Drafting the NEW Beneficiary Deed

BY THOMAS J. MURPHY

There is a new form of deed that allows transfers of real estate on the death of the owner to whomever the owner designates as beneficiary. Effective August 9, 2001, it takes the familiar "payable on death" concept used for bank and brokerage accounts and applies it to real estate. It thereby avoids the probate process often required for testamentary or post-mortem transfers of real property. It will benefit many of our clients, particularly the modest-sized estates in which the residence is the primary estate asset.

The New A.R.S. § 33-405

The statute creates a "deed that is not to take effect until the death of the owner (that) transfers the interest to the designated grantee beneficiary effective on the death of the owner."[1] The statute provides suggested (but very basic) forms for the deed and for the revocation of the beneficiary deed. Section 33-405(a) specifically allows for multiple beneficiaries who can take title in any recognized form (e.g., joint tenancy, community property). Trusts, including revocable trusts, can be beneficiaries. The deed must be recorded before the death of the last surviving owner to be effective—§ 33-405(b) & (c). Likewise, any revocation of the deed also must be recorded before the last surviving owner's death—§ 33-405(d).

When To Use the Beneficiary Deed

The beneficiary deed is an ideal tool for the married couple or person with a simple, modest-sized estate. This typically would involve someone whose primary asset is a paid-off home. The modest size of the estate usually does not warrant the expense of a revocable trust. Because the equity in the home will likely exceed $50,000, a probate proceeding would normally have to be commenced upon the death of the owner because the $50,000 limitation for real property affidavits has been exceeded.[2] The good news is that the probate process can now be avoided through the use of this new deed.

This new deed will work best for an unmarried person who is the sole owner of the property or for a married couple who have no prior marriages. For reasons discussed here, the beneficiary deed should be avoided for couples with children from prior marriages or where there are multiple owners.

In short, the wisest course of action will be to keep it simple.

Drafting Tips and Other Practical Considerations

The new statute does a good job in addressing potential problem areas. Yet, as with any newly enacted statute, there are always other problems that exist but that can be cured with proper drafting. After discussing the new statute with attorneys for several title companies,[3] here are my suggestions:

Multiple beneficiaries. If the owner is designating more than one beneficiary, the deed should indicate how title is to be taken. Any of the commonly recognized forms of title can be used.[4] If this is not done, then, as with any deed, a tenancy-in-common will be presumed—§ 33-431(a)—unless the beneficiaries are married to one another, which will result in a presumption of community property—§ 25-211.

Predeceased beneficiary. If desired, a "per stirpes" or other succession designation should be indicated. This is intended to cover the situation in which a beneficiary predeceases the owner. The new statute specifically authorizes successor beneficiaries,[5] and every title company I have consulted approves of this procedure.

Trust as beneficiary. Section 33-405(c) expressly allows the use of a trust as beneficiary. It is my understanding that, in those states having a similar statute,[6] it is common practice to name a revocable trust as beneficiary rather than to deed the property into the trust. It is felt that this avoids problems with title or property and casualty insurance arising from the transfer of title while the grantor is alive. However, a downside to this procedure is that it precludes the use of the property to fund a credit shelter trust, because the property does not pass into the trust until the death of the surviving spouse.

Signature of beneficiary. There has been some concern expressed by title companies as to whether the deed must be delivered to the beneficiary. The new statute does not address this. Although this would seem to indicate that no delivery is necessary, the better, proactive course of action is to have the beneficiary sign and notarize the deed as would the grantee of any other deed.

Recording exemption. Practitioners should note that an additional exemption was added to the recording exemption statute, A.R.S. § 11-1134, whereby any affidavit or fee is waived for a transfer of title "pursuant to a beneficiary deed with only nominal consideration for the transfer." Reference to that statutory exemption—A.R.S. § 11-1134(b)(12)—should be indicated in the deed.

Recording. A beneficiary deed, or the revocation of one, must be recorded prior to the death of the last surviving owner to be effective.[7] To make sure this gets done, the attorney drafting the deed should assume the obligation of recording any beneficiary deed or revocation. This can be particularly important if more than one beneficiary deed has been executed for the same property, because it is the last deed that is recorded, and not the last to be executed, that controls.[8]

Death of the owner. It is not entirely clear what procedure is required to effect the transfer of title upon the death of the owner. A death certificate will obviously have to be recorded, but there is no statutorily prescribed form. The emerging consensus is to use something akin to the termination-of-joint-tenancy form used upon the death of a joint tenant. The form should be signed by the beneficiary stating that the sole or last surviving owner has died and that the beneficiary now accepts ownership of the property.

Issues Raised by Title Companies and Other Potential Problems

The response of title companies to the new statute has been somewhat lukewarm. This reinforces my initial suggestion to keep things simple. There are two concerns that have commonly been expressed to me by title company representatives.

The first is that the owner will have to revoke any existing beneficiary deed prior to selling or refinancing the property. The second concern regards notice to the beneficiary on a trustee's sale pursuant to a deed of trust. Neither concern is addressed in the new statute. The title companies intend to propose legislation in the next legislative session to clarify this.

Nothing in the new statute addresses the issue of disclaimers. The consensus is that nothing has changed regarding dis-

claimers. However, a probate attorney needs to make sure that a beneficiary is aware of his or her interest in order to disclaim within the requisite nine-month period. Similarly, there is nothing in the new statute that affects the step-up in basis upon the death of the owner.

The use of beneficiary deeds for couples with previous marriages is very problematic and should be avoided. The problem is that the surviving spouse can revoke or change the beneficiary deed after the death of the first spouse. Simply naming the children from the first spouse's prior marriage leaves then vulnerable to the vicissitudes of the second spouse if the first spouse dies first. There is no provision in the new statute for an irrevocable beneficiary designation by the first spouse or any other owner.

There also may be problems if a tenant-in-common uses a beneficiary deed. The difficulty stems from some unfortunate language. The statute specifically addresses joint tenancies and community property but omits reference to tenants-in-common. It also states that a beneficiary deed can be revoked "by any of the owners who executed the beneficiary deed" and that a revocation is not effective "unless executed by the last surviving owner."[9] It is not clear if the term "owner" refers to the ownership of a particular undivided interest or to the entire property. Until this can be ascertained, this is an area that should be avoided.

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endnotes

1. A.R.S. § 33-405(a).
2. *Id.* § 14-3971(e).
3. The author acknowledges the generous and thoughtful input provided by attorneys John Lotardo, Pat Ihnat and John Graham and estate planning attorneys Mark Bregman and Roger Curley.
4. A.R.S. § 33-405(a).
5. *Id.* § 33-405(a).
6. *See, e.g.*, Ohio Rev. Stat. 5502.22.
7. A.R.S. § 33-405(c) & (d).
8. *Id.*
9. *Id.* § 33-405(d).