

TO: All County Auditors
Through: Shelley Wilson, Executive Administrator, Tax Equalization Division
FROM: Edward C. Samsel, Legal Counsel for the Tax Equalization Division
RE: Transfer on Death Deeds – S.B. 124
DATE: January 22, 2010

Amended Substitute Senate Bill 124 (SB 124), effective December 28, 2009, changes the way transfer on death (TOD) beneficiary designation to real property is created and administered.

Highlights of Major Changes

The first major change is that the creation of a TOD beneficiary is done by affidavit instead of by deed. Accordingly, each owner of a parcel of real property may designate a TOD beneficiary without effectuating a transfer of property using the cumbersome transfer “to oneself and others” exception. Since no transfer is made at all to create a TOD beneficiary, the county auditor is not involved in that process and no conveyance fee issues arise. The owner simply records the affidavit with the county recorder. The transfer will occur when the surviving beneficiary attempts to transfer the property into the beneficiary’s name. At that time, the county auditor is involved and a conveyance fee will most likely be due.

The second major change is that individuals that own property as survivorship tenants are now entitled to create a TOD beneficiary. The details are explained below. For purposes of this information release, tenants by the entirety are not discussed, per se, but they are treated like survivorship tenants.

Creating a TOD Designation– R.C. § 5302.22

On or after December 28, 2009, a TOD beneficiary designation will be created by affidavit instead of by deed. An individual who is a sole owner, a tenant in common, or a survivorship tenant may designate one or more beneficiaries by executing a TOD designation affidavit, together with the individual’s spouse, if any, and recording that affidavit with the county recorder, who will record it in the same manner as deeds are recorded. If the affidavit is executed by an individual with a spouse, the dower rights of the spouse are subordinate to the vesting of title to the real property in the TOD beneficiary.

The TOD designation affidavit must be verified before a person authorized to administer oaths and shall include (1) a description of the real property with a reference to an instrument of record containing that description; (2) if less than the entire interest is to be transferred, a statement describing that specific interest; (3) a statement that the individual executing the affidavit is the owner of the real property, and whether married or not; (4) if the owner is married, a statement by the owner’s spouse that the spouse’s dower rights are subordinate to the vesting of title to the real property in the TOD beneficiary; and (5) a statement designating one or more TOD beneficiaries. To be effective, the affidavit must be recorded with the county recorder prior to the death of the individual executing the affidavit. The affidavit need not be supported by consideration and need not be delivered to the TOD beneficiary to be effective.

If a sole owner or tenant in common executes a TOD designation affidavit, title to the real property will vest in the beneficiary upon the death of that individual. If a survivorship tenant executes a TOD designation affidavit, title will vest in the surviving survivorship tenants, if any, upon the death of that individual. Upon the death of the last surviving survivorship tenant, title will then vest in the TOD beneficiary or beneficiaries.

To take title, the TOD beneficiary must survive the deceased owner, meaning the beneficiary must be in existence on the date of death of the deceased owner. If the TOD beneficiary is a trustee of a trust, who has died, resigned, or otherwise been replaced by a successor trustee of the trust on the date of death of the deceased owner, the successor trustee shall be considered the TOD beneficiary, even though the successor trustee is not named as a TOD beneficiary in the affidavit.

Characteristics of a TOD Designation – R.C. § 5302.23

1. If more than one TOD beneficiary exists, the beneficiaries shall take title in equal shares as tenants in common, unless the deceased owner designated other than equal shares or has designated that the beneficiaries shall take title as survivorship tenants.
2. If none of the designated TOD beneficiaries or contingent beneficiaries exist on the date of the deceased owner's death, the interest of the deceased owner shall be distributed as part of probate estate.
3. If there are two or more TOD beneficiaries and the deceased owner has designated that those beneficiaries shall take title as survivorship tenants, then no designated contingent TOD beneficiaries shall take title to the real property unless none of the TOD beneficiaries survives the deceased owner on the date of the deceased owner's death.
4. A TOD beneficiary may be a natural (i.e., human being) or legal (e.g., corporation) person, except that if two or more TOD beneficiaries are designated as survivorship tenants, all the beneficiaries must be natural persons. If two or more contingent TOD beneficiaries are designated as survivorship tenants, all the contingent beneficiaries must be natural persons.
5. A natural person who is designated a TOD beneficiary solely in that person's capacity as a trustee of a trust is not considered a natural person for purposes of designating TOD beneficiaries as survivorship tenants.
6. The designation of a TOD beneficiary may be revoked or changed at any time, by the owner of the interest or by the surviving survivorship tenants of the interest, by executing and recording, prior to the death of the owner or surviving survivorship tenants, a new TOD designation affidavit stating the revocation or change in that designation. The new TOD designation affidavit shall automatically supersede and revoke all prior recorded TOD designation affidavits concerning the real property or interest therein identified in the new affidavit, provided that the prior recorded affidavit was executed before the later recorded affidavit.
7. If the owners hold title to the real property in a survivorship tenancy, the death of all except the last survivorship tenant automatically terminates and nullifies any TOD beneficiary designation made solely by the deceased tenants without joinder by the last surviving survivorship tenant. Such termination is effective on the date of death of a deceased survivorship tenant, without the last surviving tenant taking any affirmative act of revocation. If the last surviving survivorship tenant dies with no TOD beneficiary designation, the entire interest of the last surviving survivorship shall be distributed as part of that tenant's probate estate.

8. A TOD designation affidavit designating a TOD beneficiary is not testamentary. That TOD shall supersede any attempted testate or intestate transfer of that real property or interest in real property. In other words, the property will transfer to the designated beneficiary by operation of law pursuant to the affidavit.
9. The execution and recording of a TOD designation affidavit shall be effective to terminate the designation of a TOD beneficiary on a TOD deed involving the same real property or interest in real property that was recorded prior to December 28, 2009.
10. The execution and recording of a TOD designation affidavit shall be effective to bar the vesting of any dower rights in a subsequent spouse of the owner of real property who executed that affidavit, unless the affidavit is revoked or changed.

Transferring TOD Property – R.C. § 5302.22

The transfer of real property designated in a TOD designation affidavit shall be recorded by presenting to the county auditor of the county in which the property is located and filing with the county recorder of that county an affidavit of confirmation executed by the TOD beneficiary. The affidavit of confirmation must be verified before a person authorized to administer oaths and shall include (1) the name and address of each TOD beneficiary that survived the deceased owner or is in existence on the date of the deceased owner's death; (2) if the TOD beneficiary is a trustee of a trust who has been replaced by a successor trustee, the name and address of the successor trustee along with a copy of the recorded successor trustee affidavit described in R.C. § 5302.171; (3) the date of death of the deceased owner; (4) a description of the real property or interest in real property; and (5) the name of each TOD beneficiary who has not survived the deceased owner.

The affidavit of confirmation shall be accompanied by a certified copy of the death certificate for the deceased owner and a certified copy of the death certificate for each TOD beneficiary who has not survived the deceased owner. The county recorder shall make an index reference in the record of deeds to the affidavit of confirmation.

Note: if the title to the real property that is the subject of a TOD designation affidavit is registered pursuant to Ch. 5309, the transfer of the property to the TOD beneficiary shall be pursuant to R.C. § 5309.081, where, apparently, the TOD beneficiary will be treated like a survivorship tenant under that statute.

Application of Statutes – R.C. §§ 5302.02 and 5302.24

The provisions of R.C. § 5302.22 as they existed prior to December 28, 2009, apply to all TOD instruments executed before that date. The provisions of amended R.C. § 5302.22 apply to all TOD instruments executed on or after that date. The provisions of R.C. §§ 5302.22, 5302.222, and 5302.23, as amended, do not affect any deed that was executed and recorded prior to December 29, 2009, or any TOD beneficiary designation made pursuant to R.C. § 5302.22, as it existed prior to December 28, 2009. If that deed or designation is valid before that date, it continues to be valid on or after that date. A grantee of that deed need not execute a TOD designation affidavit that designates the same TOD beneficiary as in the deed, unless the grantee chooses to do so.