

THE RISELING REPORT

EXCLUSIVELY FOR THE ESTATE PLANNING PROFESSIONAL

NEW OKLAHOMA LAW NONTTESTAMENTARY TRANSFER OF PROPERTY ACT

There is a new Oklahoma State law at Title 58, Section 1251, et. seq. This new law is called the “**Nontestamentary Transfer of Property Act**” (the “**Act**”). It is effective November 1, 2008.

The Act provides a transfer on death deed form, which will accomplish a transfer of real estate to a beneficiary upon the death of the Owner. The deed requires two witnesses, notarization and must be recorded prior to Owner’s death.

The law contains other very specific provisions which must be complied with:

1. A transfer on death deed (“**TOD Deed**”) may not be revoked by a will. 58 O.S. §1254 C. This means that once a TOD Deed is executed and recorded, a will (the statute doesn’t specify whether a subsequent or antecedent will) does not revoke the TOD Deed.

2. 58 O.S. §1254 D. provides that a TOD Deed may be disclaimed and the disclaimer must be recorded in the County Clerk’s office prior to exercising any dominion. The Act does describe what constitutes dominion. The Act does not specify what happens when the Disclaimer is recorded; one would assume that other statutory provisions regarding disclaimers which treat the disclaiming person as predeceasing the decedent would apply. Unfortunately, this is not clear in the law.

3. If a beneficiary dies prior to the death of the Owner and there is no alternative beneficiary, the transfer lapses. 58 O.S. §1255 C.

4. 58 O.S. §1256 A. allows a joint owner of real estate to sign a TOD Deed, but title to the interest only vests in the beneficiary if the person signing the TOD Deed as a joint owner is the last to die of all of the record joint owners. A TOD Deed specifically does not sever a joint tenancy.

QUESTION: Does the reference to record joint owner only mean a joint tenancy with right of survivorship or can it mean a tenancy in common? This needs clarification.

5. A written revocation of the TOD Deed recorded prior to Owner's death in the County Land Records is required to revoke the TOD Deed. 58 O.S. §1254.

POTENTIAL PROBLEMS

We have identified a number of potential problems with the utilization of a TOD Deed as follows:

1. If real estate is owned by more than one person (i.e., joint tenancy or tenancy in common) the law is very confusing as to how the TOD Deed actually works.

2. Since a TOD Deed may not be revoked by Will, we anticipate confusion in that area.

3. If your client designates multiple beneficiaries on a TOD Deed, significant problems could arise if one of the beneficiaries predeceases the Owner (Probate) or if a beneficiary is in financial difficulty (IRS liens, bankruptcy, divorce) at the time of Owner's death.

4. If all of a client's assets are distributed through transfer on death, where does the cash come from to pay funeral and last illness expenses? We have seen situations where a recipient of assets by virtue of a transfer on death has simply refused to pay his/her proportionate share of expenses.

5. A person will still need a Durable Power of Attorney to protect them during lifetime, even if they use the TOD Deed. The law is silent as to whether a person holding Power of Attorney can sign a TOD Deed or revocation for the Owner. We do not feel this would be permitted.

6. If the beneficiary of a TOD Deed dies before the Owner, a probate will be required since the transfer will lapse.

7. "Death Bed" or last minute changes will be difficult (maybe impossible) since recording prior to Owner's death is required.

8. The statute provides that a TOD beneficiary takes subject to "conveyances", liens, etc. by Owner. This implies an Owner can "revoke" a TOD Deed by signing a "regular" Deed.

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