What You Need to Know About New HB 2639: The‘Nontestamentary Transfer of Property Act’

By Julie Bushyhead

This new session law, effective Nov. 1, 2008, provides a method for individuals to transfer real property outside probate upon their death.[1] This method of transferring property is similar to a Pay-on-Death bank account, and is frequently termed a Transfer-On-Death (TOD) deed. In addition to real property, Oklahoma enables TOD transfers for securities such as stocks and bonds under the “Oklahoma Uniform TOD Security Registration Act.”[2] Similar to Pay-on-Death bank accounts and other TOD transfers, the grantor or property owner transferring his/her real property upon death may revoke the beneficiary designation at any time prior to death, and the beneficiary may choose to disclaim his/her interest upon the grantor’s death. The beneficiary deed is almost limitless in its scope to transfer property upon death.

The Nontestamentary Transfer of Property Act extends to “an interest in real estate.” *Blacks Law Dictionary* states that “real estate” has the same meaning as real property.[3] Oklahoma law defines real property as including land, fixtures to land, and appurtenances to land.[4] Oklahoma law defines land as “the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.”[5] A thing is affixed when “it is attached to it by roots, as in the case of trees, vines or shrubs, or embedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws.”[6] Finally, a thing is incidental or appurtenant when “it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air or heat, from or across the land of another.”[7]

In terms of oil, gas, and mineral interests, Oklahoma’s case law supports that both the interest in the “exclusive right to drill for, produce, or otherwise gain possession of such substances,”[8] and the right to royalty interests, or the percentage of profit from what is drilled or taken out of property under an oil and gas lease, are both real property interests.[9] However, Oklahoma’s case law also suggests that a leasehold interest to explore for hydrocarbons such as oil and gas creates interest or estate in realty, but is not *per se* real estate.[10] Thus, the question arises as to whether or not HB 2639 includes transfers of leasehold interests in its scope.

HOW TO CREATE A TRANSFER-ON-DEATH DEED

First, the record owner must title the real property as “transfer-on-death.” This requires the record owner, through the use of a TOD deed, to designate a grantee beneficiary who is to receive the interest upon the record owner’s death. Just as common practice is to designate an alternate beneficiary or executor in a will, you should also designate an alternate beneficiary in a TOD deed. If the record owner does not designate an alternate beneficiary, and the primary beneficiary either dies or disclaims his/her

interest, the transfer will lapse. This would cause the property to fall into probate and transfer according to the terms of the record owner's will or by intestate succession. Second, the record owner must sign the TOD deed and record the deed in the county where the real estate is located. A transfer-on-death deed does not require consideration to be effective.[11]

HOW TO REVOKE A TRANSFER-ON-DEATH DEED

The record owner may revoke the transfer to a grantee beneficiary at any time prior to the grantor's death. The grantor may accomplish this goal in two ways. First, the record owner may execute an instrument revoking the designation, acknowledge the instrument before a county clerk or notary public, and record the instrument in the office of the county clerk where the real estate is located. The grantor is not required to give the designated beneficiary notice of the revocation. The first method of revocation results in the grantor not transferring property through a TOD deed.

Second, the grantor may execute a new TOD deed. Any subsequent TOD deed controls the designation of the transfer and revokes all prior designations to grantee beneficiaries. The grantor need not notify the prior beneficiary or new beneficiary for any reason. The grantor should follow the steps listed above under "HOW TO CREATE A TRANSFER-ON-DEATH DEED" for the second method of revoking a beneficiary designation. Where the record owner's goal is to avoid probate, the second method might be a more appropriate choice.[12]

Finally, "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."[13] In other words, a will executed subsequent to recording a TOD deed does not effectively revoke a TOD deed where the will designates a different beneficiary for the same property. Does a TOD deed partially revoke an inconsistent provision in an existing will? The effect of executing a TOD deed is to convert probate property, or property subject to probate, to non-probate property. For example, when a property owner owns property in joint tenancy with right of survivorship, title to the property passes to the surviving joint tenant upon the death of the other joint tenant by operation of law, and is not subject to probate. Similarly, a property owner/grantor who executes a TOD deed no longer owns the real property upon his/her death. The real property transfers to a designated beneficiary, or alternate beneficiary, upon the death of the grantor by operation of law. Therefore, a provision in a will bequeathing the same real property that is the subject of a TOD deed will be adeemed, in other words, fail, because the decedent/grantor does not own the real property upon his/her death. Although a TOD deed does not partially revoke an inconsistent provision in a pre-existing will, inquiry as to a client's existing will may be relevant in order to effectively assist clients with estate planning.

HOW TO CLAIM AN INTEREST TRANSFERRED

First, a designated grantee beneficiary must execute a notarized affidavit affirming three facts: 1) verification of the record owner's death, 2) whether or not 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. In addition, if the grantee beneficiary was not the record owner's spouse, he/she must attach a copy of the record owner's death certificate and an estate tax release to the beneficiary affidavit. Last, the beneficiary must record the affidavit and related documents with the office of the county clerk where the real estate is located.[14] Of note, real property owned in joint tenancy with right of survivorship would not pass to the beneficiary unless the grantor was the last surviving joint tenant.[15]

HOW TO DISCLAIM OR REFUSE AN INTEREST TRANSFERRED

A designated grantee beneficiary, or guardian of a minor or legally incompetent grantee beneficiary, may disclaim or refuse to accept a transfer within nine months of the record owner's death. Including this and other reasons, a designated beneficiary may choose to disclaim the transferred interest due to the beneficiary's obligation to honor any and all agreements made by the grantor during his/her lifetime. These obligations include, but are not limited to, any mortgage on the property, easement, deed of trust or lien, lease, contract of sale or other agreement. In order to effectively disclaim the interest, the grantee beneficiary must file a disclaimer with the office of the county clerk in which the TOD deed was recorded. In addition, if the beneficiary intends to disclaim the interest, he/she *should not* exert dominion over the real estate within the nine month period.[16]The Nontestamentary Transfer of Property Act defines dominion as "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."[17] If the grantee beneficiary exerts dominion, his/her disclaimer is waived.

CONCLUSION

The beneficiary deed or TOD deed provides a low-cost alternative for individuals desiring to avoid probate. The TOD deed does not preclude the necessity of having a will. For example, if both a grantee beneficiary and alternate grantee beneficiaries are deceased at the time of the record owner's death, or if both disclaim the interest after the record owner's death, the real estate interest will pass by intestate succession. If a grantor desired to transfer real property outside the progression of intestate succession, it would be prudent to execute a will to that effect. Further, a grantor/testator would need to execute a will for the appointment of a guardian for his/her minor children, funeral and/or burial wishes, etc. Moreover, the TOD deed does not preclude other estate planning instruments. The TOD deed is merely a low-cost alternative for transferring real property upon a record owner's death without the formalities of probate.

About the Author

Julie Bushyhead is a third-year student at the University of Tulsa College of Law. During the spring semester of 2008, she interned approximately 270 hours for Judge Linda Morrissey, previously the chief probate judge for Tulsa County. She researched and

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1. 58 O.S. Supp.2008, §§ 1251-1258.
2. 71 O.S.2001 § 901.
3. *Blacks Law Dictionary* 1254 (Bryan A. Garner ed., 8th ed., West 2004).
4. 60 O.S.2001 § 5.
5. 60 O.S.2001 § 6.
6. 60 O.S.2001 § 7.
7. 60 O.S.2001 § 8.
8. *Frost v. Ponca City*, 1975 OK 141, ¶ 8, 541 P.2d 1321, 1323.
9. *Booner v. Oklahoma Rock Corp.*, 1993 OK 131, ¶ 11 n. 28, 863 P.2d 1176, 1182 (citing *Hays v. Phoenix Mutual Life Ins. Co.*, 1964 OK 80, ¶ 7, 391 P.2d 214, 216).
10. *Booner* at ¶ 19, 863 P.2d at 1185.
11. 58 O.S. Supp.2008, § 1252.
12. 58 O.S. Supp.2008, § 1254.
13. 58 O.S. Supp.2008, § 1254(C).
14. 58 O.S. Supp.2008, § 1255.
15. 58 O.S. Supp.2008, § 1256.
16. 58 O.S. Supp.2008, § 1254(D).
17. 58 O.S. Supp.2008, § 1254(D).

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