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## **REPORT OF COUNSEL October 2013**

### **The Pros and Cons of Using a Transfer-on-Death Deed**

Last month's newsletter outlined the requirements for creating and revoking a transfer-on-death [TOD] deed in Virginia. This month we will consider the situations in which a TOD deed might be a good idea as well as situations in which a TOD deed can complicate or destroy a well-thought out estate plan.

#### **When Using a Transfer-on-Death Deed Is Useful**

Scenario 1 — Husband and Wife with one child. The couple are persons of modest wealth. They may have joint bank accounts, they may have one or more IRA's and they have a jointly owned primary residence with no mortgage. All of their assets will go to their one child upon the death of the second spouse. The TOD designation for their bank accounts, the beneficiary designation for their IRA's and the TOD deed will permit the surviving spouse to avoid probate at their death.

Scenario 2 — A single person with no children and modest net worth. He or she is likely to have one or more bank accounts, CD's, Money Market Accounts, brokerage accounts, or Savings Bonds in addition to a primary residence. All of these assets can be transferred to an individual or a charity by a TOD designation or deed. If the person wishes to benefit several persons or charities, a different person can be named as the TOD beneficiary for each asset.

#### **When to Avoid Using a Transfer-on- Death Deed**

Many if not most people will want to avoid a TOD deed.

*Is there a Mortgage on the Property?* If your property is mortgaged, consider whether the person to whom you wish to transfer the property via a TOD deed can qualify to assume the mortgage or will qualify to refinance the loan with the lender. Does the beneficiary have the credit and income to qualify for a mortgage?

*Is your estate subject to federal estate tax?* While Virginia no longer has an estate tax, the federal estate tax remains in effect for estates that exceed \$5,250,000. If your estate is large enough to incur a federal estate tax, it may be too large to manage by TOD designations. An estate planning attorney can help you maximize the tax benefits available to you. Probate can be avoided through the use of many different types of trusts.

*Do you have multiple children or beneficiaries with continuing needs?* If you have multiple children or heirs, it is likely that one or more of them will require ongoing asset management through a trust. For example, it is better to leave assets to a trust for a child with special needs rather than to transfer an asset to them through a TOD designation.

## **Using the Statutory Format**

The Virginia statute provides a form deed. Should you consider drafting a TOD deed yourself? Virginia has specific requirements for deeds. If you are not familiar with those requirements consider employing a title company or attorney to draft the deed for you.

If you decide to go the DIY route, be sure to get a copy of the most recent deed for the property to be certain you have the correct legal description and the proper deed book and page number for reference in the deed.

## **Experience with Statutory Deeds in other Jurisdictions**

Missouri adopted the TOD deed statute in 1989. According to one law professor, the use of the TOD Deed in Missouri is widespread especially in smaller estates. Despite initial concerns about this type of deed, title insurance companies in Missouri will underwrite title insurance policies for sales involving TOD deeds. And encouragingly, the law professor reports that there is little litigation over TOD deeds.

## **Conclusion**

The use of the TOD deed in Virginia will increase as knowledge of the statute and process becomes better known. The TOD deed can be a useful way to avoid probate for the small to moderate estate with a one or two beneficiaries.

The experience of title insurance companies in other states like Missouri will provide guidance for Virginia title insurance underwriters to write policies involving the TOD deeds in the Commonwealth.

***Lynne N. Clark, P. C.***  
**Estate Planning**  
**Estate Administration**

*We are always happy to talk to  
your friends and family members  
about their planning needs.*