

WHAT IS A TRANSFER ON DEATH DEED?

A new state law allows real property owners to record a “transfer on death deed” naming a beneficiary to own that real property after you die. With a properly recorded deed, no probate is needed to transfer the real property. In combination with other non-probate transfers, such as pay on death bank accounts and transfer on death stocks, many people can develop a simple estate plan that avoids probate entirely.

CAN I NAME MORE THAN ONE BENEFICIARY?

The transfer on death deed law allows you to name more than one beneficiary. Also, the law allows you to name alternate beneficiaries. For example, you may provide that your house goes to your son and daughter in equal shares. You may also provide that if your son dies before you, his two children take his share, and if your childless daughter dies before you, your niece takes her share. But, the transfer on death deed does not allow you to name classes of relatives, such as “all of my grandchildren.” The beneficiaries’ names must appear on the face of the deed.

CAN A TRANSFER ON DEATH DEED BE REVOKED?

A great benefit of the transfer on death deed is that you may revoke or cancel

it. You revoke the deed by recording a new transfer on death deed, or by recording a revocation. The deed is also revoked by selling all of your interest in the real property.

DOES THE BENEFICIARY HAVE ANY CONTROL OVER MY REAL PROPERTY DURING MY LIFE?

Unlike a joint tenancy, where you transfer real property to a co-owner during your lifetime, the transfer on death deed is not effective until you die. That means the beneficiary you name in the transfer on death deed cannot control your property. You do not need the beneficiary’s permission to sell or mortgage the land. You are not subject to the beneficiary’s debts. Your interest in the real property goes to the beneficiary only after you die.

DOES A BENEFICIARY NEED TO SIGN A TRANSFER ON DEATH DEED?

A beneficiary need not sign a transfer on death deed. Further, the transfer on death deed does not need to be delivered to the beneficiary to be effective. It is up to you whether you tell the beneficiary that you have named him in a transfer on death deed. However, the law strictly requires that the transfer on death deed be recorded with the County Clerk in the county in which the real property is located. If the deed is not recorded, it is ineffective. If someone drafts

a deed and leaves it in a cookie jar, it is no good.

WHICH TAKES PRECEDENCE, A WILL OR A TRANSFER ON DEATH DEED?

If your will and transfer on death deed are inconsistent, the transfer on death deed controls who owns your real property after your death. A similar rule applies to pay on death bank accounts and transfer on death stocks. It is important that you coordinate the beneficiary provisions of your deed, mutual funds, bank accounts and stocks with the provisions of your will.

DOES A TRANSFER ON DEATH DEED REPLACE A WILL?

The transfer on death deed does not replace a will. The will remains an important part of your estate plan. Your will may provide how property without beneficiary designations passes, and may provide what happens if all beneficiaries predecease you. Your will may allow you to provide in detail who gets items of personal property, including your motor vehicles, heirlooms and furniture. You should consult your attorney about how a transfer on death deed fits into your estate plan.

HOW DOES THE TRANSFER ON DEATH DEED AFFECT JOINT TENANCY?

Joint tenancy is where more than one person owns real property and the property passes automatically on the death of one joint owner to the surviving joint owners. Joint tenants may use the transfer on death deed. All joint tenants should sign the transfer on death deed.

The transfer on death deed takes effect only when the last surviving joint tenant dies. For example, if a husband and wife own real property as joint tenants and one dies, the surviving joint tenant will own the entire real property, even if they recorded a transfer on death deed. Only when the final joint tenant dies do the provisions of the transfer on death deed take effect.

DOES A TRANSFER ON DEATH DEED ESCAPE THE CLAIMS OF CREDITORS?

Property owners cannot escape the claims of creditors with a transfer on death deed. The law provides that all family and statutory allowances, as well as claims of creditors including mortgage and lien holders, may be applied against the real property.

WHAT ARE THE TAX CONSEQUENCES OF A TRANSFER ON DEATH DEED?

For tax purposes, property transferred with the new deed should be treated in the same way as real property passing through probate. For most estates, there should be

no federal or state estate tax (check with your accountant about current estate taxes). Additionally, the heirs should get the “stepped up basis” (date of death value) in the real property and will likely owe no tax on their inheritance.

CAN I USE A TRANSFER ON DEATH DEED FOR REAL PROPERTY IN OTHER STATES?

New Mexico’s transfer on death deed law is only effective for real property located in New Mexico. If you have real property in another state, you will not be able to use a New Mexico transfer on death deed.

CAN I DRAFT MY OWN TRANSFER ON DEATH DEED?

Transfer on death deeds are relatively new and may require skillful drafting. Further, it is important that a transfer on death deed be coordinated with your estate plan. For these reasons, it is probably safest to seek an attorney to help you with the transfer on death deed.

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