TODD IS THE WORST

MORE PROBLEMS WITH OKLAHOMA TRANSFER-ON-DEATH DEEDS

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OKC Real Property Lawyers Association
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A Brief History of TOD Deeds

Timeline of Legislative Adoption

- 1989 – Missouri* is first state to adopt statute allowing transfer-on-death deeds (TODDs)
- 1997 – Kansas* becomes second state to allow TODDs
- 2008 – Oklahoma enacts Nontestamentary Transfer of Property Act*
- 2009 – ULC promulgates Uniform Real Property Transfer on Death Act*

*Common feature: affirmative acceptance by grantee not required.[1]

1. Gerry W. Beyer, Transfer on Death Deeds Survey (revised July 21, 2022), available at www.actec.org (last accessed June 4, 2023).

A Brief History of TOD Deeds

Nontestamentary Transfer of Property Act (58 O.S. §§ 1251-1258)

- 2008 – Enacted by Legislature (without OBA input).
  - Originally, a grantee-beneficiary did not need to *accept* an interest granted under a TODD, but they could *disclaim* within 9 months of grantor-owner's death.
- 2010 – Amended (without OBA input) to require acceptance of interest.
- 2011 – Amended in cooperation with TES Committee[2] to resolve issues, including clarification that interest not accepted by beneficiary reverts to estate.
- 2015 – Amended to resolve other title issues.

2. Kraettli Q. Epperson, *Nontestamentary Transfer of Property Act: An Update on Oklahoma's Use of the Transfer-on-Death Deed (2011)* (presented October 13, 2011).

Problems With the Law

- Although TODDs are undoubtedly a great tool for estate planning, the NTPA fails to address numerous important issues.
- Moreover, the patchwork of amendments to the NTPA has resulted in something quite distinct from other deathtime, as well as inter vivos, transfers of property.
  - The mechanics of how property interests transfer under the NTPA is both internally inconsistent and at odds with other types of nonprobate transfers.[3]
- If only there were a group of Oklahoma property law experts out there who could help untangle this mess…

3. David M. Postic, *Untying the Gordian Knot: Making Sense of Oklahoma Transfer-on-Death Deeds*, presentation to Oklahoma City Real Property Lawyers Association (presented June 10, 2022).

Agenda

- What is the problem?
- What is the outcome?
- Is that outcome “good”?

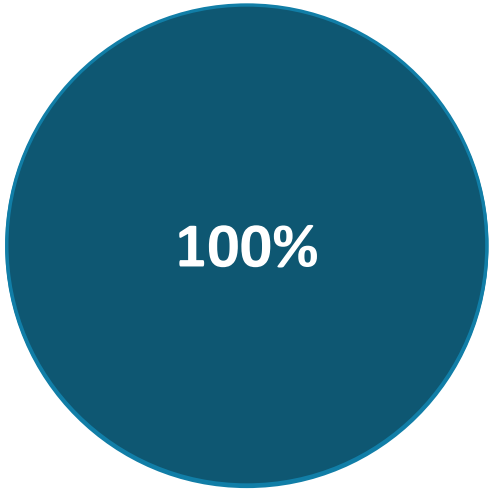
Problem #1: Multiple Beneficiaries

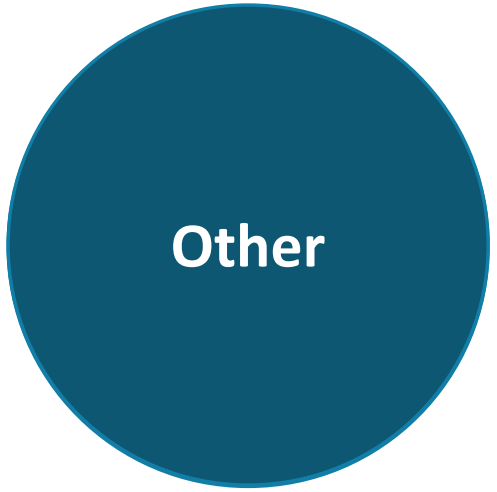
- The NTPA provides that an interest in real property can be titled in transfer-on-death form and designate "a grantee beneficiary **or beneficiaries** of the interest."[4]
- With a single grantee-beneficiary, it is (mostly) simple to determine how an interest passes under a TODD: Does the beneficiary file a timely acceptance, or not?
- But multiple beneficiaries can lead to multiple problems.

4. 58 O.S. § 1252(A) (emphasis added).

Example 1.1: Partial Acceptance

- O executed TODD granting Whiteacre “to A and B equally.” O dies. B accepts; A does not.
- What interest does B hold?





Example 1.1: Partial Acceptance

- "To accept the transfer of a conveyance to multiple grantee beneficiaries in a Transfer-on-Death Deed, **each individual beneficiary** must accept and record the Affidavit affirming the acceptance of the conveyed real property interest under the Transfer-on-Death Deed."[5]
- In our example, A did not accept. So, what is the consequence of A failing to accept?
- "[Each] beneficiary shall record the affidavit and related documents with the office of the county clerk where the real estate is located within nine (9) months of the grantor's death, otherwise the interest in the property reverts to the deceased grantor's estate . . . ."[6]
- But exactly *what* interest reverts to the estate?
  - A's nonaccepted interest?
  - The TODD granted the property "to A and B *equally*." What does that mean for B?

5. Title Examination Standard 17.4.1 (emphasis added).

6. 58 O.S. § 1252(D).

Example 1.1: Partial Acceptance

- "All beneficiaries must execute and record an acceptance in order to receive their respective interest under a Transfer on Death Deed. As an example, A executes a Transfer on Death Deed naming X, Y, and Z as beneficiaries. X and Y execute and record the acceptance required under the statute. Z does not. In this situation, the 1/3 interest that would have gone to Z reverts to A's estate to be distributed by proceedings pursuant to applicable law and statute. Under this scenario, the 1/3 interest which reverts to A's estate may ultimately be distributed to a party other than or in addition to Z."[7]
- Does the language in our example ("to A and B *equally*") change this outcome?
- Can you avoid this result through drafting? Suppose the TODD left Whiteacre "to A and B equally, or if A fails to accept their interest within 9 months of my death, all of Whiteacre goes to B."

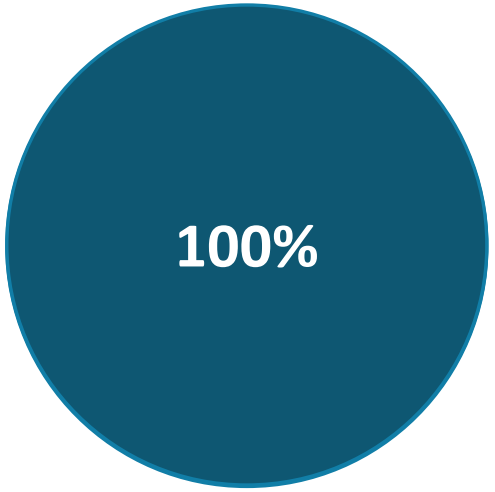
7. Title Examination Standard 17.4.1 cmt. 1.

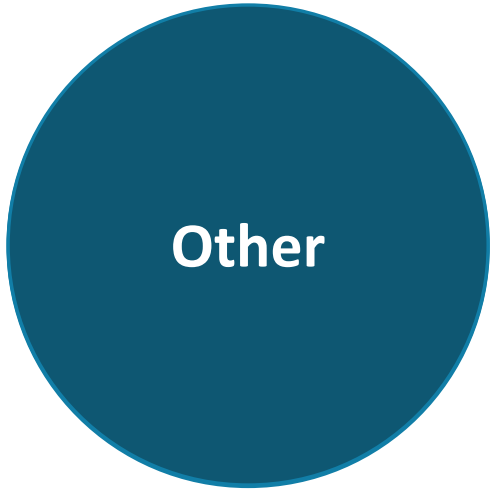
Example 1.1½: Partial Acceptance

- O executes TODD granting life estate to A, with remainder to B. After O's death, B files timely acceptance; A does not.
- Is there a principled reason to treat this situation differently than the previous example ("to A and B equally," where B accepts and A does not)?

Example 1.2: Death of Beneficiary

- Same example with TODD “to A and B equally.” A dies. *Then* O dies. B accepts interest.
- What interest does B hold?





Example 1.2: Death of Beneficiary

- "If one or more of the grantee beneficiaries dies prior to the death of the grantor owner, the transfer to those beneficiaries who predecease the grantor owner shall lapse."[8]
  - But what does it mean for the transfer to the deceased beneficiary to "lapse" in this context?
  - *Lapse* is a decidedly testamentary term; however, TODDs are expressly *non*testamentary.[9]
- Normally, "[w]hen the beneficiary named in the will has predeceased the testator . . ., the gift must . . . lapse unless it is saved by appropriate testamentary or statutory language."[10]
- Assuming the antilapse statute (84 O.S. § 142) will not be applied to TODDs, could a grantor use "appropriate . . . language" in the TODD to prevent lapse?
  - E.g., "to A and B, or the survivor of them" or "to A and B, or whichever of them survives me"?
- Or does the statute's directive that the transfer "*shall* lapse" prevent this?

8. 58 O.S. § 1255(B).

9. *See* 58 O.S. § 1258 (noting that a TODD "shall not be considered a testamentary disposition").

10. 1 R. Robert Huff & Varley H. Taylor, Jr., Oklahoma Probate Law and Practice § 4.8, at 65 (3d ed. 1995) *(citing* 84 O.S. §§ 142, 177).

Example 1.2½: Death of Beneficiary

- Similar facts, but suppose O's TODD granted Whiteacre "to A, B, and C as joint tenants, and not as tenants in common, with rights of survivorship." A dies, then O dies. B and C accept.
- "In the event the grantee beneficiaries are designated . . . to be joint tenants with right of survivorship, the death of one or more of the grantee beneficiaries prior to the death of the grantor owner shall not invalidate an otherwise validly created joint tenancy estate as to those grantee beneficiaries who are living at the time of the death of the grantor owner."[11]
  - Does Section 1255(B) mean that the *entirety* of Whiteacre is now owned by B and C as JTWROS?
  - Or does it mean that B and C only own 2/3rds of Whiteacre, but the *nature* of their estate with respect to that 2/3rds interest is a joint tenancy?

11. 58 O.S. § 1255(B). *See also* Title Examination Standard 17.4.

Example 1.2⅘: Death of Beneficiary

- Suppose O's TODD granted Whiteacre "to A, B, and C as joint tenants, and not as tenants in common, with rights of survivorship." But this time, O dies first. *Then* A dies. B and C accept.
- NTPA does not cover death of a grantee-beneficiary *after* the grantor.
  - And remember: Section 1255(B) specifically states that "the death of one or more of the grantee beneficiaries ***prior to*** the death of the grantor owner shall not invalidate an otherwise validly created joint tenancy estate as to those [surviving] grantee beneficiaries."[12]
- The deceased beneficiary couldn't accept the interest after death, but even if A's interest reverts to O's estate, is there still a valid JTWROS as to B and C?

12. 58 O.S. § 1255(B) (emphasis added).

Example 1.3: Alternate Beneficiaries

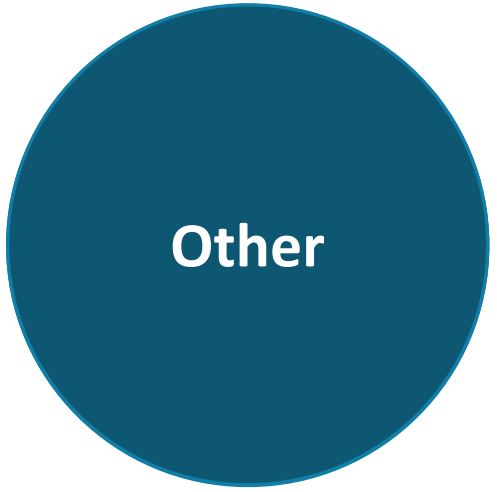
- O executed TODD granting Whiteacre “to A or, if A predeceases me, then to B.” A dies. Then O dies. B files timely acceptance.
- What interest does B hold?

Example 1.3½: Alternate Beneficiaries

- O executed TODD granting Whiteacre “to A, per stirpes, by right of representation.” A dies, survived by one child, B. Then O dies. B files timely acceptance.
- What interest does B hold?

Example 1.3⅘: Alternate Beneficiaries

- O executed TODD granting Whiteacre “to A, per stirpes, by right of representation.” A dies, survived by 3 children: B, C, and D. Then O dies. B and C file timely acceptance; D does not.
- What interest does B hold?



Problem #2: Actions by Fiduciaries

- The NTPA consistently refers to the "grantor-owner" and "grantee-beneficiary."
- But to what extent can fiduciaries act on behalf of their principal with respect to actions described under the NTPA?
  - Unsurprisingly, this is not addressed in the statutes.
- Is the answer different for grantee-beneficiaries than for grantor-owners?
- Do we construe the NTPA strictly (e.g., "grantee-beneficiary" means the beneficiary, not an agent of the beneficiary)?
- Should we look to wills law for guidance, even though TODDs are *non*testamentary?

Example 2.1: Acceptance by Agent

- O executed TODD granting Whiteacre to A. O dies. A is in a coma but has a valid DPOA giving B power to make all non-medical decisions. B files timely acceptance (w/ POA) on A's behalf.
- Does O's interest in Whiteacre vest in A?

Example 2.1: Acceptance by Agent

- As a general matter, "language in a power of attorney granting general authority with respect to estates, trusts and other beneficial interests authorizes the agent to:

  1. Accept, receive, receipt for, sell, assign, pledge or exchange a share in or payment from an estate, trust **or other beneficial interest**; . . . [and]

  8. Reject, renounce, disclaim, release or consent to a reduction in or modification of a share in or payment from an estate, trust or other beneficial interest."[13]

- The ability of an attorney-in-fact to take these kinds of actions is also referenced elsewhere in the statutes. As to a beneficiary entitled to take by devise or by succession, Title 84 states that "[a] guardian, executor, . . . or other personal representative of the estate of a minor, incompetent or deceased beneficiary, . . . may execute and file a disclaimer on behalf of the beneficiary," as may an "agent or attorney so empowered."[14]

13. 58 O.S. § 3034(B) (emphasis added).

14. 84 O.S. § 23.

Example 2.1: Acceptance by Agent

- There is an almost identical statute in Title 60. But whereas the Title 84 statute expressly applies to beneficiaries taking by devise or by succession, this statute defines "beneficiary" as "any person entitled . . . to take an interest, as grantee; as donee; under any assignment or instrument of conveyance . . .; or otherwise under any nontestamentary instrument."[15]
- To be clear, these statutes are speaking to *disclaimers* of interests.
  - Though it is worth noting that when it comes to the mechanics of TODDs, acceptance and disclaimer are two sides of the same coin.
- However, it has long been accepted that a duly authorized agent may, for example, accept a deed on behalf of their principal, thereby consummating the conveyance.[16]
- Is there any reason why this same rule should not apply to a duly authorized attorney-in-fact accepting an interest under a TODD?

15. 60 O.S. § 751(1).

16. 23 Am. Jur. 2d *Deeds* § 179, at 198 ("The acceptance of a deed need not be made by the grantee personally; it may be effectuated by the delivery of the deed to an agent of the grantee . . . .")

Example 2.2: Execution of TODD by Agent

- What about the flip side of the previous example: O is incapacitated, but O's attorney-in-fact B executes a TODD granting Whiteacre to A. O dies. A files timely acceptance.
- Does O's interest in Whiteacre vest in A?

Example 2.2: Execution of TODD by Agent

- "An interest in real estate may be titled in transfer-on-death form by recording a deed, signed ***by the record owner of the interest***, designating a grantee beneficiary . . . ."[17]
- Although a signature is viewed as the most indispensable formality for any donative transfer, it is well-established the donor *himself* does not necessarily need to be the one to sign.
  - Someone else can sign a testator's name to a will, provided it is signed (1) at the testator's direction and (2) in his presence.[18] The same is true of deeds.
    - This originated in the Statute of Frauds of 1677.
  - A 'normal' deed can be signed by an agent even if the agent is not formally authorized and even if the grantor is not present, if the grantor adopts the signature and agrees to be bound by it.[19]
    - Based on doctrine of ratification, which traces its roots back to the Roman Empire.[20]

17. 58 O.S. § 1252(A) (emphasis added).
18. 84 O.S. § 55(1).
19. 23 AM. JUR. 2D *Deeds* § 114, at 151. *Cf.* 72 AM. JUR. 2D *Statute of Frauds* §§ 358, 379 *et seq*.
20. *See generally Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279 (1891) (Holmes, J.).

Example 2.2: Execution of TODD by Agent

- The issue becomes a bit murkier if the donor is *not* present or does *not* affirmatively adopt the signature of another as indicating their own acceptance and validation.
- In wills law, if a testator cannot in some way communicate their assent and signal another to sign the will for them, the instrument is invalid.[21]
  - Even if duly authorized by a power of attorney, a will signed by an attorney-in-fact is invalid.
- Inter vivos conveyances are a different matter, as it is broadly accepted that a deed signed by a duly authorized attorney-in-fact is valid.[22]
- However, the difference between signing wills and deeds is not simply because the nature of one is intrinsically different than the other.
  - Statute *expressly* allows deeds to be signed by an attorney-in-fact.[23]

21. *Cf. Estate of Luce*, No. 02-17-00097-CV, 2018 WL 5993577, at *5 (Tex. App. Nov. 15, 2018) (affirming admission of will to probate when testator, who was paralyzed, communicated through "blinking system" that he wanted notary to sign will for him).

22. *See* Title Examination Standard 6.7(A).

23. 16 O.S. § 3.

Example 2.2: Execution of TODD by Agent

- Although the NTPA does not expressly state that someone else can sign a TODD on behalf of a grantor-owner, Oklahoma law seems to support it.
- 16 O.S. § 3: "Any instrument affecting real estate may be made by an attorney-in-fact, duly appointed and empowered as hereinafter provided."
  - Isn't a TODD an "instrument affecting real estate"?
- One could argue that a TODD is closer to a will (both in effect and in formalities), therefore the same limitation vis-à-vis signatures should apply to TODDs.
  - However, the NTPA takes care to state that a TODD is a *nontestamentary* transfer.[24]
  - The NTPA also expressly classifies a TODD as "a deed."[25]

24. 58 O.S. § 1258 (stating that a TODD "shall not be considered a testamentary disposition").
25. 58 O.S. § 1252(A).

Problem #3: Creditor Rights

- Probate performs three primary functions: (1) making property owned at death marketable (title-clearing); (2) paying off decedent's debts (creditor protection); and (3) implementing the decedent's donative intent with respect to the property that remains (distribution).[26]
- Although creditors have adapted in numerous ways to the nonprobate revolution, the decentralized nature of nonprobate transfers undoubtedly disadvantages creditors.[27]
- States (including Oklahoma) have addressed this with respect to many types of nonprobate transfers; however, the NTPA does not weigh in on the matter.
- Is property that transfers under a valid TODD—effectuated by a timely acceptance by the grantee-beneficiary—subject to unsecured claims of the deceased grantor-owner?

26. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1117 (1984).

27. *See id.* at 1120-1125; Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 823-829 (2007).

Example 3.1: Creditor of O's Estate

- O executes a TODD granting Whiteacre to A. After O's death, A files timely acceptance. An unsecured Creditor of O then sues A to recover debt.
- Can Creditor recover from A (either generally or Whiteacre specifically)?

Example 3.1: Creditor of O's Estate

- The Legislature has addressed this issue with some types of nonprobate transfers:
  - "A transferee [of securities registered in pay-on-death form] … is subject to liability to any probate estate of the decedent for allowed claims against that estate … to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received by that transferee."[28]
- But is silent with respect to other POD/TOD assets, including bank accounts[29], credit union shares,[30] savings and loan accounts,[31] and vehicle titles.[32]
- Do creditors have rights in property transferred by nonprobate means if statute does not expressly grant them such rights?

28. 71 O.S. § 910(C).
29. 6 O.S. § 901. *But see* 6 O.S. § 905 (addressing adverse claims to deposits).
30. 6 O.S. § 2025.
31. 18 O.S. § 381.39a.
32. 47 O.S. § 1107.5

Example 3.1: Creditor of O's Estate

- In the example given, Creditor's argument is that acceptance by A resulted in a fraudulent transfer because it made O's estate insolvent.
- Does this argument hold water?
  - Uniform Fraudulent Transfer Act defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of . . . [an] encumbrance."[33]
- In matters of equity, Oklahoma courts have also been hesitant to use the UFTA to invalidate transfers, even when it's clear that the transfer was made with intent to avoid creditors.[34]
  - But is a TODD a transfer "[w]ith actual intent to hinder, delay, or defraud" a creditor of the grantor?
- What about the possible remedy of an implied equitable lien?[35]

33. 24 O.S. § 113(12).

34. *Peveto v. Peveto*, 2022 OK CIV APP 7, ¶ 11, 508 P.3d 979 (citing *Metcalf v. Metcalf*, 2020 OK 20, 465 P.3d 1187 ("Husband's preparation and execution of the deeds for fraudulent purposes does not preclude the transfer of the property to Wife."

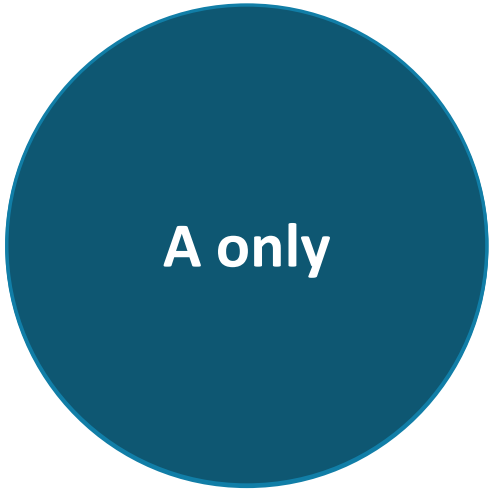
35. *See Burford Manor, Inc. v. Deel*, 1994 OK CIV APP 66, ¶¶ 17-19, 877 P.2d 623 (discussing equitable liens vis-à-vis distributed trust property).

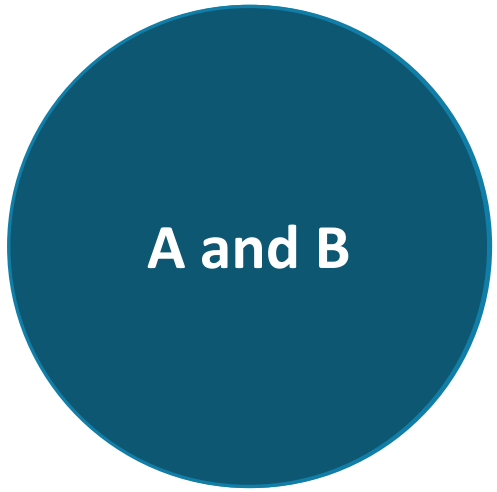
Example 4.1: Grant in Trust

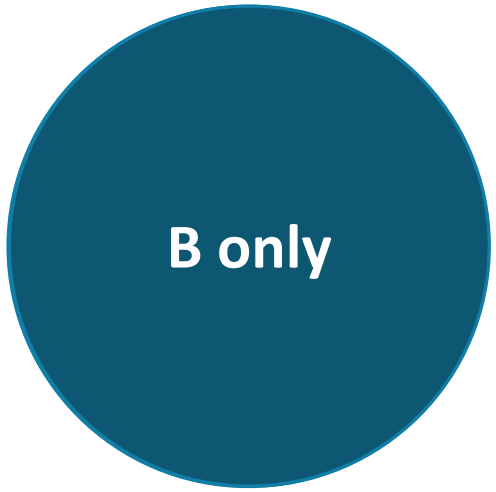
- O executes a TODD granting Whiteacre to A, “to hold in trust for the benefit of B until B turns 30.” Then O dies.
- If A files timely acceptance, is a valid trust created?

Example 4.1½: Grant in Trust

- Same scenario. O executes a TODD granting Whiteacre to A, “to hold in trust for the benefit of B until B turns 30.” Then O dies.
- Who must file an affidavit accepting Whiteacre?





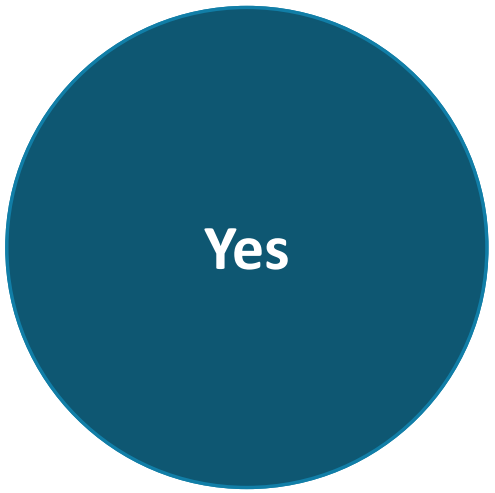


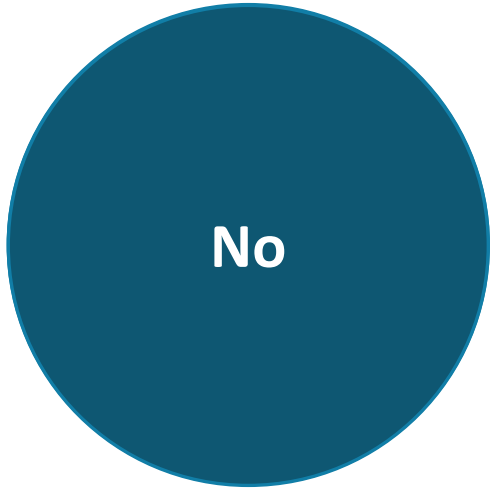
Example 4.2: Power of Appointment

- O executes a TODD granting D general power of appointment over Whiteacre. After O's death, D files timely acceptance. D appoints Whiteacre to A.
- Does A have marketable title?

Example 5.1: Grant of Homestead

- H & W are married. Title to homestead is in H alone. H executes a TODD granting Whiteacre to A, but W does not sign. W dies, then H dies. A records timely affidavit accepting interest.
- Does A have marketable title?





Example 5.1: Grant of Homestead

- "No deed, mortgage, or contract affecting the homestead exempt by law . . . shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law."[38]

36. 16 O.S. § 4(A).

QUESTIONS?

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