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## **REPORT OF COUNSEL September 2013**

### **TRANSFER-ON-DEATH DEEDS**

During the past 20-25 years legislatures adopted legislation permitting an individual to transfer assets owned at death without either a Will or a Probate. These statutory mechanisms are known as Will Substitutes — and in the Virginia Code, they are referred to as Transfers Without Qualification.

Most people are familiar with the pay-on-death designation that allows them to transfer a bank account or a securities account without probate to one or more persons. Similarly, life insurance annuities and retirement accounts can be transferred without probate by naming one or more beneficiaries.

The one asset type that could not be transferred by a transfer-on-death designation in Virginia was real estate. However, beginning July 1, 2013 it is now possible to sign a transfer-on-death deed to transfer your real estate without probate.

To date nine jurisdictions have adopted the Uniform Real Estate Transfer-On-Death Act — Virginia, New Mexico, Nevada, the District of Columbia, Hawaii, Illinois, Nebraska, North Dakota, Oregon. In 2013 the Uniform Act was introduced by an additional six states - Alaska, Connecticut, Maryland, South Dakota, Washington and West Virginia.

The Virginia statute [VA Code § 64.2-621 *et. seq.*] contains a statutory form for a transfer-on-death deed. An owner of real estate can sign a deed that names one or more beneficiaries who will obtain title to the real

property at the owner's death without going through probate.

A property owner who has the capacity to make a Will has the capacity to make or revoke a transfer-on-death deed. If a property is owned by joint owners, the deed must be signed by all joint owners.

The transfer-on-death deed must contain all the essential elements and formalities of a properly recordable deed. The deed must state that the transfer to the beneficiary is to occur at the transferor's death. The deed must be recorded before the transferor's death in the land records of the clerk's office of the circuit court in the jurisdiction in which the property is located. Unless the transfer is for consideration, the deed shall be exempt from recordation tax as provided in §58-1.88 (J) of the Virginia Code.

The landowner does not need to notify the beneficiary of the transfer-on-death deed (TOD) during the landowner's life time. A beneficiary must survive the landowner to take the property by beneficiary designation. If the beneficiary predeceases the landowner, the interest lapses. A beneficiary who receives an interest in property at a transferor's death may disclaim all or part of the interest in the real property by executing a disclaimer.

## **Revocation of the Deed**

A transferor can revoke a transfer-on-death in a several ways. First, by signing a transfer-on-death deed that revokes the transfer-on-death deed or part of the transfer-on-death deed expressly. Second, by signing a transfer-on-death deed that names a designated beneficiary that is inconsistent with the designated beneficiary on a prior transfer-on-death deed. Third, by signing an instrument of revocation that expressly revokes the transfer-on-death deed or part of the transfer-on-death deed. For example, if after purchasing a property by a deed of conveyance the transferor signed a transfer on death deed naming a beneficiary and then later wished to revoke the beneficiary, the use of an instrument of revocation would make it clear that the beneficiary designation was revoked. The underlying deed of conveyance to the transferor would remain unaffected. Or fourth, a transferor may sign an Intervivos deed that expressly revokes the transfer-on-death deed or part of the transfer-on-death deed.

When a transfer-on-death deed is made by more than one transferor, the revocation by a transferor does not affect the transfer-on-death deed as to the interest of another transferor. [For example, the transferor in a prior deed grants a life estate in the property to another person and thereafter signs a transfer-on-death deed naming a beneficiary at the transferor's death. The life estate granted in the previous deed is not affected by the transfer-on-death deed, provided that the person to whom the life estate is granted survives the transferor.]

A transfer-on-death deed of joint owners can be revoked only if it revoked by all of the living joint owners.

After a transfer-on-death deed is recorded, it can be revoked only by an effective revocatory instrument recorded prior to the death of the transferor. A transfer-on-death deed may not be revoked by a revocatory act taken against or on the original or a copy of the recorded transfer-on-death deed. [For example, crossing out a beneficiary on either the original recorded deed or a copy of the original deed will not revoke the beneficiary designation.]

## **Effect of the Transfer-On-Death Deed During the Transferor's Life**

During the transferor's life, a transfer-on-death deed does not:

Affect an interest or right of the transferor or any other owner;

Affect an interest or right of a transferee;

Affect an interest or right of a secured or unsecured creditor or future creditor of the transferor;

Affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

Create a legal or equitable interest in favor of the designated beneficiary; or

Subject the property to claims or process of a creditor of the designated beneficiary.

## **Tax Issues**

Signing a TOD deed has no income tax consequences to the transferor or to the transferee. A TOD deed is not a completed gift because the gift can be revoked during the transferor's lifetime.

## **Liability for Creditor Claims and Statutory Allowances**

Property transferred at the transferor's death by a transfer-on-death deed is subject to claims of the transferor's creditors, costs of administration of the transferor's estate, the expenses of the transferor's funeral and statutory allowances to a surviving spouse and children of the transferor including the family allowance, the right to exempt property and the homestead allowance to the extent that transferor's probate estate is inadequate to satisfy any of these claims, costs, expenses or allowances.

The October newsletter will discuss when a transfer-on-death deed might be a good idea as well as how the use of such a deed could destroy a well-crafted estate plan.