

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

BY:

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TABLE OF CONTENTS

AUTHOR'S RESUME

- I. **INTRODUCTION**
- II. **COMPARISON OF NONTESTAMENTARY TRANSFER TOOLS**
- III. **OVERVIEW OF TOD DEED PROCESS**
- IV. **THE PROVISIONS OF THE TOD ACT**
- V. **DISCUSSION OF PROBLEMS WITH THE TOD ACT'S PROVISIONS**
- VI. **PROPOSED TITLE EXAMINATION STANDARD ON TOD ACT**
- VII. **ISSUES CONCERNING THE PRE-2011 TOD DEEDS, MENTIONED IN STANDARD 17.4**

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. ATTORNEY GENERAL OPINION (2009 OK AG 6) REGARDING MINERALS
- E. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)
- F. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT
- G. 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) 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 both 2010 and 2011, 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 a consequence of these discoveries, members of the TES Committee¹ worked with the state legislature² 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 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

¹ Primarily Dale Astle, Jeff Noble, Chase Ritter, and me

² Senator Brian Crain from Tulsa

Delegates.³

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 it⁴, and several published and unpublished articles discussing Oklahoma's Act.⁵ 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 (at least the client is).

In a quest to "avoid probate", due to the perception that probate is slow, public and 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) joint tenancy deed, (2) grant of a fee keeping a life estate (for the grantor's life), and (3) a trust, either revocable or irrevocable.

The challenge for the estate planner involves selecting which tool satisfies the

³ See Exhibits E-G concerning the TES Committee

⁴ 2009 OK AG 6

⁵ See the list of articles attached hereto as Exhibit A

following criteria (see below):

How do the various non-testamentary tools fair:

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 ¹	No	Yes	No ²		
2. Exclusive control and use in interim by grantor	Yes	No (Joint)	Limited	Yes	Yes ³		
3. Free from grantees' severance and debts	Yes	No	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	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
2. Revocable, if trustor retains power of appointment
3. If grantor is trustee

III. OVERVIEW OF TOD DEED PROCESS

Using the statutorily prescribed form for the TOD Deed, the grantor-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 filing a written express revocation, or (2) by reconveying the same interest to a different person, again by executing, acknowledging, and 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 executes, swears to (using a jurat), and 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 goes to the record owner's estate.

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

IV. THE PROVISIONS OF THE TOD ACT

The current TOD Act contains 8 sections, as amended in 2011, and the following

shows the provisions which remain unamended as of 2011, plus the red lined amended sections⁶:

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".

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

⁶ The original 2008 TOD Act and the 2010 amendments to the TOD Act, in a red line form, are attached hereto as Exhibits B and C

the county clerk without having been acknowledged and, when recorded, shall be effective as if it had been acknowledged.

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.

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.

58 O.S. Section 1255 (as 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.~~

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.

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.

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.

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 -- to ensure that the interest in the lands goes to the preferred recipients -- it is suggested that 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 lapse and thereby return 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".

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

There have been occasional disputes about the differences between the terms "real estate" and an "interest in real estate", as used in various statutes.⁷ 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".⁸

To provide solid footing for the application of this TOD Act to minerals, the 2011 amendment (Section 1252(A)) expressly 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 1251(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 gain 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 to either record the affidavit accepting such interest or have it lapse back to the decedent's estate. Yet, the grantee-beneficiary may have no actual knowledge of the existence of the TOD Deed, or the ticking of time towards the deadline.

[It may be that in the absence of such notice under the current statutory language, and in the face of the presumption that, in almost every instance, the grantee-beneficiary

⁷ First National Bank v. Dunlap, 1927 OK 67, 254 P. 729

⁸ 2009 OK AG 6; see D for a complete copy of this AG Opinion

will want to accept title to the granted asset, this TOD Act might need to be returned to its original 2008 form, wherein the presumption was that, in the absence of a disclaimer - - recorded within 9 months of the date of the death of the grantor-owner -- the title is presumed accepted by the grantee-beneficiary.]

4. 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 the life tenant to establish the termination of the intervening estate. In a similar vein, the recording of the TOD Act affidavit of the grantee-beneficiary shows 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 author's concern about the encouragement of fraud or error by a spouse. Where there is a requirement to provide the certification of the death of the certificate by an independent governmental agency (such as the county health department) the chances of fraud obviously go down. The 2011 amendment made all grantee-beneficiaries, including spouses, provide the death certificate with the affidavit evidencing the grantor-owner's death. (Section 1252(D))

5. 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 is confirming 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.

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".

7. AFFIDAVIT AND NO DISCLAIMER (Section 1252(C) & (D) AND 1254(D))

Under the original TOD Act, adopted in 2008, there was a requirement for an affidavit establishing the death of the grantor-owner (1255(A)). However, there was an assumption of acceptance, with the opportunity for the grantee-beneficiary to disclaim the interest within 9 months of the death of the grantor-owner.

In 2010, the TOD Act was amended to add the requirement for an affidavit of acceptance of the transfer (1252(C)). There was no deadline provided for the execution, jurat, and recording of this affidavit. Also, there was no consequence provided for the failure to record such affidavit. Consequently, 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), but there was some uncertainty due to the absence of the required affidavit of acceptance.

In 2011, the disclaimer requirement language was removed (1254(D)), the affidavit evidencing the death of the grantor-owner was removed also (1255(A)), and we were left with the 2010 language requiring an affidavit of acceptance (in 1252(D)), 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 the absence of an Oklahoma estate tax, the need to disclose whether the grantee-beneficiary is the spouse of the grantor-owner seems irrelevant.

8. CONSIDERATION IRRELEVANT (Section 1253)

The revocability of the interest conveyed under the TOD Deed is buttressed 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." Presumably this warning language is intended to head off any claim by a grantee-beneficiary that the conveyance was not revocable because consideration was paid.⁹

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

⁹ 15 O.S. Section 75; 16 O.S. Section 11

9. NECESSITY OF ACKNOWLEDGMENT AND RECORDATION

(Section 1253 & 1252 (D))

A deed will normally be effective and enforceable between the parties upon simple execution and delivery; however, the Oklahoma recording statutes¹⁰ require both acknowledgment and recordation but only for the purpose of giving third parties constructive notice of the conveyance.

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

Similarly, it appears that the "instrument revoking the designation" and the "subsequent [revoking] transfer-on-death deed", must complete all three steps, including recording, before it is timely and effective.

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

This issue of when is an instrument 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 that should win. On the other hand, if the first grantee-beneficiary receives the original TOD Deed, after it is executed and acknowledged, but before it is recorded, he

¹⁰ 16 O.S. Sections 15 & 16

could hold onto and record it immediately before the death of the grantor-owner, thereby ensuring that he wins over any other "subsequently" executed and acknowledged, but earlier recorded revoking TOD Deed, which was promptly recorded after execution. To avoid this scenario, an advisor 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, one would assume that such act 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.¹¹

Some attorneys have expressed worries about whether any marital homestead interests 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

¹¹ 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)***

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."¹² This new language is intended to remove any concerns about the possible election by a

¹² 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.

surviving spouse to claim a 1/2 interest of a spouse is real estate. Such protection should not be necessary because this Section 44 only applied to property acquired by joint industry while the parties are married. The TOD Deed being discussed herein is executed before such marriage, making the protection unnecessary; but this 2011 amendment does show legislative intent to avoid a later spouse gaining an interest.

This statutory language should supersede the holding (pre-2008 TOD Act) in the 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.

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 a non-spouse's joint tenancy interest extinguishes a spouse's probate homestead right of occupancy, and applies that logic to the TOD Deed issue and concludes:

““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.”¹³ [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 by Judge Morrissey above, would seem to end concerns

¹³ “Homestead and Spousal Rights: Puzzling Predicaments in Probate Part II”, 82 OBJ 160, Morrissey & Bushyhead, January 15, 2011, at pgs. 161-162

about a spousal's probate rights in the homestead, where the title was transferred by a TOD Deed. However, this author (Kraettli Q. Epperson) has extensively studied and written about homestead rights enough to recognize that the appellate courts' decisions display substantial inconsistency on whether the homestead right depends on the existence of an "ownership interest."¹⁴ For instance, in Judge Morrissey's own article, she happens to present contradictory quotes, on the ownership issue, from two different appellate decisions:

"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

"The Supreme Court in Lawley v. Richardson held, 'the homestead in 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 shows 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, property rights.

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

¹⁴ "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

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

The original version of the TOD Act (2008) 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., mortgage) or a non-consensual lien (e.g., a money judgment lien) against the grantee-beneficiary would attach to such title. If the title was vested 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 an unanticipated problem only if the grantee-beneficiary disclaimed the interest back to the estate of the grantor-owner, making such title more encumbered than when it started.

The amendment in 2011 covered this specific problem but only to the extent of non-consensual liens (such as general money judgment liens and general tax liens). But the question arises as to whether there might be instances where the grantee-beneficiary may have consented to a lien or encumbrance which would not be covered by this curative language (e.g., mortgage). This author is uncertain of the outcome of this issue.

13. JOINT TENANT BENEFICIARIES (Section 1255(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.

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, 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. 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 notice to 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.¹⁵

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". It cannot be signed by a representative, in case the grantee-beneficiary dies right after the grantor-owner dies, or is a minor, or is otherwise incapacitated.

¹⁵ 12 O.S. Section 95 (A)(3)

An earlier version of this TOD Act, which originally allowed a disclaimer of the interest, allowed a representative of the grantee-beneficiary to sign the disclaimer.

It is suggested that this statute be amended to allow such representative to sign for the grantee-beneficiary.

**16. LACK OF DUE PROCESS NOTICE OF LOSS OF PROPERTY
RIGHT (Section 1252(D))**

A due process question might eventually be raised against the now-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.

A loss of title through adverse possession or the operation of the 30-year marketable record title act, are instances where such divestiture occurs. In the instance of adverse possession, notice through actual possession 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 is in the land records for that lengthy period of time, subject to discovery.

It is unclear how such a question will be resolved, if raised against this TOD Act.

This Act has been adopted in a variety of forms in various states, and eventually this due process issue will surface and be resolved somewhere.

VI. PROPOSED TITLE EXAMINATION STANDARD

The TES Committee has adopted the following Standard 17.4 to address this new 2011 version of the TOD Act. This proposed Standard will be published in the Oklahoma Bar Journal in October 2011 and then presented for approval to 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)

VII. ISSUES CONCERNING PRE-2011 TOD DEEDS, MENTIONED IN

STANDARD 17.4

- 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 after 2011, for TOD Deeds executed before 2011?
- c. What will be the court's ruling regarding marital and probate homestead rights?
- d. Specifically, is a quit claim deed needed if the grantor-owner was single when the TOD Deed was executed, but is married on death?
- e. 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?

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. ATTORNEY GENERAL OPINION (2009 OK AG 6) REGARDING MINERALS
- E. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)
- F. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT
- G. 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

- 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**
- 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.

Presiding Officer of the House of Representatives
Passed the Senate the 14th day of April, 2008.

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.

Governor of the State of Oklahoma

Citationizer© Summary of Documents Citing This Document

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None Found.

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=451538> 9/9/2011

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.

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

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.

Governor of the State of Oklahoma
Citationizer© Summary of Documents Citing This Document
Citationizer: Table of Authority

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None Found.

OSCN Found Document:[SB 2270] - An Act relating to probate procedure; amending

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458485> 9/9/2011

EXHIBIT D

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

Cite as: 2009 OK AG 6, __ __

¶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.Sup.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.Sup.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.Sup.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 E

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	
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Jason Baker	Tulsa	
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Alex Haley	Idabel	
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Faith Orłowski	Tulsa	
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Darin Savage	Norman	
Chris Smith	Oklahoma City	
Jason Alan Soper	Oklahoma City	
Keith Stitt	Tulsa	
Scott Sullivan	Oklahoma City	
Jack Wimbish	Tulsa	

EXHIBIT F

**THE NATIONAL TITLE EXAMINATION STANDARDS
RESOURCE CENTER**
(Effective May 1, 2011)

STATUS REPORT

<u>State</u>	<u>Last Revised</u>		<u>Standards</u>		<u>#Pgs.</u>
	<u>Pre-2006</u>	<u>2006+</u>	<u>#Ch.</u>	<u>#Stand.</u>	
1. Arkansas	-	12-07-09	22	110	65
2. Colorado	-	05-00-10	15	134	71
3. Connecticut	-	01-12-09	30	151	471
4. Florida	-	11-00-10	21	142	187
5. Georgia	08-18-05	-	39	194	144
6. Idaho	c. 1946	-	-	-	-
7. Illinois	01-00-77	-	14	26	35
8. Iowa	-	06-00-10	16	105	90
9. Kansas	00-00-05	-	23	71	122
10. Louisiana	00-00-01	-	25	233	99
11. Maine	-	05-18-10	09	72	90
12. Massachusetts	-	05-05-08	N/A	74	103
13. Michigan	-	05-00-07	29	430	484
14. Minnesota	-	11-14-09	N/A	97	85
15. Mississippi	10-00-40	-	-	-	-
16. Missouri	05-15-80	-	N/A	26	17
17. Montana	c. 1955	-	N/A	76	78
18. Nebraska	-	01-30-09	16	96	99
19. New Hampshire	-	12-31-10	13	180	36
20. New Mexico	00-00-50	-	06	23	05
21. New York	01-30-76	-	N/A	68	16
22. North Dakota	-	00-00-10	18	191	231
23. Ohio	-	05-13-09	N/A	53	45
24. Oklahoma	-	11-19-10	33	120	110
25. Rhode Island	-	04-28-09	14	78	78
26. South Dakota	06-21-03	-	N/A	66	58
27. Texas	-	06-30-10	16	89	80
28. Utah	06-18-64	-	N/A	59	13
29. Vermont	-	10-00-10	28	43	61
30. Washington	09-25-42	-	N/A	29	09
31. Wisconsin	02-00-46	-	N/A	15	08
32. Wyoming	07-01-80	-	22	81	99
Total	15	17			

*Prepared by Kraettli Q. Epperson, Attorney-at-Law, OKC, OK
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EXHIBIT G

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

2011

240. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", The 2011 Cleverdon Roundtable Seminar, Oklahoma City, Oklahoma (March 6, 2011), and Oklahoma City, Oklahoma (March 13, 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

236. (Not Published)
235. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Recent Developments 2010 in Oklahoma, Oklahoma Bar Association, Tulsa, Oklahoma (December 10, 2010), and Oklahoma City, Oklahoma (December 17, 2010)
234. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Title Law in Oklahoma, National Business Institute, Oklahoma City, Oklahoma (December 8, 2010)
233. "Update on Oklahoma Land Title Related Cases: For 2009-2010", Oklahoma Bar

Association Real Property Law Section Annual Meeting, Tulsa, Oklahoma
(November 18, 2010)

232. "Oil and Gas Title Examination Basic Terms", Energy Law Basics, The National Business Institute, Oklahoma City, Oklahoma (November 18, 2010)
231. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Tulsa Title and Probate Association, Tulsa, Oklahoma (October 14, 2010)