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10 Pesky Problems with Real Estate

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TEN PESKY PROBLEMS WITH REAL ESTATE – PLUS A FEW MORE

Estate planning covers a wide variety of asset planning, with one of the biggest assets being real property owned by the client. In recent years, the variety of options and considerations of planning with real property has become more complicated due to case law changes, the rules and regulations of the local government entities and the statutory forms that have been promulgated. When representing a client, the attorney must consider not only the legal ramifications of what he is drafting but also the practical concerns. This paper is designed to discuss ten pesky problems which occur when dealing with real estate, plus a few more.

How were these top ten decided upon? In preparing to write this paper, I found myself at the County Clerk's office attempting to file a document that they stated complied with the statute but did not comply with their filing system. That led to a further discussion of the issues that they frequently see as well and what the appraisal district requires. Based on this conversation, ten practical issues became apparent and are included in this paper.

COUNTY CLERK

When drafting a document, one thing to consider is how it is going to be filed at the county clerk's office. Attached to this document as Exhibit A are the indexing guidelines for the Comal county clerk's office. Why is this important? Because not everyone searches each index. For example, the appraisal districts only search the deed records and the probate records so if a document is filed as an affidavit, the appraisal district will never see it. Also attached, as Exhibit B, is a list of categories that are used when e-filing a document. These are not exactly the same as the indexing list because certain documents cannot be e-filed. In addition, not all counties use the same indexing procedure so if you are filing a document or searching for a document, be aware of the indexes used by the county in which the property is located.

THE TEN PROBLEMS

I. TRANSFER ON DEATH DEEDS – When a client comes in for estate planning and/or elder planning, that client is looking to the attorney for options. When it involves real estate, one of the options to consider is whether to gift the property during lifetime or to leave the property to the beneficiary at death. In 2015 the Texas Legislature passed Senate Bill 462 which added a new Chapter 114 to the Texas Estates Code and gave estate planners another tool. This chapter created the statutory transfer of death deed. The transfer on death deed is a statutory form under which an individual may transfer that individual's interest in real property to one or more beneficiaries at the transferor's death. According to Chapter 114, the deed must comply with the following:

- A. The transfer on death deed must be executed and acknowledged on or after September 1, 2015 by a transferor who dies on or after September 1, 2015.¹
- B. The transfer on death deed cannot be executed using a power of attorney.²**
- C. The transfer on death deed must contain the essential elements and formalities of a recordable deed³. – be in writing, be signed by the grantor, be notarized, have a property description, contain the address of the Grantee.
- D. State that the transfer is to occur on the transferor's death.⁴
- E. 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.⁵**
- F. A transfer on death deed is effective without consideration or notice or delivery to or acceptance by the designated beneficiary during the transferor's life.⁶
- G. The transfer on death deed has no warranty of title and cannot have a warranty of title.

Items B and E above are highlighted to point out two of the issues with transfer on death deeds that can be easily overlooked. The first is that the transfer on death deed cannot be executed using a power of attorney. One of the best tools an estate planning attorney can give his client is a power of attorney. A statutory durable power of attorney, with the correct power chosen, can be used to sell property, lease property, pay taxes on property and generally handle the real property just like the principal would. However, a transfer on death deed cannot be executed using the power of attorney. Since transfer on death deeds are commonly considered when a person is older, the attorney will need to be comfortable with the client's capacity because the agent under a power of attorney cannot execute this deed.

Another concern is the recording of the transfer on death deed. Our office has recently had several clients who are terminally ill. In a few cases, the client has passed away within a week of executing his documents. If the transfer on death deed is not recorded prior to the passing of the client, it is not a valid document. Therefore, it is imperative that the attorney take immediate action and record the deed once executed.

II. REVOCATION OF TRANSFER ON DEATH DEEDS - Texas Estates Code Section 114.152 provides an optional form for the revocation and cancellation of a transfer on death deed. This form is inadequate. When a document is recorded in the Official Public Records, the County Clerk indexes the document by grantor, grantee, date, and description. The form set forth in the statute does not reference the grantee or the original transfer on death deed or the property description. This causes the indexing to be

¹ Texas Estates Code Section 114.003

² Texas Estates Code Section 114.054(b)

³ Texas Estates Code Section 114.055

⁴ Texas Estates Code Section 114.055(2)

⁵ Texas Estates Code Section 114.055(3)

⁶ Texas Estates Code Section 114.056

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