Kimball, Tirey & St. John LLP

Transfer on Death Deeds

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January, 2016

A new law (AB 139) was recently signed by California Governor Brown. It will allow people to record deeds in California naming beneficiaries to receive real property when they die. The new type of deed will be referred to as a "transfer on death" deed, "revocable transfer on death" deed or "revocable TOD deed." Transfer on death deeds will transfer residential real property on the death of its owner, without a probate proceeding or trust. The deed must be recorded, but during the owner's life it will not affect his or her ownership rights. The new law will take effect in January 2016 and will be effective for a five year trial period until January 1, 2021.

Transfer on death deeds may result in cost savings (as compared to probate proceedings). Transfer on death deeds may avoid problems that could arise if a property is transferred before death. Some people who want to avoid probate and don't want to pay for the costs of a living trust have been persuaded to transfer their homes to their children while they are alive. This can sometimes create problems; if their children threaten to evict them so they can sell the property, or lose it through debt, divorce or bankruptcy. Also, property that is transferred during someone's lifetime does not get a new capital gains value when the person dies (the "stepped up basis") which can lead to significant taxes if the property is sold later. Using the transfer on death deed preserves the advantages of receiving the new capital gains basis after death.

Unfortunately, there are many complexities and unknowns in this 24-page new law, which many believe was poorly drafted. There are also some significant drawbacks. People may use them without consulting a lawyer, and may make costly legal mistakes. If someone challenges the deed, perhaps based on an argument that the owner lacked capacity or was being improperly influenced, a court proceeding may be needed to resolve the issue. The deed will take precedence over the owner's will or trust, which many people may not understand or want. Also, the property transferred is subject to the debts of the deceased person, including credit cards, taxes and Medi-Cal claims.

There are also a number of technical limitations, and requirements that must be carefully followed, which many people may not understand. A transfer on death deed will not be legally effective unless the deed is recorded with the County Recorder where the property is located within 60 days after the date it was signed. It only will transfer the owner's share of the property, and not the shares of any co-owners, and doesn't work for joint tenancy property. It can only be used for single-family homes, residential units of up to 4 dwellings, and agricultural land that has a single-family house on it. The deed must have an accurate and full legal description, which is often difficult for a layperson to locate and accurately copy. If an intended beneficiary dies before the owner, but other beneficiaries survive, the share of the deceased person will be divided equally between the surviving named beneficiaries, and will not go to the deceased beneficiary's descendants, such as the owner's grandchildren. It cannot be "customized" with provisions for disabled beneficiaries, alternate beneficiaries if a beneficiary dies, or similar provisions.

Although the law was passed with good intentions, and may help some people avoid probate in limited situations, it may not be the best option for many people. It is not as flexible or as

predictable as a living trust. In many situations, a living trust continues to be the best way to pass property without probate, to ensure that the owner's specific wishes are fully and properly carried out.

Kimball, Tirey & St. John LLP's estate planning attorneys can help you identify and implement the best estate planning options – whether transfer on death deeds, living trusts, and/or other options – at an affordable price. Feel free to contact us with any questions at (800) 574-5587.