

September 2014 Bar Bulletin

What Every Attorney Should Know about Washington Transfer on Death Deeds

By Amber Quintal

(First of two parts)

On June 12, Washington joined more than 20 other states and the District of Columbia in authorizing transfer on death deeds ("TOD Deed").¹ The bulk of the new law is now codified as new RCW Chapter 64.80 and may be cited as the Washington Uniform Real Property Transfer On Death Act,² although it also includes changes to various provisions in RCW Titles 11, 82 and 84.

A TOD Deed offers a non-probate method of transferring an interest in Washington real property to one or more beneficiaries at the death of the property owner or owners. To be valid, a TOD Deed must satisfy all the requirements of an inter vivos deed and must be recorded during the life of the owner in the county where the property to be transferred is located.³

A TOD Deed does not transfer any interest in the property until the owner's death and is fully revocable during the owner's lifetime as long as the owner has testamentary capacity.⁴ To take under the TOD Deed, a designated beneficiary must survive the transferor⁵ and, to perfect title after the transferor's death, record a certified copy of the owner's death certificate in the county where the property is located.⁶

Although the new TOD Deed form offers many benefits over other, often-used probate avoidance techniques for transferring real property, it also presents many potential traps for both laypersons and practitioners. Thus, it is vitally important that practitioners know the basics of TOD Deeds, their uses and limitations, and avoid inadvertent failures and unintended consequences from the use of TOD Deeds in conjunction with uncoordinated planning.

Terminology

The Washington act comes with its own terminology.⁷ A "transferor" of a TOD Deed is an individual who makes a transfer on death deed, and a "designated beneficiary" means a person designated to receive property in the TOD Deed.⁸ The designated beneficiary might not actually take under the TOD Deed; thus, a "beneficiary" is a person or entity that actually receives property under the TOD Deed.⁹

For example, although Jim and Sally Smith may both be listed as designated beneficiaries on a TOD Deed, if Jim predeceases the transferor, the gift to Jim lapses and only Sally receives the property on the transferor's death. In that case, only Sally is a beneficiary. In addition to natural persons, corporations, trusts, estates, partnerships, limited liability companies, the government or a governmental subdivision, agency or instrumentality, any other legal or commercial entity may be a beneficiary of a TOD Deed.¹⁰

The Washington act applies to interests in real property located in Washington and is not limited to residential property.¹¹ The TOD Deed statute defines "joint owner" as "an individual who owns property concurrently with one or more other individuals with a right of survivorship."¹² For TOD Deed purposes, a "joint owner" includes a joint tenant with a right to survivorship, but does not include a tenant-in-common or owner of community property. Keep this in mind as you read RCW ch. 64.80.

Requirements

To make or revoke a TOD Deed, the transferor must have the same mental capacity as is required to make a will.¹³ The TOD Deed must: (1) contain the essential elements and formalities of a properly recordable inter vivos deed; (2) state that the transfer to the designated beneficiary is to occur at the transferor's death; and (3) be recorded before the transferor's death, in the public records in the office of the auditor of the county where the property is located.¹⁴

No notice, delivery, acceptance or consideration is required for an effective TOD Deed.¹⁵ Thus, just as if the transferor had made or revoked a will devising the property at his death, neither a designated beneficiary nor any of the transferor's heirs, spouse or even other concurrent owners of the property are required to be notified of the recording or revocation of a TOD Deed.

Unlike a will, however, a recorded TOD Deed is a public document and it is unclear whether and how the public nature of the TOD Deed may affect the

time allowed to challenge the validity of a recorded TOD Deed after the transferor's death. Some other states' acts include specific rules on the time and procedure for challenging the validity of a TOD Deed, but the Washington act does not.

Revocation

A TOD Deed is fully revocable while the transferor is alive and has testamentary capacity, but an effective revocation of a TOD Deed cannot be accomplished as easily or as privately as revoking a will because, as noted above, the instrument revoking the TOD Deed must be recorded before the death of the transferor.¹⁶

The revocation instrument can take the form of a later TOD Deed, inter vivos deed or other instrument, and it must be acknowledged¹⁷ by the transferor subsequent to the acknowledgement of the TOD Deed that is being revoked, and must be recorded before the transferor's death and in the county in which the property is located.¹⁸

Revocation by Subsequent Deed

The transferor can revoke a prior TOD Deed fully or in part, and a subsequent TOD Deed can revoke a prior TOD Deed explicitly or by inconsistency.¹⁹ For example, if:

- (a) Peter records a TOD Deed, acknowledged in 2014, transferring 100 percent of Property A on Peter's death to designated beneficiary Jim;
- (b) later records a TOD Deed acknowledged in 2015 transferring 100 percent of Property A on Peter's death to designated beneficiary Paul, then;
- (c) the prior TOD Deed to Jim is revoked because;
- (d) the later acknowledged and recorded TOD Deed in favor of Paul is inconsistent with the prior TOD Deed in favor of Jim.

Note that it is the date of the acknowledgement, not the date of recording, that controls.²⁰ Thus, if the TOD Deed acknowledged in 2015 in favor of Paul was recorded in 2015 and the TOD Deed acknowledged in 2014 in favor of Jim is later recorded in 2018, the result is the same as in the prior example.

Joint Ownership

A TOD Deed made by one spouse or registered domestic partner ("RDP") with respect to community property, may only be revoked by that spouse or RDP and does not require any revocation by the other spouse or RDP. However, if both spouses or RDPs join to make a TOD Deed with respect to community property, as long as both spouses or RDPs are living, the TOD Deed may only be revoked if both spouses or RDPs revoke.²¹ If only one is living, the TOD Deed made by the two of them may be revoked by the survivor.²²

If the TOD Deed is made by more than one transferor in a non-community property context, and the transferors do not own the property with rights of survivorship, revocation by one transferor does not revoke the TOD Deed as to the interest of the other transferor, but only with respect to his own interest.²³ Thus, if:

- (a) Peter and Jim own Property B as tenants-in-common without rights of survivorship, and;
- (b) they jointly make a TOD Deed to transfer Property B to Paul on their deaths, then;
- (c) if only Peter revokes the TOD Deed;
- (d) it is still effective to transfer Jim's interest in the property to Paul at Jim's death.

However, a TOD Deed made by concurrent owners, who own the property with rights of survivorship, is revoked only if revoked by all the joint owners living at the time the revocation is recorded.²⁴ Thus, if Peter, Paul and Jim own Property B as joint tenants with rights of survivorship and jointly make a TOD Deed to transfer Property B to Mary, the TOD Deed is not effective until the death of the last surviving joint tenant.

Revocation of the TOD Deed is not effective unless all of the joint tenants with rights of survivorship who are living at the time of the revocation revoke the TOD Deed. That means that as long as Peter, Paul and Jim are alive, they must all revoke the TOD Deed for the revocation to be effective. If Peter dies, Paul and Jim take their shares of Peter's interest in the property pursuant to the right of survivorship; at that time, revocation is only effective if both Paul and Jim revoke it.

Revocatory Acts

It is important to note that after a TOD Deed is recorded, it may not be revoked by a revocatory act on the deed.²⁵ This is a trap for the layperson using the TOD Deed as a self-help probate avoidance technique and cause for some concern. It is unfortunately common to see attempts to change wills by crossing out or interlineating provisions on an executed will and initialing changes.

Such attempts to change a designated beneficiary will be ineffective unless the instrument complies with the requirements for a TOD Deed or revocation instrument, and is acknowledged and recorded before the transferor's death. Likewise, tearing up the recorded deed or crossing it out and writing "REVOKED" also will be ineffective unless it is acknowledged and recorded before the transferor's death.

Transfer and Dissolution

A TOD Deed is revoked by the inter vivos transfer of the property by the transferor.²⁶ One of the beneficial features of a TOD Deed is that it does not transfer any interest in the property during the transferor's lifetime, and thus leaves the transferor free to sell or otherwise transfer the property until the transferor's death. A TOD Deed is not effective unless the transferor owns the subject property when the transferor dies.²⁷

A TOD Deed by one spouse or RDP to the other spouse or RDP is revoked by operation of law upon the subsequent dissolution, termination or declaration of invalidity of the marriage or domestic partnership registration, unless the decree of dissolution, declaration of invalidity or other court order requires otherwise.²⁸

Amber Quintal is a senior associate at Ogden Murphy Wallace, PLLC, and her practice includes tax, business and estate planning. She is the president of the WSBA Tax Section, an adjunct faculty member for the UW School of Law Tax LL.M. and GGU MS Tax programs, and can be reached at aquintal@omwlaw.com or 206-447-7000.

1 Laws of 2014, ch. 58, signed into law on March 27, 2014, effective date June 12, 2014. In other jurisdictions, TOD Deeds are also referred to as "beneficiary deeds" or "Transfer on Death Instruments."

2 RCW 64.80.900. The Washington Uniform Real Property Transfer On Death Act largely follows the Uniform Real Property Transfer on Death Act (URPTODA), which was promulgated by the National Conference of Commissioners on Uniform State Laws in 2009. The text of URPTODA, with

prefatory note and comments by the National Conference of Commissioners on Uniform State Laws, may be accessed at:
http://www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf.

3 RCW 64.08.060.

4 RCW 64.80.030 and .050.

5 RCW 64.80.100(1)(b).

6 RCW 82.45.197(7) and WAC 458-61A-202(8)(f). The DOR adopted amendments to WAC 458-61A-202 and 303 regarding the taxability of TOD Deeds and transfers by emergency rule effective June 10. The emergency rules may be relied upon until October 8 unless a permanent rule is adopted before then.

7 RCW 64.80.010.

8 RCW 64.80.010(2), (7).

9 RCW 64.80.010(1).

10 RCW 64.80.010(4).

11 RCW 64.80.010(5).

12 RCW 64.80.010(3).

13 RCW 64.80.050.

14 RCW 64.80.060.

15 RCW 64.80.070.

16 RCW 64.80.050 and .080(1)(b).

17 Most commonly, a deed is "acknowledged" through execution before a public notary. RCW 64.08.010.

18 RCW 64.80.080.

19 RCW 64.80.080(1)(a)(i).

20 RCW 64.80.080(1)(b).

21 RCW 64.80.080(2)(c).

22 *Id.*

23 RCW 64.80.080(2)(a).

24 RCW 64.80.080(2)(b).

25 RCW 64.80.080(3).

26 RCW 64.80.080(4).

27 RCW 64.80.100(1).

28 *Id.* and RCW 11.07.010.

[Go Back](#)

October 2014 Bar Bulletin

What Every Attorney Should Know about Washington Transfer on Death Deeds

By Amber Quintal

(Second of two parts)

Part One of this article in last month's Bar Bulletin covered making, amending and revoking transfer on death (TOD) deeds.

Effect on Death of Transferor

If the transferor owns the property subject to the TOD deed at his death, the property interest is transferred, by operation of law, in accordance with the TOD deed to the designated beneficiaries who survive the transferor by at least 120 hours.¹ If there is more than one beneficiary, each beneficiary receives an equal and undivided interest in the property without the right of survivorship.²

If a designated beneficiary's share lapses or otherwise fails, that beneficiary's share is transferred proportionately to the other designated beneficiaries whose shares have not lapsed or failed.³ A beneficiary may disclaim the interest in the property passing pursuant to the TOD deed within nine months of the transferor's death.⁴

Even if it contains a contrary provision, a TOD deed transfers property without covenant or warranty of title.⁵ In addition, the beneficiaries take the property subject to all encumbrances, including any contracts, mortgages, liens and other interests to which the property is subject at the transferor's death.⁶

For this purpose, the TOD deed is deemed to have been recorded at the transferor's death. The property is also subject to the claims of the transferor's creditors, and income and transfer taxes, and the Washington Department of Social and Health Services may file liens against the transferred property within 24 months of the transferor's death for any long-term-care assistance the

transferor received.⁷

Effect on the Death of the Transferor: Concurrent Ownership

If a transferor owns the property concurrently with one or more individuals with rights of survivorship, the effect of a TOD deed depends on whether all the owners have joined in making the deed, and the order in which they die. If the TOD deed is made by only one joint owner with rights of survivorship, it is effective only if the transferor is the last of the joint owners to die.⁸

If the transferor is survived by any of the other joint owners, the TOD deed is not effective and the property subject to the survivorship rights passes to the surviving joint owners with rights of survivorship.⁹ If the TOD deed is made by all of the joint owners with rights of survivorship, it is effective when the last of the joint owners dies, and is revoked only if it is revoked by all the joint owners living at the time the revocation is recorded.¹⁰

If the property subject to a TOD deed is community property and the transferor's spouse or registered domestic partner (RDP) does not join in the deed, the transferor's undivided one-half interest in the property is transferred in accordance with the deed on the transferor's death.¹¹ If both spouses or RDPs join to make the deed with respect to community property, it is only effective on the second person's death.¹² After the death of the first spouse or RDP, the surviving spouse or RDP may revoke the TOD deed unilaterally by recording a subsequent deed or instrument of revocation, or by an inter vivos transfer of the property.¹³

Real Estate Excise Tax

No real estate excise tax or affidavit is due at the time the TOD deed is recorded.¹⁴ A transfer of property on the death of the transferor pursuant to a TOD deed is generally not subject to real estate excise tax, unless the transfer is in satisfaction of a contractual obligation of the transferor owed to the designated beneficiaries in the deed.¹⁵

To perfect title after the death of the transferor, the beneficiary records a certified copy of the transferor's death certificate and files a real estate excise tax affidavit, claiming the excise tax exemption, if appropriate.¹⁶

Tips and Takeaways

Here is a list of ten things that every practitioner should know about TOD deeds:

1. *Recording required.* To be effective, a TOD deed or revocation must be recorded before the death of a transferor. Even if the TOD deed or revocation was otherwise validly executed, if it is not also recorded before the transferor's death, it is invalid.

Thus, it is important to caution against the use of so-called "pocket deeds" where the transferor executes the deed and either leaves it to be found after the transferor's death or delivers it to the designated beneficiary or a trusted third party to be recorded after the transferor's death. Similarly, it is important to counsel clients that once the TOD deed is recorded, it cannot be revoked by simply destroying or otherwise marking the recorded TOD deed.

2. *Update beneficiary designations.* Careful attention must be paid to the beneficiary designations in TOD deeds to ensure they are updated appropriately. For example, unlike the will statute, the TOD deed statute does not provide for an "omitted child" share.¹⁷ Thus, if a parent records a TOD deed in favor of child 1 and child 2, and subsequently has or adopts child 3, child 3 is not included in the TOD deed designation unless the parent records a subsequent TOD deed including child 3.

Similarly, the TOD deed statute does not provide any independent relief for an "omitted spouse." Thus, if a transferor records a TOD deed in favor of a friend and later marries, the subsequent marriage does not affect the validity of the prior TOD deed.¹⁸

3. *Effect of lapsed beneficiary designations.* Pay careful attention to the effect of the survival requirement when naming multiple designated beneficiaries. For example, if a parent executes a TOD deed in favor of the parent's adult daughter and son-in-law, but the daughter predeceases the parent, the son-in-law stands to take the entire property, even if he remarries.

4. *Avoid ambiguous and complex beneficiary designations.* Take care when making complex beneficiary designations such as "class gifts" that may require a court order to clear title. For example, a TOD deed in favor of "all my children who survive me" may require a court order confirming the identities of the beneficiaries. Such a result clearly frustrates the primary purpose of a TOD deed, which is to avoid the expense and hassle of a probate proceeding.

5. *Power of attorney.* Although an attorney-in-fact does not have the power to make, amend, alter or revoke the principal's will or codicil, an attorney-in-fact may be given the power to make or revoke TOD deeds, but that power must be

specifically provided for in the power of attorney document.¹⁹ Even without the explicit power to revoke a TOD deed, an attorney-in-fact can take actions that may have the effect of revoking the TOD deed, such as an inter vivos transfer of the property. This leaves open the question of whether such an action taken by an attorney-in-fact without the specifically provided power to revoke a TOD deed can be challenged if it has the effect of revoking the TOD deed.

6. *Concurrent ownership.* Carefully review the rules for how TOD deeds behave in a concurrent ownership context. Remember that the rules are different depending on whether: (a) the property in question is community property; (b) the concurrent owners have survivorship rights in the property; and (c) the TOD deed is made by one or all of the concurrent owners.

7. *Clarify what the client wants.* The TOD deed may replace other probate avoidance devices that suffer from larger drawbacks. For example, a property owner may request that you "put my kid on the deed to my house" in order to avoid probate. The non-probate transfer of the property to the owner's child can be accomplished in several ways that give the child current rights to the property, including transferring the property to the parent and child as joint tenants with rights of survivorship or transferring the property to the child with a retained life estate for the parent.

The biggest drawbacks to these techniques are that they are irrevocable; give both the child *and the child's creditors* access to the property during the parent's lifetime; and limit the parent's ability to borrow against or sell the property if the parent's needs change. TOD deeds can solve some of these problems by allowing for a revocable designation of the beneficiary only to take effect on the transferor's death.

The transferor retains the ability to borrow against and even sell the property during the transferor's life, and neither the designated beneficiary nor his creditors have access to the property during the transferor's life. Even so, depending on the situation, a trust or other non-probate transfer technique may be more appropriate, so it is important to clarify the client's needs and goals in assessing the best options.

8. *Not limited to residential property.* Some states limit TOD deeds to residential property only; Washington does not. Washington's statute applies to interests in Washington real property transferrable on the death of the owner. Thus, practitioners should be aware of the potential of TOD deeds even when dealing with owners of non-residential and multiple properties.

9. *"Superwill" statute does not apply.* The "superwill" statute that allows for testamentary disposition of certain non-probate assets does not apply to TOD

deeds.²⁰ Thus, a valid TOD deed cannot be overridden by a contrary provision in the transferor's will.

10. Beneficiary takes property subject to encumbrances and liabilities. As noted above, beneficiaries take the property subject to all encumbrances, contracts, mortgages, liens and other interests to which the property is subject at the transferor's death. The beneficiaries also take the property subject to claims against the decedent and the decedent's estate, including income and estate taxes due.

Remember also that the period during which DSHS may file a lien against the property runs for 24 months after the transferor's death, far longer than the nine-month disclaimer period.

Amber Quintal is a senior associate at Ogden Murphy Wallace, PLLC, and her practice includes tax, business and estate planning. She is the president of the WSBA Tax Section and an adjunct faculty member for the UW School of Law Tax LL.M. and GGU MS Tax programs. She can be reached at aquintal@omwlaw.com or 206-447-7000.

1 RCW 64.80.100(1)(b) and 11.05A.030.

2 RCW 64.80.100(1)(c). The statute precludes the transfer of unequal interests in the property to designated beneficiaries in a single TOD deed. However, unequal interests may be transferred by using multiple, non-contradictory TOD deeds that pass unequal concurrent interests to designated beneficiaries, *e.g.*, TOD deed #1 passes an undivided 80% interest in Property A to Paul and TOD deed #2 passes an undivided 20% interest in Property A to Jim. Because TOD deed #1 and #2 are not inconsistent, as long as a later TOD deed does not explicitly revoke a prior one, both should be valid. If, however, TOD deed #2 purported to transfer a 30% interest in the property, it is inconsistent with the earlier TOD deed transferring an 80% interest and would thus revoke TOD deed #1.

3 RCW 64.80.100(1)(d).

4 RCW 64.80.110.

5 RCW 64.80.100(5).

6 RCW 64.80.100(2).

7 *Id.*

8 RCW 64.80.100(3)(b).

9 RCW 64.80.100(3)(a).

10 RCW 64.80.100(3)(b) and .080(2)(b).

11 RCW 64.80.100(4)(a).

12 RCW 64.80.100(4)(b).

13 RCW 64.80.080(2)(c).

14 WAC 458-61A-303(3).

15 RCW 82.45.010(3)(b) and WAC 458-61A-202(7).

16 RCW 82.45.197(7), WAC 458-61A-202(7), (8)(f) and -303(2)(m).

17 See RCW 11.12.091.

18 In some cases, a surviving spouse, surviving domestic partner and/or surviving children of a decedent may petition for a family award under RCW Chapter 11.54. The family award may be made out of the probate and non-probate property of the decedent, regardless of the property's character as separate or community. Unless otherwise ordered by the court, the decedent's probate and non-probate assets abate in accordance with RCW Chapter 11.10 in satisfaction of the family award.

19 RCW 11.94.050.

20 RCW 11.11.010(7)(a)(iii).

[Go Back](#)