

**NONTESTAMENTARY TRANSFER OF PROPERTY ACT:  
AN UPDATE ON OKLAHOMA'S USE OF THE TRANSFER-ON-  
DEATH DEED (2011)**

BY:

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## EXHIBITS

- A. ARTICLES ON OKLAHOMA'S NON-TESTAMENTARY TRANSFER OF PROPERTY ACT: TRANSFER ON DEATH DEED
- B. THE ORIGINAL 2008 TOD ACT
- C. THE 2010 AMENDMENTS TO THE TOD ACT, IN RED LINE FORM
- D. THE 2011 AMENDMENTS TO THE TOD ACT, IN RED LINE FORM
- E. ATTORNEY GENERAL OPINION (2009 OK AG 6) REGARDING MINERALS
- F. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)
- G. SEPTEMBER 2011 TITLE EXAMINATION STANDARDS COMMITTEE AGENDA
- H. LIST OF THE LATEST 10 ARTICLES BY KRAETTLI Q. EPPERSON (AVAILABLE ON-LINE)

## **I. INTRODUCTION**

Up until November 1, 2008, in Oklahoma, laymen and estate planning attorneys had a set of nontestamentary transfer tools at their disposal to convey real property at the death of the owner, according to the owner's wishes, including (1) the joint tenancy deed, with right of survivorship, conveying a current interest to the recipient, (2) using a life estate by granting the fee to the intended recipient, while retaining a life estate in the grantor, for the life of the grantor (in essence granting a remainder), and (3) conveying real property to an inter-vivos trust, either revocable or irrevocable.

However, the perception was that such range of tools was limited, which view was due in large part to the never ending quest for a perfect mechanism which gave the owner of the land the maximum flexibility and control, for the minimum cost. Such owners wanted this vehicle to be all things (to them): revocable until death, allowing avoidance of probate, being low cost both to prepare and to implement on death, avoiding gift taxes, and keeping the exclusive use and control of the land in the original owner. Such a perfect vehicle did not exist; there were always trade-offs.

Several other states, most notably Missouri in 1989, enacted legislation creating a new conveyancing document and process which apparently embodied all of these desirable traits. This Nontestamentary Transfer of Property Act ("NTP Act" or "Act"), utilizes what is referred to as a Transfer-on-Death Deed ("TOD Deed"). In Oklahoma a version was enacted in 2008, and it entails the execution, acknowledgement and recording (in the local land records) of a TOD Deed witnessed by two additional persons

(as done on a will), which only vests title in the grantor-beneficiary immediately upon the death of the owner-grantor (sometimes called the "record owner"). 58 O.S. Sections 1251-1258.

The initial adoption of this Act in Oklahoma in 2008, and its amendment in 2010, was without input from the members of the Oklahoma Bar Association Real Law Section ("Section"). However, once the Act was adopted, the Section, acting through its Title Examination Standards Committee ("TES Committee"), reviewed this Act and adopted a Title Examination Standard (17.4) in 2008 to inform title examiners what to look for in the record to determine where the marketable title resides (1) after a TOD Deed is recorded, but before the grantor-owner dies, and (2) after the grantor-owner dies. When the Act was amended in 2010 again without input from the Section, the TES Committee updated its Standard in 2010.

However, during the process of fashioning a Standard, it became evident that the terms of this Act, as originally adopted and as amended in 2010, produced multiple instances of unintended consequences, and that it contained ambiguous and even contradictory provisions. As the result of these discoveries, members of the TES Committee<sup>1</sup> worked with the state legislature<sup>2</sup> to address some of these problems through remedial legislation. These curative legislative changes were adopted during the 2011 session of the legislature, and are effective on November 1, 2011. As will be discussed below, several problems remain, which may need further legislative adjustment. The TES Committee has recently adopted a further revision of the TOD Standard to reflect the 2011 legislative changes, and such changes to the Standard will be submitted to the

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<sup>1</sup> Primarily Dale Astle, Jeff Noble, Chase Ritter, and me (Kraettli Q. Epperson)

<sup>2</sup> Senator Brian Crain from Tulsa

Section and the OBA House of Delegates for approval at the November 2011 Annual Meeting. Such revisions will be effective immediately upon adoption by the House of Delegates.<sup>3</sup>

In this article, I will explain the differences between the TOD Deed and the earlier nontestamentary transfer mechanisms, will outline the process for using such a TOD Deed, and will identify the earlier and remaining problems with using a TOD Deed. This is a relatively new Act, adopted in 2008, and, consequently, there are no reported Oklahoma Appellate cases dealing with it. However, there is one Oklahoma Attorney General Opinion interpreting it<sup>4</sup>, and several published and unpublished articles discussing Oklahoma's Act.<sup>5</sup> I have drawn from this Attorney General's Opinion and from these articles in presenting this article, and want to thank the authors for helping all of us to better understand this Act.

## **II. COMPARISON OF NONTESTAMENTARY TRANSFER TOOLS**

Laymen and their estate planning attorneys are usually looking for tools to allow the transfer of real property with a minimum of cost and a maximum of benefits to the grantor.

In a quest to "avoid probate", due to the perception that probate is too slow, too public and too expensive, people have been continually looking for alternative nontestamentary mechanisms to transfer their assets, including their real property.

The usual alternatives, prior to the availability of the TOD Deed, included (1) the joint tenancy deed, (2) grant of a fee keeping a life estate (for the grantor's life), and (3)

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<sup>3</sup> See Exhibits F-G concerning the TES Committee

<sup>4</sup> 2009 OK AG 6; see Exhibit E attached hereto

<sup>5</sup> See the list of articles attached hereto as Exhibit A

an inter vivos trust, either revocable or irrevocable.

The challenge for the estate planner involves selecting which tool best satisfies the following criteria (see next page):

NONTESTAMENTARY TRANSFER OF PROPERTY – COMPARISON OF TODD TO OTHER TOOLS							
	TOD DEED	JOINT TENANCY	LIFE ESTATE	REVOCABLE TRUST	IRREVOCABLE TRUST		
1. Revocable unilaterally by grantor	Yes	No <sup>1</sup>	No	Yes	No <sup>2</sup>		
2. Exclusive control and use in interim by grantor	Yes	No (Joint)	Limited <sup>3</sup>	Yes	Yes <sup>4</sup>		
3. Free in interim from grantees' severance and debts	Yes	No <sup>1</sup>	Yes	Yes	Yes		
4. Low cost to establish	Yes	Yes	Yes	No	No		
5. Lost cost to implement at death	Yes	Yes	Yes	No	No		
6. Immediate transfer upon death (avoid probate)	Yes	Yes	Yes	Yes	Yes		
7. Public disclosure avoidance	No	No	No	Yes	Yes		
8. Gift tax avoidance	Yes	No	No	Yes	No		

[NOTE: A person may still need a will to identify guardians for minor children, and to establish funeral arrangements]

Footnotes:

1. Either joint can sever such interest, converting it into a tenancy –in-common; joint tenant can encumber own share or lose it through execution
2. Revocable, if trustor retains power of appointment
3. Must avoid “waste”
4. If grantor is trustee

### **III. OVERVIEW OF TOD DEED PROCESS**

Using the statutorily prescribed form for the TOD Deed, the grantor-owner (aka owner or record owner) executes, acknowledges, and records the deed. The deed includes the signatures of two witnesses in addition to the grantor-owner's signature, to verify the grantor-owner's intentions.

Without any requirement to give any notice of the existence and recording of this deed to the grantee-beneficiary, the grantor-owner records the deed in the local land records, meaning the Office of the County Clerk for the county where the land is located.

During the lifetime of the owner-grantor, he/she can unilaterally revoke the conveyance. Such revocation can be done, according to the statutes, (1) by recording a written express revocation, or (2) by reconveying the same interest to a different person, again by recording a TOD Deed covering the same interest.

At the death of the granter-owner, without undertaking a probate or other proceeding, the grantee-beneficiary records an affidavit (1) verifying the "record owner's" death, (2) declaring whether the record owner and the beneficiary were married at the time of the record owner's death, and (3) including a copy of the record owner's death certificate. This recordation must occur within 9 months of the record owner's death, otherwise the title reverts to the record owner's estate.

This process seems simple, right? Well, we shall see.

### **IV. THE PROVISIONS OF THE TOD ACT**

The current TOD Act contains 8 sections, amended in 2010 and 2011, and the following text shows the provisions which remain unamended as of 2011, plus the 2011

“red lined” amended sections<sup>6</sup>:

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58 O.S. Section 1251 (unamended):

Sections 1 through 8 of this act shall be known and may be cited as the "Nontestamentary Transfer of Property Act".

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58 O.S. Section 1252. (amended in 2010 & 2011)

A. An interest in real estate may be titled in transfer-on-death form by recording a deed, signed by the record owner of the interest, designating a grantee beneficiary or beneficiaries of the interest. The deed shall transfer ownership of the interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration. For purposes of the Nontestamentary Transfer of Property Act, an "interest in real estate" means any estate or interest in, over or under land, including surface, minerals, structures and fixtures.

B. The signature, consent or agreement of or notice to a grantee beneficiary or beneficiaries of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.

C. To accept real estate pursuant to a transfer-on-death deed, a designated grantee beneficiary shall execute ~~a notarized~~ an affidavit affirming:

1. Verification of the record owner's death;
2. Whether the record owner and the designated beneficiary were married at the time of the record owner's death; and
3. A legal description of the real estate.

~~D. If the grantee beneficiary was not the record owner's spouse, he or she~~ The grantee shall attach a copy of the record owner's death certificate and an estate tax release to the beneficiary affidavit. The beneficiary shall record the affidavit and related documents with the office of the county clerk where the real estate is located within nine (9) months of the grantor's death, otherwise the interest in the property reverts to the deceased grantor's estate.

Notwithstanding the provisions of Section 26 of Title 16 of the Oklahoma Statutes, an affidavit properly sworn to before a notary shall be received for record and recorded by the county clerk without having been acknowledged and, when recorded, shall be effective as if it had been acknowledged.

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<sup>6</sup> The original 2008 TOD Act and both the 2010 and 2011 amendments to the TOD Act, in “red line” form, are attached hereto as Exhibits B, C and D

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58 O.S. Section 1253 (unamended):

*An interest in real estate is titled in transfer-on-death form by executing, acknowledging and recording in the office of the county clerk in the county where the real estate is located, prior to the death of the owner, a deed in substantially the following form:*

\_\_\_\_\_ (name of owner) being of competent mind and having the legal capacity to execute this document, as owner transfers on death to \_\_\_\_\_ (name of beneficiary) as grantee beneficiary, the following described interest in real estate: (here insert description of the interest in real estate).

**THIS TRANSFER-ON-DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY THIS OWNER FOR THIS INTEREST IN REAL ESTATE. THE GRANTOR HAS THE RIGHT TO WITHDRAW OR RESCIND THIS DEED AT ANY TIME. ANY BENEFICIARY NAMED IN THIS DEED IS HEREBY ADVISED THAT THIS DEED MAY BE WITHDRAWN OR RESCINDED WHETHER OR NOT MONEY OR ANY OTHER CONSIDERATION WAS PAID OR GIVEN.**

**THE STATE OF OKLAHOMA COUNTY OF \_\_\_\_\_**

*Before me, on this day personally appeared \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, the owner of the land described in this deed, and the witnesses, respectively, whose names are subscribed below in their respective capacities, and the owner of the land declared to me and to the witnesses in my presence that the deed is a revocable transfer-on-death of the real estate described therein, and the witnesses declared in the presence of the owner of the real estate and in my presence that the owner of the land declared to them that the deed is a revocable transfer-on-death of the real estate described therein and that the owner of the land wanted each of them to sign it as a witness, and that each witness did sign the same as witness in the presence of the owner of the land and in my presence.*

(name of owner)

(witness)

(witness)

*Subscribed and acknowledged before me by \_\_\_\_\_, the owner of the land, and \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_\_ day of \_\_\_\_\_ (month), \_\_\_\_\_ (year).*

*(signature of notary public)*

*(Seal)*

*My commission expires \_\_\_\_\_ (date).*

*Instead of the words "transfer-on-death" the abbreviation "TOD" may be used.*

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*58 O.S. Section 1254 (amended in 2011):*

*Section 1254. A. A designation of the grantee beneficiary may be revoked at any time prior to the death of the record owner, by executing, acknowledging and recording in the office of the county clerk in the county where the real estate is located an instrument revoking the designation. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries to the revocation is not required.*

*B. A designation of the grantee beneficiary may be changed at any time prior to the death of the record owner, by executing, acknowledging and recording a subsequent transfer-on-death deed in accordance with the Nontestamentary Transfer of Property Act. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required. A subsequent transfer-on-death beneficiary designation revokes all prior designations of grantee beneficiary or beneficiaries by the record owner for the interest in real estate.*

*C. A transfer-on-death deed executed, acknowledged and recorded in accordance with the Nontestamentary Transfer of Property Act may not be revoked by the provisions of a will.*

*D. A transfer on death deed executed, acknowledged and recorded in accordance with the Nontestamentary Transfer of Property Act may be disclaimed in whole or in part or with reference to specific parts by the grantee beneficiary or beneficiaries. The disclaimer must occur within nine (9) months after the death of the landowner.*

*The disclaimer shall be filed with the office of the county clerk in which the transfer on death deed was recorded.*

*If a grantee beneficiary exerts dominion over the real estate within the nine-month period, the disclaimer is waived. Dominion may be evidenced by acts including, but not limited to, possession or the execution of any conveyance, assignment, contract, mortgage, security pledge, executory contract for sale, option to purchase, lease, license, easement or right-of-way. A guardian, executor, administrator or other personal representative of a minor or legally incompetent beneficiary may execute and file a disclaimer on behalf of the beneficiary within the time and in the manner in which the*

~~beneficiary could disclaim, if the guardian, executor, administrator or other personal representative deems it in the best interests of and not detrimental to the best interests of the beneficiary.~~

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58 O.S. Section 1255 (amended in 2011):

~~A. Title to the interest in real estate recorded in transfer-on-death form shall vest in the designated grantee beneficiary or beneficiaries on the death of the record owner. The death of the record owner shall be evidenced by the recording of an affidavit in the office of the county clerk of the county where the real estate is located. The affidavit shall be executed by the grantee beneficiary or beneficiaries. The affidavit shall state the fact of the death of the record owner, state whether or not the record owner and the designated grantee were husband and wife, and provide the legal description of the real estate. The affidavit shall be notarized. If the record owner and designated grantee were not husband and wife, a copy of the death certificate of the record owner and an estate tax release shall be attached to the affidavit.~~

~~B. Grantee beneficiaries of a transfer-on-death deed take the interest of the record owner in the real estate at the death of the grantor owner, free and clear of any claims or interest under Section 44 of Title 84 of the Oklahoma Statutes as to a person who became the spouse of the grantor subsequent to the execution of the transfer-on-death deed, subject to all recorded conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the lifetime of the record owner including, but not limited to, any recorded executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust or lien, and to any interest conveyed by the record owner that is less than all of the record owner's interest in the property, provided however, a non-consensual lien against the grantee beneficiary shall not attach to the property until the recording of the affidavit described in Section 1252 of this title.~~

~~C. B. If a one or more of the grantee beneficiary beneficiaries dies prior to the death of the record grantor owner and an alternative grantee beneficiary has not been designated on the deed, the transfer to those beneficiaries who predecease the grantor owner shall lapse. In the event the grantee beneficiaries are designated in the deed to be joint tenants with right of survivorship, the death of one or more of the grantee beneficiaries prior to the death of the grantor owner shall not invalidate an otherwise validly created joint tenancy estate as to those grantee beneficiaries who are living at the time of the death of the grantor owner.~~

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58 O.S. Section 1256 (unamended):

A. A record joint owner of an interest in real estate may use the procedures in the Nontestamentary Transfer of Property Act to title the interest in transfer-on-death form.

*However, title to the interest shall vest in the designated grantee beneficiary or beneficiaries only if the record joint owner is the last to die of all of the record joint owners of the interest. A deed in transfer-on-death form shall not sever a joint tenancy.*

*B. As used in this section, "joint owner" means a person who owns an interest in real estate as a joint tenant with right of survivorship.*

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*58 O.S. Section 1257 (unamended):*

*A record owner who executes a transfer-on-death deed remains the legal and equitable owner until the death of the owner and during the lifetime of the owner is considered an absolute owner as regards creditors and purchasers.*

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*58 O.S. Section 1258 (unamended):*

*A deed in transfer-on-death form, executed in conformity with the Nontestamentary Transfer of Property Act, shall not be considered a testamentary disposition and shall not be invalidated due to nonconformity with other provisions in Title 58 or Title 84 of the Oklahoma Statutes.*

## **V. DISCUSSIONS OF PROBLEMS WITH THE TOD ACT'S PROVISIONS**

### **1. ALTERNATIVE BENEFICIARIES (Section 1252(A))**

In order to carry out the intentions of the grantor-owner – by ensuring that the interest in the lands goes to the preferred recipients – the Act allows alternative grantee-beneficiaries be designated in the TOD Deed. In this manner, the death of a grantee-beneficiary before the death of the grantor-owner does not frustrate the grantor-owner's intent by making the interest revert to the estate of the grantor-owner, to be distributed by will (probably by a residuary clause) or by intestate succession. Instead, the grantor-owner can, in descending order, identify "the objects of his/her affection" as alternative beneficiaries.

### **2. AN "INTEREST IN REAL ESTATE" (Section 1252(A))**

There have been occasional decisions by the Courts about the difference between the terms "real estate" and an "interest in real estate", as used in various statutes.<sup>7</sup>

Consequently, in 2009 an Attorney General Opinion was requested and issued determining that when the TOD Act provides that it can be used to convey an "interest in real estate" (Section 1252(A)), such conveyance can include "interests in minerals".<sup>8</sup>

To provide solid footing for the application of this TOD Act to minerals, the 2011 amendment (Section 1252(A)) adds this sentence: "For purposes of the Nontestamentary Transfer of Property Act, an 'interest in real estate' means any estate or interest in, over or under land, including surface, minerals, structures and fixtures."

### **3. CONSENT OF GRANTEE-BENEFICIARY (Section 1252(B))**

It should be noted that contrary to the long honored tradition that makes the effectiveness of a deed contingent on the delivery of the deed to the grantee therein, this TOD Act specifically removes any requirement to acquire the "signature, consent or agreement of or notice to a grantee beneficiary...". Part of the negative consequence of this lack of notice is that, at the grantor-owner's own death, the clock starts ticking towards the 9 month deadline for the grantee-beneficiary either to record the affidavit accepting such interest or to have it revert back to the decedent's estate. Yet, the grantee-beneficiary may have no actual knowledge of the existence of the TOD Deed, or the approach of the deadline.

It may be that in the absence of a requirement for such notice under the current statutory language, and in the face of the presumption that, in almost every instance, the

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<sup>7</sup> First National Bank v. Dunlap, 1927 OK 67, 254 P. 729 (an oil and gas lessee's interest is an "interest in real estate" but is not "real estate," and, consequently, is not subject to a judgment lien under 12 O.S. Section 706)

<sup>8</sup> 2009 OK AG 6; see E for a complete copy of this AG Opinion

grantee-beneficiary will want to accept title to the granted asset, this TOD Act might need to be returned to its original 2008 form, whereby, in the absence of a disclaimer – recorded within 9 months of the date of the death of the grantor-owner – the title is deemed accepted by the grantee-beneficiary. The requirement for the recording of an acceptance affidavit could be eliminated.

#### **4. JURAT VERSUS ACKNOWLEDGMENT (Section 1252(C))**

The 2010 amendment to the TOD Act added (on top of the existing separate requirement to disclaim the interest in 9 months or have it deemed accepted by the grantee-beneficiary) a requirement for the grantee-beneficiary, after the death of the grantor-owner, to execute, acknowledge, and record an affidavit accepting the interest.

This affidavit of acceptance needs either a jurat (“subscribed and sworn to before me”), or an acknowledgment (“acknowledged” as my action). A jurat is used to support a sworn statement of facts (e.g., death, marriage, legal description, etc.), while an acknowledgment confirms the grantor's intent to convey or release an interest (e.g., a deed, mortgage, easement, or release of mortgage). In the instance of an TOD Act affidavit verifying certain facts, the use of a jurat seems the most appropriate format. The case of a jurat is declared adequate for recording purposes in the 2011 amendment, instead of an acknowledgement.

#### **5. DEATH CERTIFICATE ATTACHMENT (Section 1252(D))**

There are statutory filings necessary to evidence, in the record, the death of a joint tenant and the death of a life tenant to establish of record the termination of the intervening estate by the filing of an affidavit. The change in title is caused by the death and not by the affidavit. In a similar vein, the recording of the TOD Act acceptance

affidavit of the grantee-beneficiary evidences in the record the passing of the grantor-owner and thereby establishes the acceptance of the interest by the grantee-beneficiary. For some undisclosed reason, the original 2008 version of the TOD Act required such affidavit be accompanied by a copy of the grantor-owner's death certificate, unless the grantee-beneficiary was the spouse of the grantor-owner. This unexplained distinction was a source of one attorney's concern about the encouragement of fraud or error by a spouse. Where there is a requirement to attach the certificate of the death of the grantor-owner provided by an independent governmental agency (such as the county health department) the chances of fraud obviously go down. The 2011 amendment requires all grantee-beneficiaries, including spouses, provide the death certificate with the acceptance affidavit evidencing the grantor-owner's death. (Section 1252(D))

**6. NO ESTATE TAX RELEASE (Section 1252(D))**

As to deaths arising after December 31, 2009, there is no longer any Oklahoma estate tax due. The 2011 amendment to the TOD Act reflected this change and removed the need for an "estate tax release". However, in those instances where an attorney is examining a title involving a TOD Death, where the death of the grantor-owner occurred on or before December 31, 2009, the attachment of an Oklahoma Tax Release will be necessary.

**7. AFFIDAVIT AND NO DISCLAIMER (Sections 1252(C) & (D), 1254(D) & 1255(A))**

Under the original TOD Act, there was a requirement for the recording of an affidavit establishing the death of the grantor-owner (1255(A)) adopted in 2008 (but replaced by the acceptance affidavit in 2011). The initial Act provided "the deed shall

transfer ownership of the interest upon the death of the owner,” with the opportunity for the grantee-beneficiary to disclaim the interest within 9 months of the death of the grantor-owner. (1254(D))

In 2010, the TOD Act was amended to add the additional requirement for an affidavit of acceptance of the transfer (1252(C)) (on top of allowing a disclaimer instrument). There was no deadline provided for the execution, verification (by jurat), and recording of this acceptance affidavit. Also, there was no consequence provided for the failure to record such affidavit. Consequently, as of November 1, 2010, if no disclaimer was recorded and no affidavit was recorded, within the 9-months after the death of the grantor-owner, the title was apparently vested in the grantee-beneficiary, under Section 1255(A) (“Title to the interest in real estate recorded in transfer on death form shall vest in the designated grantees-beneficiaries on the death of the record owner”). However, there could be some uncertainty in the absence of the required recording of the affidavit of acceptance.

In 2011, the disclaimer option language was removed (1254(D)), and the affidavit evidencing the death of the grantor-owner was removed also (1255(A)); consequently, we were left with the 2010 language requiring an affidavit of acceptance (1252(C)), including information verifying the death of the grantor-owner, disclosing whether the grantee-beneficiary is the spouse of the grantor-owner on the grantor-owner's death, and giving the legal description. In 2011, a deadline to record the affidavit of acceptance within 9-months after the grantor-owner's was added (1252(D)). Missing such deadline causes the title to revert to the grantor-owners' estate.

In the absence of an Oklahoma estate tax obligation (for deaths after December 31, 2009), the need to disclose whether the grantee-beneficiary is the spouse of the grantor-owner seems irrelevant. The requirement for the attachment of an estate tax release was eliminated in the 2011 amendment (1252(D)).

#### **8. CONSIDERATION IRRELEVANT (Section 1253)**

The revocability of the interest conveyed under the TOD Deed is emphasized by the language required to be placed on the face of the TOD Deed (in BOLD PRINT) which states: "ANY BENEFICIARY NAMED IN THIS DEED IS HEREBY ADVISED THAT THIS DEED MAY BE WITHDRAWN OR RESCINDED WHETHER OR NOT MONEY OR OTHER CONSIDERATION WAS PAID OR GIVEN." (1253) Presumably this warning language is intended to stave off any claim by a grantee-beneficiary that the conveyance was not revocable based on an argument that consideration was paid.<sup>9</sup>

Although this Section of the statute only calls for "a deed in substantially the following form...", it seems prudent to ensure that all TOD Deeds use BOLD PRINT for the indicated warning language.

#### **9. NECESSITY OF ACKNOWLEDGMENT AND RECORDATION (Sections 1252 (D), 1253, 1254(A) & (B), & 1257)**

A deed will normally be effective and enforceable between the parties upon simple execution and delivery. The Oklahoma recording statutes<sup>10</sup> require both acknowledgment and recordation, but only for the purpose of giving third parties constructive notice of the conveyance.

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<sup>9</sup> 15 O.S. Section 75; 16 O.S. Section 11

<sup>10</sup> 16 O.S. Sections 15 & 16

According to the express terms of the TOD Act, all three steps: execution, acknowledgment and recording, are required, expressly, to create an effective TOD Deed (Section 1253), and, by implication, to create an effective acceptance affidavit (Section 1252(D)).

Similarly, it is expressly provided that the "instrument revoking the designation" and the "subsequent [revoking] transfer-on-death deed", must include all three steps, including recording, before it is timely and effective. (1254(A) & (B))

In other words, it is arguable that an executed, but unrecorded deed, affidavit or instrument cannot give actual notice.<sup>11</sup>

This issue of when an instrument is effective, becomes especially important when there are multiple "subsequent [revoking] transfer-on-death deed(s)". If one revoking deed is executed and acknowledged first, but recorded second, the question might arise as to which one is superior as the "subsequent" expression of the grantor-owner's intent. If it is the grantor-owner's desire that is expected to prevail in a contest between holders of competing TOD Deeds, then it could be argued that it is probably the last deed to be recorded by the grantor-owner that should win. For example, if the first grantee-beneficiary receives the original TOD Deed, after it is executed and acknowledged, but before it is recorded, he could intentionally hold onto it and record it immediately before the death of the grantor-owner, thereby trying to ensure that he beats any other "subsequently" executed and acknowledged, but "earlier" recorded "revoking TOD Deed," which was promptly recorded after execution. To avoid this scenario, an advisor

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<sup>11</sup> See: *Bentley v. Zelma*, 1919 OK 180 (A conveyance of an interest in real estate by a corporation, where it is not acknowledged, is invalid, and subsequent purchasers are charged with notice of its invalidity. ¶0(5))

to the grantor-owner would be wise to ensure that such grantor-owner does not give up physical control of a TOD Deed, but records each one promptly after execution.

In addition, while the TOD Act fails to discuss the results of a later "regular" deed (non-TOD Deed) being executed, acknowledged and recorded, due to the grantor-owner continuing as the "absolute owner as regards creditors and purchasers" (1257), one would assume that such action would be interpreted as revoking any earlier TOD Deed, by being an expression of the later intent of the grantor-owner.

#### **10. SPOUSAL INTERESTS (Section 1255(A))**

To avoid any concerns about an outstanding spousal marital interest in a homestead, the execution of the TOD Deed must include the normal statement of marital status and joinder of spouse, if any.<sup>12</sup>

Some attorneys have expressed worries about whether any spousal homestead interests (marital or probate) come into existence, if a grantor-owner marries after executing a TOD Deed while single.

The TOD Act, as amended in 2011, expressly provides (Section 1255(A)) that "Grantee beneficiaries of a transfer-on-death deed take the interest of the record owner in the real estate at the death of the grantor-owner, free and clear of any claims or interest under Section 44 of Title 84 of the Oklahoma Statutes as to a person who became the

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<sup>12</sup> 16 O.S. Section 4: A. "No deed, mortgage, or conveyance of real estate or any interest in real estate, other than a lease for a period not to exceed one (1) year, shall be valid unless in writing and subscribed by the grantors. No deed, mortgage, or contract affecting the homestead exempt by law, except a lease for a period not exceeding one (1) year, shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law." (emphasis added)\*\*\*; see also OK CONST Art. 12, Section 2.

spouse of the grantor subsequent to the execution of the transfer-on-death deed."<sup>13</sup> This new language is intended to remove any concerns about the possible election by a surviving spouse to claim a 1/2 interest in the deceased spouse's real estate. Such protection should not be necessary because this Section 44 only applies to "property

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<sup>13</sup> 84 O.S. Section 44:\*\*\*

B. This subsection shall apply to the estate of a decedent who dies on or after July 1, 1985.

1. Every estate in property may be disposed of by will except that a will shall be subservient to any antenuptial marriage contract in writing. In addition, no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than an undivided one-half (1/2) interest in the property acquired by the joint industry of the husband and wife during coverture. No person shall by will dispose of property which could not be by the testator alienated, encumbered or conveyed while living, except that the homestead may be devised by one spouse to the other.

2. The spouse of a decedent has a right of election to take the one-half (1/2) interest in the property as provided in paragraph 1 of this subsection in lieu of all devises, legacies and bequests for the benefit of the spouse contained in the last will and testament of the decedent.

3. If the surviving spouse desires to make the election provided in paragraph 2 of this subsection to take the property specified therein in lieu of all devises, legacies and bequests for the benefit of the surviving spouse contained in the last will and testament of a decedent, then the surviving spouse shall make such election affirmatively in writing, which writing shall be filed in the district court in which the estate of the decedent is being administered on or before the final date for hearing of the petition for final distribution of the estate. The court clerk shall immediately mail a copy of such election to the personal representative of the estate and to all attorneys of record of the estate. Such written election of the surviving spouse shall be in the form of a writing separate from all other pleadings and documents filed in the district court in which the estate is being administered. Failure of the surviving spouse to substantially comply with the provisions of this subsection shall render the attempted election by the surviving spouse void and of no force or effect; provided that such failure shall not prohibit the surviving spouse from making a subsequent election within the allotted time period, which substantially complies with this subsection.

4. The right of election of the surviving spouse provided for in paragraph 2 of this subsection is personal to the surviving spouse and may be exercised only during the lifetime of the surviving spouse. However, if there has been a guardian or conservator duly appointed by a court of competent jurisdiction, and such court has judicially determined the surviving spouse to be incompetent, then such guardian or conservator may make the election on behalf of the surviving spouse, but only if the same is approved by the court having jurisdiction over such guardian or conservator. Further, a certified copy of the document or documents evidencing the appointment of such guardian or conservator for the surviving spouse, and a certified copy of the order of the applicable court approving such guardian's or conservator's making such election on behalf of the surviving spouse, shall be attached to the election, which shall also be in substantial compliance with the provisions of paragraph 3 of this subsection, or such election shall be void and of no force or effect. The guardian or conservator may be appointed in any state, and may have been appointed at any time prior to the expiration of the time permitted for the election to be made as provided in paragraph 3 of this subsection.

acquired by the joint industry of the husband and wife during coverture” (i.e., acquired during marriage). The TOD Deed being discussed herein is executed before such marriage, making this particular protection unnecessary; but this 2011 amendment does show legislative intent to avoid a later spouse gaining this particular statutory interest.

This 2011 amendatory language (1252(A)) should also supersede the holding (issued prior to the enactment of the 2008 TOD Act) in Thomas v. Bank of America, 1984 OK 41, 684 P.2d 554, which held that the Section 44 rights allowed the surviving spouse to elect against a trust.

Due to the continued “absolute” ownership of the subject real estate by the grantor-owner during his lifetime, combined with the immediate attachment on marriage of a new spouse’s right to a claim of marital homestead on their residence, prudence dictates that upon the grantor-owner’s death there must be either (a) an affidavit filed showing he was single at the time of his death, or (b), if married, a quit claim deed recorded from the surviving spouse (showing her marital status at the time of execution of the quit claim deed, with joinder of any new spouse). This requirement is already embodied in the current Title Examination Standard 17.4.

A related spousal rights issue arises when one considers the spousal probate possessory right in the homestead. A recently published article extrapolates from an appellate decision, wherein two non-married people held title as joint tenants, and upon the death of one joint tenant, the spouse of the deceased joint tenant was denied a probate homestead homestead possessory right. That author applied that same logic to the TOD Deed issue and concluded:

““If a transfer-on-death deed is determined to transfer property in the same manner as a joint tenancy with right of survivorship, and the decedent's ownership terminates and vests by operation of law in the grantee beneficiary upon the grantor's death, neither the spouse nor the decedent's estate will have a ownership interest in the property, and the surviving spouse will have no right to occupy or possess the probate homestead.”<sup>14</sup> [emphasis added]

The amendment to the TOD Act in 2011 (Section 1255(A)), discussed above, which addresses the surviving spouse's rights under 84 O.S. Section 44, combined with the appellate case law cited in the article above, would seem to end concerns about a spousal's probate rights in the homestead, where the title was included in a recorded TOD Deed before the marriage. However, this author (Kraettli Q. Epperson) is concerned that the appellate courts' past decisions have displayed substantial inconsistency as to whether the homestead right depends on the existence of an “ownership interest.”<sup>15</sup> For instance, in Judge Morrissey's own article, she happens to present contradictory quotes, on the ownership issue, from two different appellate decisions concerning the probate homestead:

“The appellate court reasoned that when the decedent’s ownership [under a joint tenancy deed] terminates and vests by operation of law, in a surviving joint tenant, neither the spouse nor the decedent’s estate had an ownership interest in the property, and therefore the homestead was ‘not reserved to the family and the widow had no homestead right of possession and occupation.’” (p. 161) (emphasis added)

## VERSUS

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<sup>14</sup> “Homestead and Spousal Rights: Puzzling Predicaments in Probate Part II”, 82 OBJ 160, Morrissey & Bushyhead, January 15, 2011, at pgs. 161-162

<sup>15</sup> “Real Estate Homesteads in Oklahoma: Conveying and Encumbering Such Interest”, 75 OBJ 1357 (May 15, 2004), by Kraettli Q. Epperson; “Marital Homestead Rights Protection: Impact of Hill v. Discover Card?”, 80 OBJ 2408 (November 21, 2009), by Kraettli Q. Epperson

“The Supreme Court in Lawley v. Richardson held, ‘the homestead interest is jointly vested in the husband and wife for the benefit of themselves and family, without regard to which spouse owns title to the land.’” (p. 162) (emphasis added)

A study of homestead rights in Oklahoma suggests that the majority of decisions hold that homestead rights do not depend for their existence on a spouse having any "ownership" interest in the subject real property. The rights are personal in nature, and are not, in the normal sense, assignable like other property rights.

Consequently, this author (Kraettli Q. Epperson) is uncertain whether the Courts will hold that a spousal probate homestead right would be superseded by a grantee-beneficiary interest acquired through a TOD Deed.

#### **11. GRANTOR'S ENCUMBRANCES ON A GRANTEE- BENEFICIARIES' TITLE (Section 1255(B), now (A))**

The original version of the TOD Act (1255(B), now (A)) made the title, which was being conveyed to the grantee-beneficiary at the grantor-owner's death, subject to any claims or liens against the title arising while in the hands of the grantor-owner, including conveyances, mortgages, executory contracts, etc., whether made by the grantor-owner or which otherwise arose (such as judgment liens) against the grantor-owner.

This original 2008 language could be interpreted to include both recorded and unrecorded claims, leaving the status of title in the hands of the grantee-beneficiary, at the death of the grantor-owner, in substantial limbo. The 2011 amendment inserted the qualification in strategic places that such claims are valid only if they are "recorded". On a go-forward basis, this removes this uncertainty.

**12. NON-CONSENSUAL LIENS AGAINST THE GRANTEE-BENEFICIARY (Section 1255(A))**

Several attorneys raised a question after the initial adoption of the TOD Act concerning whether and when a consensual (e.g., a mortgage) or a non-consensual lien (e.g., a money judgment lien) against the grantee-beneficiary would attach to such title. Since the title vests in the grantee-beneficiary automatically at the death of the grantor-owner, than at that moment all encumbrances against the grantee-beneficiary would attach to the title. This would create a problem only if the grantee-beneficiary disclaimed the interest back to the estate of the grantor-owner, making such title more encumbered than when the grantor-owner died.

The amendment in 2011 (1255(A)) covered this specific problem as to non-consensual liens (such as general money judgment liens and general tax liens) by preventing such liens from attaching until such grantee-beneficiary records the acceptance affidavit. But the question continues as to whether there might be instances where the grantee-beneficiary may have made a consensual lien or encumbrance which would not be covered by this curative language (e.g., a mortgage). The outcome of this remaining issue is uncertain.

**13. JOINT TENANT BENEFICIARIES (Section 1255(C), now (B))**

Under the original TOD Act, if a grantee-beneficiary pre-deceased the grantor-owner, and if an alternative grantee-beneficiary had not been designated, the interest would lapse back to the decedent's estate. (1255 (C), now (B))

However, there was a question raised about whether this lapse would occur if there were multiple grantee-beneficiaries who were designated as joint tenants of one

another. To create a joint tenancy there must be all 4 of the unities in place, including the vesting of the interest in the joint tenants at the same time. If a grantee-beneficiary pre-deceased the grantor-owner, then at the grantor-owner's death the pre-deceased grantee-beneficiary could not, even for an instant, acquire such interest. Therefore, it would be impossible, under the normal understanding of joint tenancies for a surviving grantee-beneficiary to acquire the interest of a pre-deceased grantee-beneficiary.

This issue was specifically addressed in the 2011 amendment (1255(B)), allowing the interest to be claimed by the surviving grantee-beneficiary, assuming there was not an alternative grantee-beneficiary designated by the grantor-owner. It is all about carrying out the intent of the grantor-owner.

#### **14. INTERESTED WITNESSES AND NOTARIES (Section 1258)**

In the execution of a will the witnesses and notary can not be an interested party under the will. This rule reduced the chance for fraud and overreaching.

But this prohibition is not expressly set out in the TOD Act, and any statutory support for it arising from Titles 58 and 84, seems to be eliminated by the language removing all impact of non-conformity with the execution requirements of Titles 58 and 84 (1258). Out of an abundance of caution, the estate planning attorney should avoid the possibility of a post-death challenge to a TOD Deed, by using disinterested parties as witnesses and notaries.

The lack of any requirement for notice to the heirs and creditors of the deceased grantor-owner when using a TOD Deed, raises the risks that unscrupulous persons (family, friends and strangers) would secure such a deed and steal the property from the rightful recipients. So long as the 2 year fraud statute of limitation is interpreted to not

begin to run until title is vested in the grantee-beneficiary, or, more likely, upon “the discovery of the fraud,” there might still be the opportunity to discover and challenge such problem.<sup>16</sup>

**15. NEED GRANTEE TO SIGN ACCEPTANCE AFFIDAVIT (Section 1252(D))**

The affidavit of acceptance, introduced in the 2010 amendment, can only be signed by "the grantee". If the grantee-beneficiary dies right after the grantor-owner dies, or is a minor, or is otherwise incapacitated, the statute does not expressly allow it to be signed by a representative.

The earlier version of this TOD Act (pre-2011), which allowed a disclaimer of the interest, authorized a representative of the grantee-beneficiary to sign the disclaimer.

Such a problem would be eliminated if this statute was amended to allow a representative to sign the acceptance affidavit for the grantee-beneficiary.

**16. LACK OF DUE PROCESS NOTICE OF LOSS OF PROPERTY RIGHT (Sections 1252(B) & (D))**

Under the 2011 amendment, if the acceptance affidavit is not recorded within 9-months of the grantor-owner’s death, the title reverts to the grantor-owner’s estate (1252(B) & (D)). A due process question might eventually be raised against this automatic forfeiture of the grantee-beneficiary's property interest, where no notice of either the initial vesting of the interest or the need to take action to avoid a loss is required.

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<sup>16</sup> 12 O.S. Section 95 (A)(3)

A loss of title through either adverse possession or the operation of the 30-year marketable record title act, are similar instances where such divestiture occurs. In the instance of adverse possession, notice through actual possession to the losing party is required. The 30-year act has a long period of time before the interest is lost (30-years) and the third party's claim (the "root") is in the land records for that lengthy period of time, subject to discovery.

It is unclear how such a question will be resolved by the courts, if raised against this TOD Act. However, a version of this Act has been adopted in various states, and eventually this due process issue will surely surface and be resolved.

Such a problem could also be avoided if the Act was amended to allow the disclaimer process to replace the acceptance affidavit process.

#### **VI. PROPOSED TITLE EXAMINATION STANDARD**

The TES Committee adopted the following Standard 17.4 in September, 2011, to reflect the provisions of this new 2011 version of the TOD Act. This proposed Standard will be published in the Oklahoma Bar Journal in October 2011 and will then be presented for approval to both the Section and the OBA House of Delegates in November 2011 at the OBA Annual Meeting.

## 17.4 TRANSFER-ON-DEATH DEEDS

*A deed appearing of record executed in accordance with the “Nontestamentary Transfer of Property Act” should be accepted as a conveyance of the grantor’s interest in the real property described in such deed effective upon the death of the grantor, provided that an affidavit evidencing the death of such grantor has been recorded, as specified in the Act, and no evidence appears of record by which:*

- A. *the conveyance represented by such deed has otherwise been revoked, disclaimed\* or has lapsed pursuant to the provisions of the Act, or*
- B. *the designation of the grantee beneficiary or grantee beneficiaries in such deed has been changed via a subsequent transfer-on-death deed pursuant to the provisions of the Act.*

*Authority: 58 O.S. § 1251, et seq.*

*~~\*The examiner should be aware of the fact that~~ On and after November 1, 2008 through October 31, 2011, a disclaimer under the provisions of the Act may be executed only within a period of time ending nine (9) months after the death of the owner/grantor. On and after November 1, 2011, the property reverts to the estate of the deceased grantor if the affidavit described in § 1252C and D is not recorded within 9 months of the grantor’s death.*

*Comment: Pursuant to the provisions of the Act, releases for Oklahoma estate taxes and, if applicable, federal estate taxes for the deceased grantor, together with a death certificate, shall be attached to the affidavit evidencing the death of the grantor, except no tax releases or death certificate are required in instances in which the grantor and grantee were husband and wife. No Oklahoma estate tax release is required for the estate of a grantor who died on or after January 1, 2010.*

*Comment: The examiner should be aware that the grantor's interest ~~may~~ be is subject to the homestead rights of a surviving spouse pursuant to Article 12, Section 2 of the Oklahoma Constitution. The examiner should be provided with satisfactory evidence which must be recorded, such as an affidavit as to marital status or death certificate of the grantor, showing no surviving spouse. If the evidence provided to the examiner reveals that the grantor had a spouse at the time of death, the examiner ~~should~~ shall require a quit claim deed from the surviving spouse, showing marital status and joined by spouse, if any.*

*Comment: The examiner should be aware that an ambiguity will arise in 58 O.S. § 1254 (B) if the grantor records more than one Transfer-on-Death (TOD) deed conveying fractional interests, unless the owner/grantor has expressed an intent in the subsequent deed or deeds not to revoke the previous deed or deeds (“TOD deed”). For instance, if X owns Greenacre and conveys 50% to A by TOD deed, and later X conveys 50% to B by a TOD deed, the conveyance to B would create uncertainty as to whether A and B each had 50%, for a total of 100%, or only B had 50% with the remaining 50% being vested in the grantor’s estate.*

*Comment: On and after November 1, 2008 through October 31, 2011, ~~in~~ in instances in which the TOD deed lists multiple grantee/-beneficiaries as joint tenants, the death of one or more of such grantees prior to the death of the grantor in the deed ~~precludes~~ may preclude the creation of the estate of joint tenancy for the surviving grantees under the precepts of the requisite unities for a joint tenancy estate. A question remains as to whether the interest of the grantor vests, via the TOD deed, in the surviving grantees as joint tenants or as tenants-in-common or fails to vest in such grantees due to the fact the estate of joint tenancy ~~was not~~ may not have been created in such surviving grantees at the time of death of the grantor. On and after November 1, 2011 the death of a joint*

tenant beneficiary before the death of the grantor will not invalidate the joint tenancy estate of the surviving joint tenant beneficiaries.

Comment: On and after November 1, 2008 through October 31, 2011, if the grantor and grantee were husband and wife it is not necessary to attach the death certificate described in Section 1252 D to the acceptance described in Section 1252 C.

Comment: On and after November 1, 2011, regardless of the marital status of the grantor and grantee, it is necessary to attach the death certificate described in Section 1252D to the acceptance described in Section 1252C.

Comment: Commencing November 1, 2010 pursuant to 58 O.S. § 1252 (C), the grantee-beneficiary, in order to accept the real estate pursuant to a TOD deed, shall record an affidavit with the County Clerk unless such grantee/beneficiary has recorded a timely executed disclaimer. ~~It is an unsettled point of law as to whether or not the requirement for an acceptance applies retroactively to TOD deeds recorded prior to November 1, 2010.~~

Comment: It is an unsettled point of law as to whether or not amendments to 58 O.S. § 1251 et seq. will apply retroactively to a TOD deed executed prior to the effective date of any amendment.

History: The 2008 Report of the Title Examination Standards Committee recommended adoption of Standard 17.4 in response to the enactment in 2008 of 58 O.S.A. § 1251 et seq., Transfer-on-Death Deeds. 79 O.B.J. 2379 (10/18/2008). The Real Property Law Section approved this new Standard on Nov. 20, 2008, and the House of Delegates adopted it on Nov. 21, 2008.

*The 2010 Report of the Title Examination Committee recommended adding additional comments to the standard to reflect the repeal of the Oklahoma Estate tax and to highlight several issues which are left unanswered by the current provisions of 58 O.S. § 1251. The Real Property Committee approved the Committee's recommendation on November 18, 2010 and it was adopted by the House of Delegates on November 19, 2010. 81 O.B.J. 32 (12/04/10)*

*[ADDITIONAL HISTORY CONCERNING THE 2011 AMENDMENTS TO THIS STANDARD WILL BE ADDED UPON ADOPTION BY THE O.B.A.]*

## **VII. CONTINUING ISSUES WHICH ARE DISCUSSED IN THE 2011 STANDARD, AND WHICH MIGHT NEED LEGISLATIVE REMEDY**

### **A. Standard 17.4 Issues**

- a. Because there are three sets of statutes (2008, 2010, and 2011), it is unclear which procedural rules will apply to TOD Deeds executed under one set of statutes, but processed at the grantor-owner's death, under a different set of statutes.
- b. Specifically, can a disclaimer be used for deaths after 2011, for TOD Deeds executed before 2011?
- c. What will be the court's ruling regarding marital and probate homestead rights?  
  
Specifically, is a quit claim deed needed if the grantor-owner was single when the TOD Deed was executed, but is married on death?
- d. Specifically, if a grantee-beneficiary dies before the grantor-owner, and the grantor-owner dies before the 2011 amendments concerning joint

tenancy take effect, will the joint tenancy interest of a grantee-beneficiary lapse?

**B. Matters Needing Legislative Remedy**

1. Define "subsequent" Transfer on Death Deed (executed or recorded?)
2. Allow revocation by filing a "regular" (non-TODD) deed
3. Allow representative to sign Acceptance Affidavit
4. Disallow grantee's voluntary/consensual liens, if title reverts to estate
5. Reverse process to allow Disclaimer instead of requiring Acceptance Affidavit (to effectuate grantor's intent; title should go to designated grantee instead of reverting due to lack of notice to grantee of deadline, and title should go to grantee because, absent a toxic waste problem, almost any grantee will want to receive the valuable asset)
6. Consider how to address the probate homestead and marital homestead interests
7. Define whether all three steps (execution, acknowledgment, and recording) are essential to the validity of the TOD Deed, to avoid late recording of earlier executed deeds, and so that an executed but unrecorded TOD Deed doesn't surface after death
8. Consider how to deal with retroactivity

## **EXHIBITS**

- A. ARTICLES ON OKLAHOMA'S NON-TESTAMENTARY TRANSFER OF PROPERTY ACT: TRANSFERS ON DEATH DEED
- B. THE ORIGINAL 2008 TOD ACT
- C. THE 2010 AMENDMENTS TO THE TOD ACT, IN A RED LINE FORM
- D. THE 2011 AMENDMENTS TO THE TOD ACT, IN A RED LINE FORM
- E. ATTORNEY GENERAL OPINION (2009 OK AG 6) REGARDING MINERALS
- F. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)
- G. TITLE EXAMINATION STANDARDS SEPTEMBER 2011 MEETING AGENDA
- H. LIST OF THE LATEST 10 ARTICLES, BY KRAETTLI Q. EPPERSON (AVAILABLE ON-LINE)

## **EXHIBIT A**

### **ARTICLES ON OKLAHOMA'S NON-TESTAMENTARY TRANSFER OF PROPERTY ACT: TRANSFERS ON DEATH DEED**

**(copies are available upon request to [www.eppersonlaw.com](http://www.eppersonlaw.com))**

- 1. "What You Need to Know about New HB 2639: The 'Nontestamentary Transfer of Property Act,'" 80 OBJ 33, January 1, 2009, Julie Bushyhead**
- 2. "Legislative and Case Law Update," National Business Institute, March 12, 2009, Martin "Marty" Postic, Jr.**
- 3. "The New Transfer on Death Deed: One Attorney's Late Night Musings on the Inevitable," Oklahoma Real Property Lawyers Association, March 13, 2009, Darin C. Savage**
- 4. "Oklahoma's Nontestamentary Transfer of Property Act: Breathing Life into a New Method for Nonprobate Transfer of Property," O.U. School of Law, September 16, 2009, Miranda Russell (law student)**
- 5. "Homestead and Spousal Rights," 82 OBJ 160, January 1, 2011, Judge Linda Morrissey and Julie Bushyhead**
- 6. "Transfer-on-Death Deeds in Oklahoma," 82 OBJ 651, March 12, 2011, Dale L. Astle**

**EXHIBIT B**

**THE ORIGINAL 2008 TOD ACT**

**Oklahoma Session Laws - 2008**

**Section 78 - [HB 2639] - An Act relating to probate procedure; creating the Nontestamentary Transfer of Property Act; providing short title; providing procedure for the transfer of certain real property; providing method for a record owner of real estate to transfer interest to certain persons; etc.**

Cite as: 2008 O.S.L. 78, \_\_ \_\_

ENROLLED HOUSE  
BILL NO. 2639

By: Peters, Roan, McMullen and Winchester of the House

and

Crain and Sykes of the Senate

An Act relating to probate procedure; creating the Nontestamentary Transfer of Property Act; providing short title; providing procedure for the transfer of certain real property; providing method for a record owner of real estate to transfer interest to certain persons; providing for certain information to be included on deed; providing statement to be signed by land owner and witness and notarized; providing method of revocation; prohibiting revocation by a will; authorizing grantee beneficiary to disclaim title to real estate recorded in a transfer-on-death deed within a certain time period; providing circumstances under which disclaimer is waived; providing for waiver on behalf of minors or legally incompetent beneficiaries; specifying when ownership interest will vest; providing recording requirements; providing that interest is subject to encumbrances; providing procedure and required documentation for proof of death of the record owner; providing when a transfer will lapse; providing certain limitation of transfer vesting; providing that record owner remains absolute owner for certain purposes; providing that transfer-on-death deed is not a testamentary disposition; providing for codification; and providing an effective date.

**BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:**

**SECTION 1. NEW LAW** A new section of law to be codified in the Oklahoma Statutes as Section 1251 of Title 58, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 8 of this act shall be known and may be cited as the "Nontestamentary Transfer of Property Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1252 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. An interest in real estate may be titled in transfer-on-death form by recording a deed, signed by the record owner of the interest, designating a grantee beneficiary or beneficiaries of the interest. The deed shall transfer ownership of the interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration.

B. The signature, consent or agreement of or notice to a grantee beneficiary or beneficiaries of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1253 of Title 58, unless there is created a duplication in numbering, reads as follows:

An interest in real estate is titled in transfer-on-death form by executing, acknowledging and recording in the office of the county clerk in the county where the real estate is located, prior to the death of the owner, a deed in substantially the following form:

\_\_\_\_\_ (name of owner) being of competent mind and having the legal capacity to execute this document, as owner transfers on death to \_\_\_\_\_ (name of beneficiary) as grantee beneficiary, the following described interest in real estate: (here insert description of the interest in real estate).

**THIS TRANSFER-ON-DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY THIS OWNER FOR THIS INTEREST IN REAL ESTATE. THE GRANTOR HAS THE RIGHT TO WITHDRAW OR RESCIND THIS DEED AT ANY TIME. ANY BENEFICIARY NAMED IN THIS DEED IS HEREBY ADVISED THAT THIS DEED MAY BE WITHDRAWN OR RESCINDED WHETHER OR NOT MONEY OR ANY OTHER CONSIDERATION WAS PAID OR GIVEN.**

THE STATE OF OKLAHOMA  
COUNTY OF \_\_\_\_\_

Before me, on this day personally appeared \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, the owner of the land described in this deed, and the witnesses, respectively, whose names are subscribed below in their respective capacities, and the owner of the land declared to me and to the witnesses in my presence that the deed is a revocable transfer-on-death of the real estate described therein, and the witnesses

declared in the presence of the owner of the real estate and in my presence that the owner of the land declared to them that the deed is a revocable transfer-on-death of the real estate described therein and that the owner of the land wanted each of them to sign it as a witness, and that each witness did sign the same as witness in the presence of the owner of the land and in my presence.

\_\_\_\_\_  
(name of owner)

\_\_\_\_\_  
(witness)

\_\_\_\_\_  
(witness)

Subscribed and acknowledged before me by \_\_\_\_\_, the owner of the land, and \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_ day of \_\_\_\_\_ (month), \_\_\_\_ (year).

\_\_\_\_\_  
(signature of notary public)

(Seal)

My commission expires \_\_\_\_\_ (date).

Instead of the words "transfer-on-death" the abbreviation "TOD" may be used.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1254 of Title 58, unless there is created a duplication in numbering, reads as follows:

- A. A designation of the grantee beneficiary may be revoked at any time prior to the death of the record owner, by executing, acknowledging and recording in the office of the county clerk in the county where the real estate is located an instrument revoking the designation. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries to the revocation is not required.
- B. A designation of the grantee beneficiary may be changed at any time prior to the death of the record owner, by executing, acknowledging and recording a subsequent transfer-on-death deed in accordance with the Nontestamentary Transfer of Property Act. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required. A subsequent transfer-on-death beneficiary designation revokes all prior designations of grantee beneficiary or beneficiaries by the record owner for the interest in real estate.
- C. A transfer-on-death deed executed, acknowledged and recorded in accordance with the Nontestamentary Transfer of Property Act may not be revoked by the provisions of a will.
- D. A transfer-on-death deed executed, acknowledged and recorded in accordance with the Nontestamentary Transfer of Property Act may be disclaimed in whole or in part or

with reference to specific parts by the grantee beneficiary or beneficiaries. The disclaimer must occur within nine (9) months after the death of the landowner.

The disclaimer shall be filed with the office of the county clerk in which the transfer-on-death deed was recorded.

If a grantee beneficiary exerts dominion over the real estate within the nine-month period, the disclaimer is waived. Dominion may be evidenced by acts including, but not limited to, possession or the execution of any conveyance, assignment, contract, mortgage, security pledge, executory contract for sale, option to purchase, lease, license, easement or right-of-way. A guardian, executor, administrator or other personal representative of a minor or legally incompetent beneficiary may execute and file a disclaimer on behalf of the beneficiary within the time and in the manner in which the beneficiary could disclaim, if the guardian, executor, administrator or other personal representative deems it in the best interests of and not detrimental to the best interests of the beneficiary.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1255 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. Title to the interest in real estate recorded in transfer-on-death form shall vest in the designated grantee beneficiary or beneficiaries on the death of the record owner. The death of the record owner shall be evidenced by the recording of an affidavit in the office of the county clerk of the county where the real estate is located. The affidavit shall be executed by the grantee beneficiary or beneficiaries. The affidavit shall state the fact of the death of the record owner, state whether or not the record owner and the designated grantee were husband and wife, and provide the legal description of the real estate. The affidavit shall be notarized. If the record owner and designated grantee were not husband and wife, a copy of the death certificate of the record owner and an estate tax release shall be attached to the affidavit.

B. Grantee beneficiaries of a transfer-on-death deed take the interest of the record owner in the real estate at death subject to all conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the lifetime of the record owner including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust or lien, and to any interest conveyed by the record owner that is less than all of the record owner's interest in the property.

C. If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1256 of Title 58, unless there is created a duplication in numbering, reads as follows:

A. A record joint owner of an interest in real estate may use the procedures in the Nontestamentary Transfer of Property Act to title the interest in transfer-on-death form. However, title to the interest shall vest in the designated grantee beneficiary or beneficiaries only if the record joint owner is the last to die of all of the record joint owners of the interest. A deed in transfer-on-death form shall not sever a joint tenancy.

B. As used in this section, "joint owner" means a person who owns an interest in real estate as a joint tenant with right of survivorship.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1257 of Title 58, unless there is created a duplication in numbering, reads as follows:

A record owner who executes a transfer-on-death deed remains the legal and equitable owner until the death of the owner and during the lifetime of the owner is considered an absolute owner as regards creditors and purchasers.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1258 of Title 58, unless there is created a duplication in numbering, reads as follows:

A deed in transfer-on-death form, executed in conformity with the Nontestamentary Transfer of Property Act, shall not be considered a testamentary disposition and shall not be invalidated due to nonconformity with other provisions in Title 58 or Title 84 of the Oklahoma Statutes.

SECTION 9. This act shall become effective November 1, 2008.

Passed the House of Representatives the 11th day of March, 2008.

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Presiding Officer of the House of Representatives

Passed the Senate the 14th day of April, 2008.

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Presiding Officer of the Senate

Approved by the Governor of the State of Oklahoma on the 25th day of April, 2008, at 5:13 o'clock p.m.

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Governor of the State of Oklahoma

## EXHIBIT C

### THE 2010 AMENDMENTS TO THE TOD ACT, IN A RED LINE FORM

#### Oklahoma Session Laws - 2010

**Section 205 - [SB 2270] - An Act relating to probate procedure; amending Section 2, Chapter 78, O.S.L. 2008 (58 O.S. Supp. 2009, Section 1252), which relates to the Nontestamentary Transfer of Property Act; requiring execution of affidavit to show acceptance; listing certain requirements for affidavit; etc.**

Cite as: 2010 O.S.L. 205, \_\_ \_\_

ENROLLED SENATE  
BILL NO. 2270

By: Crain of the Senate  
and  
Sullivan of the House

An Act relating to probate procedure; amending Section 2, Chapter 78, O.S.L. 2008 (58 O.S. Supp. 2009, Section 1252), which relates to the Nontestamentary Transfer of Property Act; requiring execution of affidavit to show acceptance; listing certain requirements for affidavit; specifying procedure for recording affidavit; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:  
SECTION 1. AMENDATORY Section 2, Chapter 78, O.S.L. 2008 (58 O.S. Supp. 2009, Section 1252), is amended to read as follows:

Section 1252. A. An interest in real estate may be titled in transfer-on-death form by recording a deed, signed by the record owner of the interest, designating a grantee beneficiary or beneficiaries of the interest. The deed shall transfer ownership of the interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration.

B. The signature, consent or agreement of or notice to a grantee beneficiary or beneficiaries of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.

C. To accept real estate pursuant to a transfer-on-death deed, a designated grantee beneficiary shall execute a notarized affidavit affirming:

1. Verification of the record owner's death;

2. Whether the record owner and the designated beneficiary were married at the time of the record owner's death; and

3. A legal description of the real estate.

If the grantee beneficiary was not the record owner's spouse, he or she shall attach a copy of the record owner's death certificate and an estate tax release to the beneficiary affidavit. The beneficiary shall record the affidavit and related documents with the office of the county clerk where the real estate is located.

SECTION 2. This act shall become effective November 1, 2010.

Passed the Senate the 28th day of April, 2010.

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Presiding Officer of the Senate

Passed the House of Representatives the 13th day of April, 2010.

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Presiding Officer of the House of Representatives

Approved by the Governor of the State of Oklahoma on the 4th day of May, 2010, at 5:05 o'clock p.m.

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Governor of the State of Oklahoma

**EXHIBIT D**

**THE 2010 AMENDMENTS TO THE TOD ACT, IN A RED LINE FORM**

**Oklahoma Session Laws - 2011**

**Section 372 - [SB 521] - An Act relating to nontestamentary transfer of property; amending Sections 2, as amended by Section 1, Chapter 205, O.S.L. 2010, 4 and 5, Chapter 78, O.S.L. 2008 (58 O.S. Supp. 2010, Sections 1252, 1254 and 1255), which relate to notice, revocation and vesting of interest; defining term; etc.**

Cite as: 2011 O.S.L. 372, \_\_ \_\_

ENROLLED SENATE  
BILL NO. 2270

By: Crain of the Senate  
and  
Sherrer and Hoskin of the House

An Act relating to nontestamentary transfer of property; amending Sections 2, as amended by Section 1, Chapter 205, O.S.L. 2010, 4 and 5, Chapter 78, O.S.L. 2008 (58 O.S. Supp. 2010, Sections 1252, 1254 and 1255), which relate to notice, revocation and vesting of interest; defining term; requiring certain documents to be recorded within specified time period; establishing requirements for recording of certain affidavit; modifying procedures for revocation of certain transfer on death deeds; modifying requirements for vesting of interest in certain property to grantee beneficiaries; and providing an effective date.

SUBJECT: Nontestamentary Transfer of Property Act

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY Section 2, Chapter 78, O.S.L. 2008, as amended by Section 1, Chapter 205, O.S.L. 2010 (58 O.S. Supp. 2010, Section 1252), is amended to read as follows:

Section 1252. A. An interest in real estate may be titled in transfer-on-death form by recording a deed, signed by the record owner of the interest, designating a grantee beneficiary or beneficiaries of the interest. The deed shall transfer ownership of the interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration. For purposes of the Nontestamentary Transfer of Property Act, an "interest in real estate" means any estate or interest in, over or under land, including surface, minerals, structures and fixtures.

B. The signature, consent or agreement of or notice to a grantee beneficiary or beneficiaries of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.

C. To accept real estate pursuant to a transfer-on-death deed, a designated grantee beneficiary shall execute ~~a notarized~~ an affidavit affirming:

1. Verification of the record owner's death;
2. Whether the record owner and the designated beneficiary were married at the time of the record owner's death; and
3. A legal description of the real estate.

~~D. If the grantee beneficiary was not the record owner's spouse, he or she~~ The grantee shall attach a copy of the record owner's death certificate ~~and an estate tax release~~ to the beneficiary affidavit. The beneficiary shall record the affidavit and related documents with the office of the county clerk where the real estate is located within nine (9) months of the grantor's death, otherwise the interest in the property reverts to the deceased grantor's estate. Notwithstanding the provisions of Section 26 of Title 16 of the Oklahoma Statutes, an affidavit properly sworn to before a notary shall be received for record and recorded by the county clerk without having been acknowledged and, when recorded, shall be effective as if it had been acknowledged.

SECTION 2. AMENDATORY Section 4, Chapter 78, O.S.L. 2008 (58 O.S. Supp. 2010, Section 1254), is amended to read as follows:

Section 1254. A. A designation of the grantee beneficiary may be revoked at any time prior to the death of the record owner, by executing, acknowledging and recording in the office of the county clerk in the county where the real estate is located an instrument revoking the designation. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries to the revocation is not required.

B. A designation of the grantee beneficiary may be changed at any time prior to the death of the record owner, by executing, acknowledging and recording a subsequent transfer-on-death deed in accordance with the Nontestamentary Transfer of Property Act. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required. A subsequent transfer-on-death beneficiary designation revokes all prior designations of grantee beneficiary or beneficiaries by the record owner for the interest in real estate.

C. A transfer-on-death deed executed, acknowledged and recorded in accordance with the Nontestamentary Transfer of Property Act may not be revoked by the provisions of a will.

~~D. A transfer on death deed executed, acknowledged and recorded in accordance with the Nontestamentary Transfer of Property Act may be disclaimed in whole or in part or with reference to specific parts by the grantee beneficiary or beneficiaries. The disclaimer must occur within nine (9) months after the death of the landowner. The disclaimer shall be filed with the office of the county clerk in which the transfer on death deed was recorded. If a grantee beneficiary exerts dominion over the real estate within the nine-month period, the disclaimer is waived. Dominion may be evidenced by acts including, but not limited to, possession or the execution of any conveyance, assignment, contract, mortgage, security pledge, executory contract for sale, option to purchase, lease, license, easement or right of way. A guardian, executor, administrator or other personal representative of a minor or legally incompetent beneficiary may execute and file a disclaimer on behalf of the beneficiary within the time and in the manner in which the beneficiary could disclaim, if the guardian, executor, administrator or other personal representative deems it in the best interests of and not detrimental to the best interests of the beneficiary.~~

SECTION 3. AMENDATORY Section 5, Chapter 78, O.S.L. 2008 (58 O.S. Supp. 2010, Section 1255), is amended to read as follows:

~~Section 1255. A. Title to the interest in real estate recorded in transfer on death form shall vest in the designated grantee beneficiary or beneficiaries on the death of the record owner. The death of the record owner shall be evidenced by the recording of an affidavit in the office of the county clerk of the county where the real estate is located. The affidavit shall be executed by the grantee beneficiary or beneficiaries. The affidavit shall state the fact of the death of the record owner, state whether or not the record owner and the designated grantee were husband and wife, and provide the legal description of the real estate. The affidavit shall be notarized. If the record owner and designated grantee were not husband and wife, a copy of the death certificate of the record owner and an estate tax release shall be attached to the affidavit.~~

~~B. Grantee beneficiaries of a transfer-on-death deed take the interest of the record owner in the real estate at the death of the grantor owner, free and clear of any claims or interest under Section 44 of Title 84 of the Oklahoma Statutes as to a person who became the spouse of the grantor subsequent to the execution of the transfer-on-death deed, subject to all recorded conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the lifetime of the record owner including, but not limited to, any recorded executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust or lien, and to any interest conveyed by the record owner that is less than all of the record owner's interest in the property, provided however, a non-consensual lien against the grantee beneficiary shall not attach to the property until the recording of the affidavit described in Section 1252 of this title.~~

~~C. B. If a one or more of the grantee beneficiary beneficiaries dies prior to the death of the record grantor owner and an alternative grantee beneficiary has not been designated~~

~~on the deed~~, the transfer to those beneficiaries who predecease the grantor owner shall lapse. In the event the grantee beneficiaries are designated in the deed to be joint tenants with right of survivorship, the death of one or more of the grantee beneficiaries prior to the death of the grantor owner shall not invalidate an otherwise validly created joint tenancy estate as to those grantee beneficiaries who are living at the time of the death of the grantor owner.

SECTION 4. This act shall become effective November 1, 2011.

Passed the Senate the 19th day of May, 2011.

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Presiding Officer of the Senate

Passed the House of Representatives the 20th day of May, 2011.

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Presiding Officer of the House of Representatives

Approved by the Governor of the State of Oklahoma the 26th day of May, 2011, at 2:02 o'clock p.m.

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Governor of the State of Oklahoma

EXHIBIT E

ATTORNEY GENERAL OPINION (2009 OK AG 6)

**Question Submitted by: The Honorable Gary W. Banz, State Representative, District 101**

**2009 OK AG 6**

**Decided: 03/31/2009**

**Oklahoma Attorney General Opinions**

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Cite as: 2009 OK AG 6, \_\_ \_\_

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¶10 This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

**Pursuant to the Nontestamentary Transfer of Property Act, 58**

**O.S.Suppl.2008, §§ 1251 - 1258, do interests in minerals constitute interests in real estate?**

**Nontestamentary Transfer of Property Act**

¶11 The Nontestamentary Transfer of Property Act ("Act"), set forth in 58 O.S.Suppl.2008, §§ 1251 - 1258, allows a record owner of an interest in real estate to designate who will receive a transfer of the interest in the future, effective upon the owner's death. The transfer is accomplished by recording a transfer-on death deed. The following provisions of the Act describe the requirements of the on-death transfer:

A. An ***interest in real estate*** may be titled in transfer-on-death form by recording a deed, signed by the record owner of the interest, designating a grantee beneficiary or beneficiaries of the interest. The deed shall transfer ownership of the interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration.

58 O.S.Suppl.2008, § 1252 (emphasis added).

¶12 Section 1253 provides that:

An ***interest in real estate*** is titled in transfer-on-death form by executing, acknowledging and recording in the office of the county clerk in the county where the real estate is located, prior to the death of the owner . . . .

*Id.* § 1253 (emphasis added).

### **Statutory Construction**

¶3 "The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the Legislature as expressed in the statute." *Jackson v. Indep. Sch. Dist. No. 16*, 648 P.2d 26, 29 (Okla. 1982). Furthermore, "statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits." *Ledbetter v. Okla. Alcoholic Beverage Laws Enforcement Comm'n*, 764 P.2d 172, 179 (Okla. 1988). With an effective date of November 1, 2008, the Act is relatively new, so there is virtually no case law or other opinion for guidance. See 2008 Okla. Sess. Laws ch. 78. Therefore, we must look to the language of the Act and any related statutes to help determine its coverage.

¶4 The operative words used in designating what is covered by the Act are not defined and only include "an interest in real estate." The fact that the Act uses the term "an interest in," rather than just stating real estate, land or real property indicates the Legislature wanted the Act to cover more than the land itself.

¶5 Central to your question is what constitutes an interest in real estate. As previously mentioned, no special or technical definition of "interest in real estate" is offered under the Act. However, under the general provisions pertaining to conveyances of real property in Title 16 of the Oklahoma Statutes, specifically Section 14 thereof, the words real estate, land and premises are synonyms and mean the same thing with respect to any instrument relating to real property. Therefore, an "interest in real estate" means a right, title, interest or legal share in land, including any buildings or improvements located thereon. *Id.*

¶6 The next issue to address in connection with your question is whether an interest in minerals constitutes an interest in real estate, thereby allowing such an interest to be transferred on death under the provisions of the Act. The answer is found in the Simplification of Land Titles Act, 16 O.S.2001, §§ 61 - 68. The Simplification of Land Titles Act is part of Title 16 of the Oklahoma statutes which deal with numerous types of conveyances involving real estate. Title 16 covers the mechanics of transferring interests in real property, including what is required to evidence title of the interest and give third parties notice of such conveyances.

¶7 Subsection (a) of Section 61 of the Simplification of Land Titles Act defines some of the interests that are considered an interest in real estate and provides as follows:

- (a) An interest in real estate shall include, but not be limited to mortgage liens, interests of purchasers under contract of sale,

leases, easements, oil and gas leases, and *mineral* and royalty interests.

*Id.* (emphasis added).

¶8 For the purposes of this Opinion, the foregoing definition of an interest in real estate contained in the Simplification of Land Titles Act has direct application to what constitutes an interest in real estate under the Act, by the authority set forth in Section 2 of Title 25 of the Oklahoma Statutes, which provides as follows:

Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

*Id.*

¶9 The Act sets forth requirements for a nontestamentary transfer of an interest in real estate similar to those found in 16 O.S.2001, §§ 4(A), 16, for a transfer of any interest in real estate, in that the conveyance must be in writing pursuant to an instrument or deed executed by the owner of the interest, be acknowledged before a notary and recorded in the office of the county clerk where the property is located. See 58 O.S.Supp.2008, §§ 1252, 1253. The similarity between the execution and recording requirements of Title 16 for conveyances of real estate and the requirements under the Act for a nontestamentary transfer supports the rationale that the Legislature intended conveyances of "interests in real estate" under the Act to be those instruments that comply with the requirements of Title 16. Had the Legislature intended to exclude mineral interests from the Act, it could have easily done so. Therefore, mineral interests qualify as an interest in real estate transferable under the Act.

**¶10 It is, therefore, the official Opinion of the Attorney General that:**

**Interests in minerals as referenced in subsection (a) of Section 61 of the Simplification of Land Titles Act, 16 O.S.2001, §§ 61 - 68, constitute an interest in real estate transferable pursuant to the Nontestamentary Transfer of Property Act, 58 O.S.Supp.2008, §§ 1251 - 1258.**

W.A. DREW EDMONDSON  
Attorney General of Oklahoma

JAMES V. BARWICK  
Assistant Attorney General

## EXHIBIT F

### OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

#### 2009 Title Examination Standards Committee

<u>Name</u>	<u>City</u>	<u>Office</u>
Kraettli Epperson	Oklahoma City	Chair
Janet Sharp	Oklahoma City	Secretary
Dale Astle	Tulsa	
Rickey Avery	Oklahoma City	
Jason Baker	Tulsa	
Barbara Carson	Tulsa	
Alice Costello	Edmond	
Bill Doyle	Tulsa	
Alan Durbin	Oklahoma City	
Larry Evans	Tulsa	
Alex Haley	Idabel	
Martha Hardwick	Tulsa	
Scott McEachin	Tulsa	
Jeff Noble	Oklahoma City	
Ademuyiwa "Daniel" Ogunbase	Norman	
Faith Orłowski	Tulsa	
Nils Raunika	Wilburton	
Henry Rheinberger	Oklahoma City	
Darin Savage	Norman	
Chris Smith	Oklahoma City	
Jason Alan Soper	Oklahoma City	
Keith Stitt	Tulsa	
Scott Sullivan	Oklahoma City	
Jack Wimbish	Tulsa	

**EXHIBIT G**

TITLE EXAMINATION STANDARDS COMMITTEE  
of the  
Real Property Law Section of the O.B.A.

*“FOR THE PURPOSE OF EDUCATING  
AND GUIDING TITLE ATTORNEYS”*

**2011 AGENDA**  
(As of September 13, 2011)

***[NOTE: SEE MEETING DATES AND LOCATIONS AT THE END]***

***[NOTE: REVIEW AND PRINT MATERIALS BEFORE MEETING FOUND AT  
[WWW.EPPERSONLAW.COM](http://WWW.EPPERSONLAW.COM) USING THE NOTED “MATERIALS NUMBER”\*]***

*SEP/TULSA*

<b>Speakers (Comm.)</b>	<b>Std.</b>	<b>Status</b>	<b>Description</b>
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**BUSINESS/GENERAL DISCUSSION OF CURRENT EVENTS**

**9:30 a.m. – 10:00 a.m.**

**Hot Topics: General Questions Sent from Title Industry Representatives (Epperson)**

**Approval of Previous Month’s TES Committee Minutes (Smith)**

**PRESENTATIONS**

**PENDING**

**10:00 a.m. – 10:45 a.m.**

**10:45-11:00 a.m. BREAK\*\*\*\*\***

**PRESENTATIONS (CONT’D)**

**11:00 a.m. – 12:00**

<b><u>Noble Epperson Orlowski</u></b>	<b>17.4 (2011.04)</b>	<b>Sep Draft (2nd Read)</b>	<b>“TRANSFER ON DEATH” DEED <i>Further clarifications are needed for the existing Standard due to 2011 statutory amendments.</i></b>
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<u>Wimbish</u> Astle Sullivan	24.11	Sep Draft	<b>IMPROPERLY EXECUTED ASSIGNMENTS OF MORTGAGE</b> <i>Someone argued that the language of this Standard allowed a stranger to sign an Assignment and it would still be valid. That erroneous position needs to be clearly disallowed in the language of this Standard.</i>
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<u>McEachin</u> Munson Ob Costello Evans Schamp	30.9 (2011.07)	Sep Report	<b>MRTA</b> <i>One of the comments to this standard refers to the possibility of there being two roots of title creating two marketable record titles, with each being subject to the other. This is improper circular reasoning and needs to be revised.</i>
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<u>Kempf</u> Evans Wimbish Schomp	3.2 (2011.15)*	Sep Draft	<b>AFFIDAVITS AND RECITALS</b> <i>The Standard provides that affidavits and recitals "cannot substitute for a conveyance or probate of a will."(except in circumstances covered in 16 O.S. Section 83 and other statutes). 16 O.S. Section 67 provides that an affidavit filed of record for 10 years, without challenge, establishes marketable title as to severed minerals, in lieu of a probate. These inconsistencies need to be addressed.</i>
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\*\*\*\*\* END OF PRESENTATIONS \*\*\*\*\*

=====APPROVED=====

<u>Wimbish</u> Gilbertson Astle Chansolme Ritter	NEW (2011.13)	Aug APP'D	<b>FEDERAL ESTATE TAX MARITAL DEDUCTION</b> <i>It has been suggested that all of the existing title standards that refer to federal estate tax marital deduction matters (and those that should but don't) should be reviewed to ensure the authority being listed is correct, and to ensure the use of standard language in all of the standards</i>
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<u>Astle</u> Wimbish Carson Kempf Doyle	NEW (2011.11)	Aug APP'D	<b>INCOMPLETE FORECLOSURE RESOLUTION</b> <i>The issue has arisen as to how title examiners should handle incomplete mortgage foreclosures.</i>
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<b>Reid Schomp</b>			
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<b><u>Noble Epperson</u></b>	<b>30.13 (2011.09)</b>	<b>May App'd</b>	<b>ABSTRACTING-30 YEAR ABSTRACT</b> <i>Due to the prior Regulations and a specific ruling by the State Auditor (who regulated the Abstractors until January 1, 2008), it appears that TES 30.13 which directs abstractors to prepare “short” “30-year” abstracts for the use of examining attorneys, is correct for only a specific period of time, and should be revised to show the two periods of time.</i>
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<b><u>Munson Ritter Sullivan Kempf Sullivan</u></b>	<b>12.4 &amp; 14.9 (2011.02)*</b>	<b>May App'd</b>	<b>CONVERSION OF ENTITIES</b> <i>Statutes allow the conversion of entities. We need a standard to recognize the continued ownership of the real property in the surviving entity, like a merger or name change.</i>
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=====PASSED TO 2012=====

<b><u>Soper</u></b>	<b>NA</b>	<b>Passed to 2012</b>	<b>LEGISLATIVE UPDATE</b> <i>Brief presentation concerning proposed or pending legislation affecting real property titles.</i>
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<b><u>Munson Wimbish McEachin</u></b>	<b>30.10 (2011.08)</b>	<b>Passed to 2012</b>	<b>QUIT CLAIM DEED...</b> <i>Can a warranty or quit claim deed, with this language: “All grantor’s right, title and interest” or “All my right, title and interest”, constitute a “root of title” under the MRTA? See Reed v. Whitney, 1945 OK CIV APP 354 (warranty limited to interest actually owned), but also see Joiner v. Ardmore Loan and Trust Co., 1912 OK 464 (a grantor under a warranty deed is liable even if “both parties knew of the lack of title”) . Should this Standard have a comment added, explaining this issue?</i>
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<b><u>Wittrock Astle Noble Wimbish</u></b>	<b>29.6</b>	<b>Passed to 2012</b>	<b>ABSTRACTING (FOR SLTA)</b> <i>Discussion among the members suggested the abstracting requirements under this existing Standard needed review and possible updating.</i>
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<u>Durbin</u> Doyle Chansolme	14.1 (2011.03)	Passed to 2012	<b>LLC'S MAY OWN PROPERTY</b> <i>Can a separate "series" LLC own title to real property, in light of the language of 18 O.S. Section 2054.4.</i>
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<u>Epperson</u> Schamp Munson McEachin Carson	30.1 et seq (2011.06)	Passed to 2012	<b>MRTA</b> <i>Due to the holding in the Rocket case, can it be concluded that the MRTA does affect severed mineral chains of title? (see Epperson's published article on the issue)</i>
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<u>Epperson</u> Orlowski Wimbish	NEW (2011.14)	Passed to 2012	<b>JUDGMENTS/DECREES &amp; CONSTRUCTIVE NOTICE</b> <i>Under the MRTA, the SLTA, and under the terms of the Uniform Abstractors Certificate, do documents that are <u>not</u> filed with the County Clerk (e.g., divorce and probate proceedings) constitute constructive notice and become part of the official chain of title. Also, if a judgment or decree – affecting title to real property -- is required by statute to be placed in the county clerk's land records in order to constitute constructive notice, but has not been filed there, does the inclusion of such document in an abstract give to the examiner and the client actual notice of the same liens and ownership changes? If so, as of what date? Can you rely upon a decree as part of a chain of title, if it was never recorded in the land records?</i>
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=====TABLED INDEFINITELY=====

<u>Evans</u> Sullivan Hardwick Wimbish Astle	7.2 (2011.01)	Jul Tabled	<b>MARITAL HOMESTEAD</b> <i>Is it acceptable for a title examiner to rely upon either a recital in a deed or on an affidavit filed either with or after a deed, which deed is signed by one spouse but not the other, where such recital or affidavit asserts that such land is not the marital homestead? The instance involved is where the spouse who holds the entire title is the grantor or affiant.[IT WAS DECIDED TO LEAVE THIS STANDARD "AS IS", IN THE ABSENCE OF NEW LAW.]</i>
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<u>McEachin</u>	24.12	May Tabled	<b>MERS</b>
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<b>Durbin Chansolme Costello Rheinberger Reid</b>	<b>&amp; 24.13 (2011.12)</b>		<i>This issue has become a national topic and recent significant activity affecting our existing standard will be monitored and reported on. [IT WAS DECIDED THAT THE CURRENT STANDARD IS STILL CORRECT]</i>
<b><u>Sullivan</u> Noble Costello Gilberts</b>	<b>NEW (2011.10)</b>	<b>Apr Tabled</b>	<b>LP AND OTHER ENTITIES BY “PRESIDENT”</b> <i>On a practical level has it become acceptable practice to accept a signature on a conveyance from a corporate officer for a non-corporate entity such as for a limited partnership?[IT WAS DECIDED THERE IS NO AUTHORITY FOR THIS PRACTICE]</i>
<b><u>Astle</u> Durbin Kempf McEachin Noble</b>	<b>NEW (2011.10)</b>	<b>Feb Tabled</b>	<b>LLC’S SIGNING BY “PRESIDENT” OR “VICE PRESIDENT”</b> <i>Did recent statutory changes, which approve the use of corporate-type bylaws also thereby recognize the authority of corporate-type “officers” to sign for an LLC, especially a non-Oklahoma LLC? Apparently, it is common practice for title insurance/closing companies in Oklahoma to accept such signatures.[DECIDED TO SEEK LEGISLATIVE RELIEF]</i>

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## EXHIBIT H

### LIST OF THE LATEST 10 ARTICLES, AUTHORED BY KRAETTLI Q. EPPERSON (AVAILABLE ON-LINE)

#### 2011

243. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2010-2011", 2011 Boiling Springs Legal Institute, Boiling Springs Park, Woodward, Oklahoma (September 20, 2011)
242. "Nontestamentary Transfer of Property Act: An Update on Oklahoma's Use of the Transfer-on-Death Deed (2011)", 2011 Boiling Springs Legal Institute, Boiling Springs Park, Woodward, Oklahoma (September 20, 2011)
239. "**Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar***", The Oklahoma Bar Journal (March 12, 2011)
238. "Legal Descriptions and Surveys: An Overview in Oklahoma", Oklahoma City University School of Law "Real Estate Development", Oklahoma City, Oklahoma (March 8, 2011)
237. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (January 14, 2011)

#### 2010

232. "Oil and Gas Title Examination Basic Terms", Energy Law Basics, The National Business Institute, Oklahoma City, Oklahoma (November 18, 2010)
229. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2008-2009", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (January 8, 2010)
228. "**Do Statutory Monetary Penalties, Arising due to a Lender's Failure to File a Mortgage Release, Apply to Constructive Mortgages and Fixtures Filings?**", The Oklahoma County Bar Association Briefcase, Part I: V. 42, No. 1 OCBA

Briefcase 5 (January 2010), and Part II: V. 42, No. 2 OCBA Briefcase 5 (February 2010)

**2009**

227. "**The Elusive Legal Malpractice Statute of Limitations for Attorney Title Opinions**", The Oklahoma County Bar Association Briefcase, Part I: V. 41, No. 10 OCBA Briefcase 7 (October 2009), and Part II: V. 41, No. 12 OCBA Briefcase 7 (December 2009)
226. "**Marital Homestead Rights Protection: Impact of *Hill v. Discover Card?***", 80 The Oklahoma Bar Journal 2408 (November 21, 2009)