REAL ESTATE CENTER
TEXAS A&M UNIVERSITY

Glad You Asked

Questions from Readers

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The article "Licensing Act Changes and More" that appeared in the January issue of *Tierra Grande* sparked questions and concerns from readers. This article addresses those inquiries.

Transfer on Death Deeds

The majority of the inquiries were about Transfer on Death Deeds (TODD) found in Chapter 114 of the Texas Estates Code. The new statute recognizes for the first time a new type of deed in Texas. These deeds, once executed and recorded, do not transfer an immediate interest in real property. Instead, the transfer takes effect at the grantor's death without the need of probate. In the interim, the grantor is free to revoke or change the deed without the consent of the grantee and without any legal consequences.

These deeds possess some aspects of a regular deed and some of jointly owned property with a right of survivorship. Property owners may use these deeds as a substitute for a will or even to remove assets that would otherwise pass under the terms of an existing will.

The Takeaway

New laws generate opportunities while others restrict them. The Transfer on Death Deed offers opportunities for gifting and estate planning. The limitation on real estate transactions entered under a power of attorney restricts opportunities that otherwise existed.

According to the statute, for a TODD to be effective, the deed must state explicitly that it takes effect at the grantor's death. (See Section 114.151 of the Texas Estates Code for a sample form.) In all other ways, the deed must be executed with the *same formalities as a regular deed* and be recorded before the grantor's death. (See "2015 Legislative Changes," pub. 2116).

Attorney and title companies question whether TODDs comply with the same formalities as a regular deed. Here is why. For a regular deed to be effective, it must:

- be in writing,
- be signed by the grantor,
- identify the grantee,
- contain a legal description of the property, and
- be delivered to and accepted by the grantee.

For a regular deed, or any deed for that matter, to be recorded, it must be signed before a notary. However, the recording is not a requirement for a regular deed to pass title. Grantees record the deed to gain protection under the Texas Recording Statute. (See "Deeds and the Texas Recording Statutes," pub. 1267.)

TODDs appear to meet all the formalities except for the delivery to and acceptance by the grantee. However, a review of the statutes reveals that while a delivery may not occur, an acceptance or rejection does.

Take the following example. You are unmarried with a will giving your house to your brother. Subsequently, you execute a TODD giving the same house to your sister. When you die, who gets the house? Basically, which document prevails when the two conflict?

The sister gets that house. Why? Because the TODD removes the house from being a probate asset subject to the terms of the will and changes it to a non-probate one. But can the sister deny (disclaim) acceptance?

Suppose the house has a fair market value of $50,000. However, the mortgage and tax liens amount to $100,000. Does the law require the sister to accept the house?

The answer is no (Section 114.105, Texas Estates Code). The statute allows grantees (designated beneficiaries) the right to disclaim all or a part of the property described in the TODD by complying with Chapter 122 of the Estates Code. This chapter, however, refers to Chapter 240 of the Texas Property Code for a description of the procedure.

According to this chapter, particularly Section 240.009, to be effective, a disclaimer must:

- be in writing;
- describe and disclaim all or a part of the property described in the TODD;
- be signed by the person making the disclaimer before a notary so it can be recorded; and
- be filed in the deed records in the county where the real property is located. (To assist those who need to read the document, reference should be made to the volume and page number where the TODD is recorded.)

If the sister files an effective disclaimer, the house would then go to the brother under the terms of the will. So, the TODD gives the grantee/beneficiary the right to passively accept the property or overtly reject (disclaim) it.

Many married couples believe that community property passes immediately to the surviving spouse when there is no will. This is not true. The surviving spouse may ultimately get the property, but not without administering the estate or filing an affidavit of heirship. (See "Where There's No Will . . .," pub. 2019.)

TODDs offer a unique opportunity for spouses to deed all or a part of their community real property to the surviving spouse and avoid these procedures. If either spouse changes his or her mind, the deed can be changed or revoked up until the time of death.

Section 114.152 contains a sample TODD to use when the grantor wishes to cancel or revoke the deed. There is no sample form for the grantee wishing to disclaim all or a part of the property.

Real Estate Licenses and Powers of Attorney

Another new statute that generated comments and even a clarification from the Texas Real Estate Commission (TREC) dealt with the limited number of real estate transactions permitted under a power of attorney without the attorney-in-fact having a real estate license. Basically, an attorney-in-fact must have a real estate license when the power of attorney authorizes more than three real estate transactions annually.

This restriction places a barrier on estate planning. Generally, an estate plan encompasses the granting of a *durable* power of attorney to another to manage one's affairs in the event of incompetency to avoid a court-appointed guardian. Requiring the attorney-in-fact to acquire a real estate license may delay the process, increase the costs or limit who can serve.

Effective Jan. 1, 2016, TREC clarified the rule in Section 535.32 of the Texas Administrative Code. The commission changed the requirement from being based on the number of real estate transactions authorized by the power of attorney annually to the number of transactions a real estate agent enters during a calendar year.

Ultimately, though, what the statute and clarification overlook is the fact that the restriction, however worded, does not limit itself to real estate transactions entered under a power of attorney that *would otherwise require a real estate license.* There are three places in the law that described real estate transactions. Two of them, the Texas Occupations Code and the Administrative Code, describe transactions in which a real estate license is or is not required.

The third source describes the types of transactions authorized when "*real estate transactions"* are permitted under a power of attorney (see Sections 752.101 and 752.012 of the Texas Estates Code). Real estate transactions are just one of 13 transactions that can be authorized under a power of attorney. (See *End of Life Documents*, pub. 2044.)

Many of the real estate transactions described in the Estates Code are specifically exempt from a license under the Occupations Code and the Administrative Code. For example, no license is required for transactions involving the sale, lease, or transfer of minerals. The same activity recognized in the Estates Code would now require a license if conducted too frequently under a power of attorney.

Evidently the drafters overlooked this conflict.

Commingling Funds

A distraught employee of a property management company inquired about the manner in which the employer handled security deposits and advanced rental payments.

The company preleases apartments for as long as a year in advance. The rental agreements require tenants to forward the security deposit and two-months rent to hold the lease.

The management company did not deposit the funds in a separate account, but instead used them to pay commissions and other operational expenses. Each attorney contacted by the employee indicated the practice was standard and legal. Evidently, the practice is widespread.

How do the statutes and administrative code address the practice?

Section 92.106 of the Texas Property Code (which deals with residential property) provides that "The landlord shall keep accurate records of all security deposits."

The Texas Occupations Code states that the Real Estate Commission may suspend or revoke a license or take other disciplinary actions if the license holder, while engaged in real estate brokerage "commingles money that belongs to another person with the license holder's own money" (Section 1101.652[b][10]).

Finally, Section 535.4 of the Texas Administrative Code addresses the matter. It states that a person who controls the acceptance or deposit of rent from a resident of a single-family residential unit must have a license if he or she uses the payment for services related to the management of the property, determines where to deposit the rent, signs checks, or withdraws money from a trust account.

The practice could require certain people to have a real estate license or could cost brokers or sales agents their license.

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