. A bona fide purchaser who purchases property from the beneficiary after the owner's death takes title free of the rights of persons interested in the owner's estate.

Planning ideas

Small estate. An owner whose estate consists primarily of a house may use a TOD deed to avoid the expense of probate.

Unmarried partner. A couple that has not married or registered as domestic partners (in a state that treats registered partners as married for most legal purposes) may want to use a TOD deed as part of an overall estate plan. The deed does not convey current rights and therefore avoids gift tax problems. (And gift tax will be a concern even if the couple is registered because the federal gift tax does not provide a deduction for persons who are registered but not legally married.) If the couple ends their relationship, the owner can revoke the TOD deed.

Parent and child. Sometimes a parent puts a child on a deed to avoid probate and ensure that the child inherits the property. If the deed creates a joint tenancy with a right of survivorship, the parent has made a lifetime gift, the parent cannot later revoke the gift, and creditors of the child can reach the asset. A TOD deed avoids those difficulties.

Revocable trust. An owner may have created a revocable trust for other property but may not want to transfer title to real property into the name of the trustee. The owner may be planning to sell the property soon and may find a sale easier if the property remains in the owner's name. A TOD deed transferring the property to the trustee of the revocable trust provides a back-up plan in case the owner does not sell the property before death.

Reasons not to use a TOD deed

Complicated estate plan. If a property owner has multiple beneficiaries who may share in the owner's probate and nonprobate estate, naming one beneficiary to take the

real property may result in unintended consequences if the beneficiary predeceases the owner or if other assets are sold or change in value. Naming multiple beneficiaries on the deed is possible, but may be difficult to implement. For example, an owner may have three children and may want grandchildren to take a share if a child predeceases the owner. Providing for various contingencies in the deed will be difficult.

Need to sell quickly. If the owner expects that the beneficiary will want to sell the house quickly, a TOD deed may not be the best choice. An interested person may contest the deed for a year after the beneficiary establishes the owner's death. Creditors can reach the property for a year, and in some circumstances longer. These uncertainties mean that a title company may be reluctant to issue title insurance until these periods have run or may issue the insurance subject to an exception and require a higher premium.

Undue influence

After a state adopts TOD legislation, TOD deed forms will be readily available. That availability raises concerns about undue influence. A neighbor or relative might influence a property owner to execute a TOD deed leaving the property to the neighbor or relative. While the risk of undue influence is always a concern with a disposition taking effect at death, a TOD deed should be no more likely to be used by someone with improper motives than the other forms of transfer. Indeed, a TOD deed provides an alternative that requires more formalities than a power of attorney and is safer during lifetime than a joint tenancy deed.

A TOD deed requires the same execution formalities as other deeds, typically notarization and recordation. Thus, someone seeking to take advantage of a property owner might find a power of attorney or even a will an easier route. Also, a TOD deed takes effect at death and has no effect during the owner's lifetime. Someone engaging in financial abuse might use a power of attorney or even a revocable trust to obtain control over assets. The owner might suffer the loss of assets during his or her lifetime, creating financial difficulties for the owner as well as undermining the owner's estate plan.

If the undue influencer's goal is specifically control of the house, a different kind of deed is already available. A joint tenancy deed has potential lifetime consequences for the owner and does not permit revocation if the owner changes his or her mind. A TOD deed, in contrast, will not affect control of the property during the owner's lifetime and can be revoked if the owner emerges from the bad influence of the person trying to reach the assets. The undue influencer will have no rights to the property until the owner dies.

If someone does unduly influence a property owner to execute a TOD deed, the personal representative of the owner's estate or an interested person may contest the validity of the deed on the basis of fraud, undue influence, or other causes that invalidate dispositive documents. The advantage of a contest of a TOD deed after the owner's death, in contrast with the contest of a power of attorney, is that the property will likely be easy to find. The current draft of the Act provides that the person contesting the deed may record a notice of lis pendens to protect the property while the contest proceeds.

Although a wrongdoer could use a TOD deed to take advantage of a property owner, other tools are just as easy to use. The fact that TOD deeds are an option will not likely lead to increased abuse.

Looking ahead

Because ten states have experience with a TOD statute, the drafters of the uniform act have the benefit of knowing how the statutes have been used in those states and have addressed concerns expressed by title companies and creditors that have experience in states in which TOD deeds have been used successfully. The current draft of the *Real Property Transfer on Death Act* is posted on the Uniform Law Commission's Web site, www.nccusl.org. Comments can be sent to the reporter, Tom Gallanis, at

gallanis@umn.edu, to the ABA advisor, Dennis Horn, dennis.horn@hklaw.com, or to the RPPT Section advisor, Susan Gary, sgary@uoregon.edu.