

BILL ANALYSIS

Senate Research Center

S.B. 462
By: Huffman et al.
State Affairs
6/17/2015
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

A transfer-on-death deed (TODD) offers a way for a real property owner to pass on real property while avoiding the expensive and sometimes confusing probate process.

Nearly all probate matters require legal counsel, and many beneficiaries are unable to afford legal counsel. As a result, otherwise inheritable real property is now passed through intestacy to pay for the decedent's estate. This problem can also lead to cloudy titles and complex unintended co-ownership structures that pose difficulties for owners, title companies, local governmental entities, and other real estate stakeholders.

S.B. 462 creates a TODD, which is a way for a real property owner to transfer real estate property while living, with or without a will. It will allow clean title to pass to the respective descendant or beneficiary without going through probate. A testator must record the TODD in the county records office during his/her lifetime. The TODD application requires both the testator and the beneficiary's (or beneficiaries') signatures. The real property owner files the TODD at the county records office in the county where the property is located.

S.B. 462 allows indigent persons and other beneficiaries to acquire an asset without the expense of hiring counsel in probate proceedings. It is a non-testamentary instrument that is only effective upon death. Upon the testator's death, the beneficiary or beneficiaries must prove the testator's death. If done successfully, title will pass to the beneficiary or beneficiaries listed on the TODD.

Any statute or common law that applies to estates also applies to TODD property unless otherwise stated in legislation. Additionally, S.B. 462 sets out a process for creditors to make a claim on the property. In all cases, a TODD will govern over a will, regardless of whether the will is created before or subsequent to a properly filed TODD.

S.B. 462 amends Title 2 of the Texas Estates Code (Estate of a Decedent) and would apply to all real property in Texas.

S.B. 462 amends current law relating to authorizing a revocable deed that transfers real property at the transferor's death.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle C, Title 2, Estates Code, by adding Chapter 114, as follows:

CHAPTER 114. TRANSFER ON DEATH DEED

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 114.001. SHORT TITLE. Authorizes this chapter to be cited as the Texas Real Property Transfer on Death Act.

Sec. 114.002. DEFINITIONS. (a) Defines "beneficiary," "designated beneficiary," "joint owner with right of survivorship" or "joint owner," "person," "real property," "transfer on death deed," and "transferor."

(b) Provides that, in this chapter, the terms "cancel" and "revoke" are synonymous.

Sec. 114.003. APPLICABILITY. Provides that this chapter applies to a transfer on death deed executed and acknowledged on or after September 1, 2015, by a transferor who dies on or after September 1, 2015.

Sec. 114.004. NONEXCLUSIVITY. Provides that this chapter does not affect any method of transferring real property otherwise permitted under the laws of this state.

Sec. 114.005. UNIFORMITY OF APPLICATION AND CONSTRUCTION. Requires that consideration, in applying and constructing this chapter, be given to the need to promote uniformity of the law with respect to the subject matter of this chapter among states that enact a law similar to this chapter.

Sec. 114.006. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. Provides that this chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.), except that this chapter does not modify, limit, or supersede Section 101(c) of that Act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that Act (15 U.S.C. Section 7003(b)).

SUBCHAPTER B. AUTHORIZATION, EXECUTION, AND REVOCATION OF TRANSFER ON DEATH DEED

Sec. 114.051. TRANSFER ON DEATH DEED AUTHORIZED. Authorizes an individual to transfer the individual's interest in real property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

Sec. 114.052. TRANSFER ON DEATH DEED REVOCABLE. Provides that a transfer on death deed is revocable regardless of whether the deed or another instrument contains a contrary provision.

Sec. 114.053. TRANSFER ON DEATH DEED NONTESTAMENTARY. Provides that a transfer on death deed is a nontestamentary instrument.

Sec. 114.054. CAPACITY OF TRANSFEROR; USE OF POWER OF ATTORNEY. (a) Provides that the capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a contract.

(b) Provides that a transfer on death deed may not be created through use of a power of attorney.

Sec. 114.055. REQUIREMENTS. Requires a transfer on death deed, to be effective, to:

(1) except as otherwise provided in Subdivision (2), contain the essential elements and formalities of a recordable deed;

(2) state that the transfer of an interest in real property to the designated beneficiary is to occur at the transferor's death; and

(3) be recorded before the transferor's death in the deed records in the county clerk's office of the county where the real property is located.

Sec. 114.056. NOTICE, DELIVERY, ACCEPTANCE, OR CONSIDERATION NOT REQUIRED. Provides that a transfer on death deed is effective without notice or delivery to or acceptance by the designated beneficiary during the transferor's life, or consideration.

Sec. 114.057. REVOCATION BY CERTAIN INSTRUMENTS; EFFECT OF WILL OR MARRIAGE DISSOLUTION. (a) Provides that, subject to Subsections (d) and (e), an instrument is effective to revoke a recorded transfer on death deed, or any part of it, if the instrument:

(1) is a subsequent transfer on death deed that revokes the preceding transfer on death deed or part of the deed expressly or by inconsistency, or except as provided by Subsection (b), an instrument of revocation that expressly revokes the transfer on death deed or part of the deed;

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked; and

(3) is recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed being revoked is recorded.

(b) Provides that a will may not revoke or supersede a transfer on death deed.

(c) Provides that, if a marriage between the transferor and a designated beneficiary is dissolved after a transfer on death deed is recorded, a final judgment of the court dissolving the marriage operates to revoke the transfer on death deed as to that designated beneficiary if notice of the judgment is recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed is recorded, notwithstanding Section 111.052 (Validity of Certain Nontestamentary Instruments and Provisions).

(d) Provides that, if a transfer on death deed is made by more than one transferor, revocation by a transferor does not affect the deed as to the interest of another transferor who does not make that revocation.

(e) Provides that a transfer on death deed made by joint owners with right of survivorship is revoked only if it is revoked by all of the living joint owners.

(f) Provides that this section does not limit the effect of an inter vivos transfer of the real property.

SUBCHAPTER C. EFFECT OF TRANSFER ON DEATH DEED; LIABILITY OF TRANSFERRED PROPERTY FOR CREDITORS' CLAIMS

Sec. 114.101. EFFECT OF TRANSFER ON DEATH DEED DURING TRANSFEROR'S LIFE. Provides that, during a transferor's life, a transfer on death deed does not:

(1) affect an interest or right of the transferor or any other owner, including:

(A) the right to transfer or encumber the real property that is the subject of the deed;

(B) homestead rights in the real property, if applicable; and

(C) ad valorem tax exemptions, including exemptions for residence homestead, persons 65 years of age or older, persons with disabilities, and veterans;

- (2) affect an interest or right of a transferee of the real property that is the subject of the deed, even if the transferee has actual or constructive notice of the deed;
- (3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;
- (4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance, subject to applicable federal law;
- (5) constitute a transfer triggering a "due on sale" or similar clause;
- (6) invoke statutory real estate notice or disclosure requirements;
- (7) create a legal or equitable interest in favor of the designated beneficiary; or
- (8) subject the real property to claims or process of a creditor of the designated beneficiary.

Sec. 114.102. EFFECT OF SUBSEQUENT CONVEYANCE ON TRANSFER ON DEATH DEED. Provides that an otherwise valid transfer on death deed is void as to any interest in real property that is conveyed by the transferor during the transferor's lifetime after the transfer on death deed is executed and recorded if:

- (1) a valid instrument conveying the interest is recorded in the deed records in the county clerk's office of the same county in which the transfer on death deed is recorded; and
- (2) the recording of the instrument occurs before the transferor's death.

Sec. 114.103. EFFECT OF TRANSFER ON DEATH DEED AT TRANSFEROR'S DEATH. (a) Provides that, except as otherwise provided in the transfer on death deed, this section, or any other statute or the common law of this state governing a decedent's estate, on the death of the transferor, the following rules apply to an interest in real property that is the subject of a transfer on death deed and owned by the transferor at death:

- (1) if the designated beneficiary survives the transferor by 120 hours, the interest in the real property is transferred to the designated beneficiary in accordance with the deed;
- (2) the interest of a designated beneficiary that fails to survive the transferor by 120 hours lapses, notwithstanding Section 111.052;
- (3) subject to Subdivision (4), concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship; and
- (4) notwithstanding Subdivision (2), if the transferor has identified two or more designated beneficiaries to receive concurrent interests in the real property, the share of a designated beneficiary who predeceases the transferor lapses and is subject to and passes in accordance with Subchapter D (Failure of Devise; Disposition of Property to Devisee Who Predeceases Testator), Chapter 255, as if the transfer on death deed were a devise made in a will.

(b) Provides that, if a transferor is a joint owner with right of survivorship who is survived by one or more other joint owners, the real property that is the subject of the transfer on death deed belongs to the surviving joint owner or owners. Provides that, if a transferor is a joint owner with right of survivorship who is the last surviving joint owner, the transfer on death deed is effective.

(c) Authorizes the last surviving joint owner to revoke the transfer on death deed subject to Section 114.057 if a transfer on death deed is made by two or more transferors who are joint owners with right of survivorship.

(d) Provides that a transfer on death deed transfers real property without covenant of warranty of title even if the deed contains a contrary provision.

Sec. 114.104. TRANSFER ON DEATH DEED PROPERTY SUBJECT TO LIENS AND ENCUMBRANCES AT TRANSFEROR'S DEATH; CREDITORS' CLAIMS. (a) Provides that, subject to Section 13.001 (Validity of Unrecorded Instrument), Property Code, a beneficiary takes the real property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the real property is subject at the transferor's death. Provides that, for purposes of this subsection and Section 13.001, Property Code, the recording of the transfer on death deed is considered to have occurred at the transferor's death.

(b) Requires the personal representative to give notice to the creditor of the transferor as the personal representative would any other secured creditor under Section 308.053 (Required Notice to Secured Creditor) if a personal representative has been appointed for the transferor's estate, an administration of the estate has been opened, and the real property transferring under a transfer on death deed is subject to a lien or security interest, including a deed of trust or mortgage. Requires the creditor to then make an election under Section 355.151 (Option to Treat Claim as Matured Secured Claim or Preferred Debt and Lien) in the period prescribed by Section 355.152 (Period for Specifying Treatment of Secured Claim) to have the claim treated as a matured secured claim or a preferred debt and lien claim, and the claim is subject to the claims procedures prescribed by this section.

(c) Provides that, if the secured creditor elects to have the claim treated as a preferred debt and lien claim, Sections 355.154 (Preferred Debt and Lien) and 355.155 (Payment of Maturities on Preferred Debt and Lien) apply as if the transfer on death deed were a devise made in a will, and the creditor may not pursue any other claims or remedies for any deficiency against the transferor's estate.

(d) Provides that, if the secured creditor elects to have the claim treated as a matured secured claim, Section 355.153 (Payment of Matured Secured Claim) applies as if the transfer on death deed were a devise made in a will, and the claim is subject to the procedural provisions of this title governing creditor claims.

Sec. 114.105. DISCLAIMER. Authorizes a designated beneficiary to disclaim all or part of the designated beneficiary's interest as provided by Chapter 122 (Disclaimers and Assignments).

Sec. 114.106. LIABILITY FOR CREDITOR CLAIMS; ALLOWANCES IN LIEU OF EXEMPT PROPERTY AND FAMILY ALLOWANCES. (a) Provides that, to the extent the transferor's estate is insufficient to satisfy a claim against the estate, expenses of administration, any estate tax owed by the estate, or an allowance in lieu of exempt property or family allowance to a surviving spouse, minor children, or incapacitated adult children, the personal representative may enforce that liability against real property transferred at the transferor's death by a transfer on death deed to the same extent the personal representative could enforce that liability if the real property were part of the probate estate.

(b) Provides that, notwithstanding Subsection (a), real property transferred at the transferor's death by a transfer on death deed is not considered property of the probate estate for any purpose, including for purposes of Section 531.077 (Recovery of Medical Assistance), Government Code.

(c) Authorizes a proceeding to enforce the liability to be brought by a creditor, a distributee of the estate, a surviving spouse of the decedent, a guardian or other appropriate person on behalf of a minor child or adult incapacitated child of the decedent, or any taxing authority if a personal representative does not commence a proceeding to enforce a liability under Subsection (a) on or before the 90th day after the date the representative receives a demand for payment.

(d) Authorizes the liability for claims, expenses, and other payments to be apportioned among those real property interests and other assets in proportion to their net values at the transferor's death if more than one real property interest is transferred by one or more transfer on death deeds or if there are other nonprobate assets of the transferor that may be liable for the claims, expenses, and other payments specified in Subsection (a).

(e) Requires a proceeding to enforce liability under this section to be commenced not later than the second anniversary of the transferor's death, except for any rights arising under Section 114.104(d).

(f) Authorizes a court, in connection with any proceeding brought under this section, to award costs and reasonable and necessary attorney's fees in amounts the court considers equitable and just.

SUBCHAPTER D. FORMS FOR TRANSFER ON DEATH DEED

Sec. 114.151. OPTIONAL FORM FOR TRANSFER ON DEATH DEED. Sets forth the form and the language in the form authorized to be used to create a transfer on death deed.

Sec. 114.152. OPTIONAL FORM OF REVOCATION. Sets forth the form and the language in the form authorized to be used to create an instrument of revocation under this chapter.

SECTION 2. Amends Section 22.027(b), Estates Code, to provide that, except as otherwise provided by this code, the definition of "person" assigned by Section 311.005 (General Definitions), Government Code, does not apply to any provision in this code.

SECTION 3. Amends Section 122.001(1), Estates Code, to redefine "beneficiary" to include a person who would have been entitled, if the person had not made a disclaimer, to receive property as the result of the death of another person by a transfer on death deed.

SECTION 4. Effective date: September 1, 2015.