

Untying the Gordian Knot:

Making Sense of Oklahoma Transfer-on-Death Deeds

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FACTS

O, the owner of Blackacre, executed a TODD granting a life estate in Blackacre to A, with the remainder to B and C.

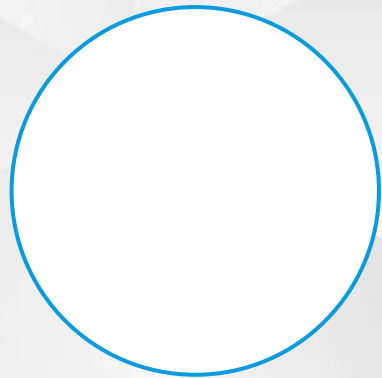
After O's death, B and C filed an Affidavit of Grantee-Beneficiaries accepting their remainder interests in Blackacre.

However, A, the grantee-beneficiary of the life estate, failed to file an affidavit within 9 months of O's death.

ISSUE PRESENTED

What interests do B and C now have in Blackacre?

Three possible outcomes:



B and C have
nothing



B and C have remainder
interest only



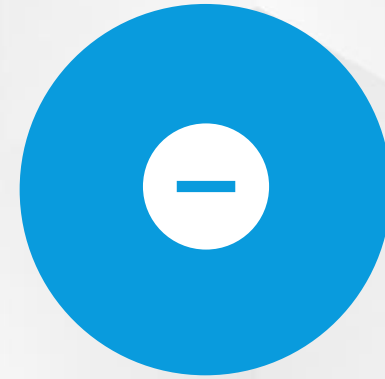
B and C have
fee simple

HYPOTHESES

What interests do B and C now have in Blackacre?



Fee Simple



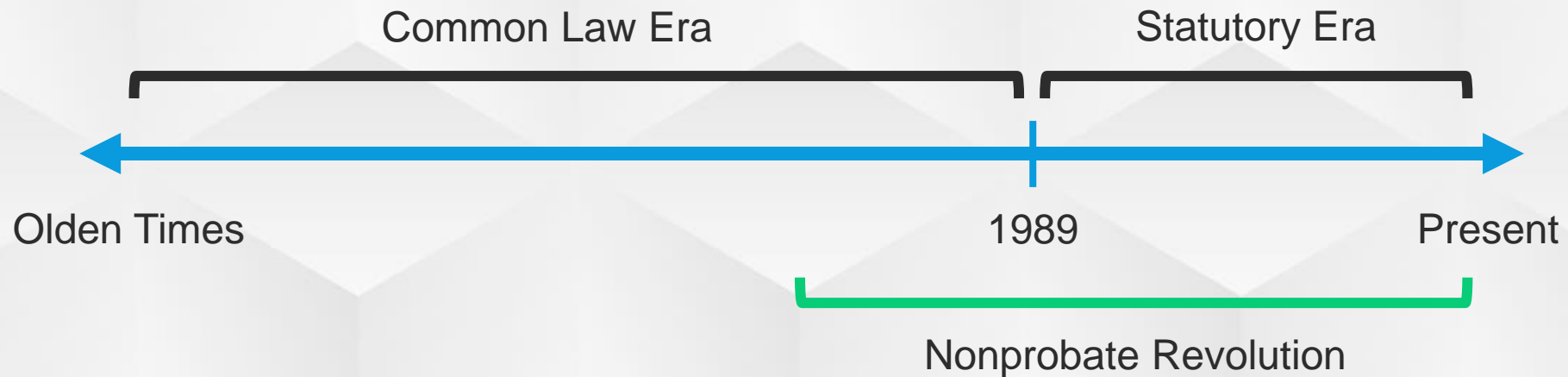
Something Less

RESEARCH AGENDA

This issue can be broken into several component parts:

- Part I – Validity of instrument
 - Can an owner use a TOD deed to convey less than their full interest?
 - Can an owner designate successive beneficiaries in a single TOD deed?
 - Part II – Mechanics of transfer
 - What is required to accept an interest under a TOD deed?
 - Exactly when is an accepted interest deemed to have transferred?
 - Once transferred, can an interest received under TOD deed be divested?
 - Part III – Effect of nonacceptance
 - What is the nature and effect of the estate’s reversionary interest?
 - What happens to an unaccepted life estate interest?
-
- The diagram consists of three blue brackets on the right side of the slide, each grouping a set of questions. The top bracket groups the two questions under Part I and is labeled 'threshold questions'. The middle bracket groups the three questions under Part II and is labeled 'minimum interest'. The bottom bracket groups the two questions under Part III and is labeled 'extent of interest'.

A BRIEF HISTORY OF TOD DEEDS



A BRIEF HISTORY OF TOD DEEDS

Common Law Era (pre-1989)

There were two notable forerunners to the TOD deed:

- (1) Jury-rigged TOD deed
- (2) Enhanced life estate deed

Jury-rigged TOD deed – Owner executes deed and places it with a third party, to be delivered to the grantee upon the owner’s death.

- In *Maynard v. Hustead*,¹ owner executed deed granting life estate to her husband with the remainder to nephew, then gave deed to attorney to deliver “in event of my death.”
- Attorney forgot about deed until 3 years after owner’s death, when owner’s estate had been administered and divided by settlement agreement between husband and daughter.

1. *Maynard v. Hustead*, 1939 OK 224, 90 P.2d 30.

A BRIEF HISTORY OF TOD DEEDS

Common Law Era (pre-1989)

Maynard v. Hustead, 1939 OK 224, 90 P.2d 30 (cont.):

- Two main questions addressed on appeal:
 - Was there valid delivery?
 - Was there acceptance by the grantees?
- Supreme Court said deed was effective to transfer possession of property even though it was not delivered to the grantees until after grantor's the death, despite not having been executed with Wills Act formalities.
- The key was that evidence showed the owner's intent in giving the deed to her attorney was to place it beyond her ability to recall (i.e., to make it irrevocable).²

2. *Id.* at ¶¶ 13–19.

A BRIEF HISTORY OF TOD DEEDS

Common Law Era (pre-1989)

Enhanced life estate deed – Owner conveys a remainder interest to one or more grantees while reserving life estate with the power to revoke. Also commonly known as a “Lady Bird Deed.”³

- With an enhanced life estate deed, owner retains the power to take back the remainder granted by the instrument (i.e., can revoke deed even after delivery).
- This allows owner with reserved life estate to mortgage or sell the property without the consent or approval of remainderman.
- Only allowed in a handful of states (including Texas), often used for Medicaid planning.

3. See generally Danaya C. Wright & Stephanie L. Emrick, *Tearing Down the Wall: How Transfer-on-Death Real-Estate Deeds Challenge the Inter Vivos/Testamentary Divide*, 78 MD. L. REV. 511, 532–538 (2019).

A BRIEF HISTORY OF TOD DEEDS

Statutory Era (1989 – present)

Timeline of Legislative Adoption:

- 1989 – Missouri* is first state to adopt statute allowing TOD deeds
- 1997 – Kansas* becomes second state
- 2008 – Oklahoma enacts Nontestamentary Transfer of Property Act*
- 2009 – Uniform Real Property Transfer on Death Act*

*Common feature: affirmative acceptance by grantee not required.⁴

4. Gerry W. Beyer, Transfer on Death Deeds Survey (revised January 14, 2022), available at www.actec.org (last accessed May 29, 2022).

OKLAHOMA STATUTE

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

- Adopted in 2008 (without OBA input).
 - Originally, a grantee-beneficiary did not need to accept an interest granted under TOD deed but could disclaim within 9 months of grantor-owner's death.
- Amended in 2010 (without OBA input) to require acceptance of interest.
- Amended in 2011, this time in cooperation with TES Committee⁵, to resolve issues, including clarification that interest not accepted reverts to estate.
- Amended 2015 to clear up other title issues.

5. 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).

OKLAHOMA STATUTE

Section 1252 – Acceptance by Grantee-Beneficiary

C. **To accept real estate** pursuant to a transfer-on-death deed, a designated grantee beneficiary shall execute an affidavit including:

1. Verification of the record owner's death;
2. Whether the record owner and the designated beneficiary were married at the time of the record owner's death; and
3. A legal description of the real estate.

D. The grantee 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**

RESEARCH AGENDA

Part I – Validity of Instrument

Threshold questions:

- **Question #1:** Can an owner use a TOD deed to convey less than their full interest?

RESEARCH AGENDA

Part I – Validity of Instrument

Question #1: Can an owner use a TOD deed to convey less than their full interest?

“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 or beneficiaries of the interest. . . . **[A]n “interest in real estate” means any estate or interest in, over or under land, including surface, minerals, structures and fixtures.**”⁶

6. 58 O.S. § 1252(A) (emphasis added).

RESEARCH AGENDA

Part I – Validity of Instrument

Q: Can an owner convey less than their full interest?

- Language in Section 1252(A) was added in 2011 amendments after 2009 AG’s opinion stating that “minerals . . . constitute an interest in real estate transferable pursuant to the [NTPA].”⁷
- Amended provision was even more expansive, stating that “interest in real estate” means “any estate or interest in real estate.”
- “Any estate” indicates an owner can convey some lesser quantum than the full interest they hold, just as with a normal deed.

7. Question Submitted by: The Honorable Gary W. Banz, State Representative, District 101, 2009 OK AG 6, ¶ 10.

RESEARCH AGENDA

Part I – Validity of Instrument

Threshold questions:

- **Question #1:** Can an owner use a TOD deed to convey less than their full interest? **Yes**
- **Question #2:** Can an owner designate successive beneficiaries in a single TOD deed?

RESEARCH AGENDA

Part I – Validity of Instrument

Q: Can an owner designate successive beneficiaries?

- If “any” estate or interest can be transferred, that would include a remainder interest—making the answer *yes* as a general matter.
- But what are the rules?
 - Life estate with a vested remainder is an easy example, as all interests would be vested upon acceptance. But what about a contingent remainder(s)? Ex:
“To A for life, then to B if B survives A; but if B does not survive A, then to C if C survives A; but if C does not survive A, then to D if D survives A; but if D...”
 - Do contingent remaindermen need to accept within 9-month window, even though their interests have not vested?

RESEARCH AGENDA

Part I – Validity of Instrument

Q: Can an owner designate successive beneficiaries?

- What about “to A, per stirpes”? This raises related questions:
 - Does a grantee-beneficiary have to be ascertained? Or merely ascertainable?
 - If ascertainable, within what time frame? 9-month TOD deed window? R.A.P.?
 - Can a TOD deed divide ownership unequally among beneficiaries?
 - If “to A, per stirpes,” and A left predeceased children B, C, and D, each of whom had a different number of children, the roots would receive different interests.
- Conclusion: Statute does not disallow life estate followed by remainder if vested and beneficiaries ascertained.

RESEARCH AGENDA

Part I – Validity of Instrument

Threshold questions:

- **Question #1:** Can an owner use a TOD deed to convey less than their full interest? **Yes**
- **Question #2:** Can an owner designate successive beneficiaries in a single TOD deed? **Yes, at least to some extent.**

Conclusion: the TOD deed is valid.

RESEARCH AGENDA

Part II – Mechanics of Transfer

- **Question #1:** What is required for a grantee-beneficiary to accept an interest under a TOD deed?

RESEARCH AGENDA

Part II – Mechanics of Transfer

Question #1:5: Do all designated beneficiaries need to accept their interest?

C. To accept real estate pursuant to a transfer-on-death deed, a designated grantee beneficiary **shall execute an affidavit** affirming:

1. Verification of the record owner's death;
2. Whether the record owner and the designated beneficiary were married at the time of the record owner's death; and
3. A legal description of the real estate.

D. The grantee 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 estate⁸

Indefinite article "a", but followed by definite article "the", indicating *each* beneficiary must execute an affidavit.

RESEARCH AGENDA

Part II – Mechanics of Transfer

Q: How does a grantee-beneficiary accept their interest?

- Requirements to accept: (1) execute and (2) record affidavit described in NTPA (3) within 9 months of grantor-owner's death.
- If *each* grantee-beneficiary must execute an affidavit, acceptance by one beneficiary cannot be deemed acceptance for another.
 - E.g., acceptance by a remainderman of his interest does not eliminate the need for life tenant to accept their interest, and vice versa.
- If requirements are satisfied, the interest transfers to beneficiary.⁹

9. *But see* Title Examination Standard 17.4, cmt. 4 (raising question concerning creation of joint tenancy under transfer-on-death deed where one or more grantee-beneficiaries dies prior to death of grantor-owner).

RESEARCH AGENDA

Part II – Mechanics of Transfer

- **Question #1:** What is required for a grantee-beneficiary to accept an interest under a TOD deed?

Affidavit filed by each beneficiary within 9 months of death.

- **Question #2:** Exactly when is an accepted interest deemed to have transferred to the grantee-beneficiary?

RESEARCH AGENDA

Part II – Mechanics of Transfer

Question #2: When does an accepted interest transfer?

“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 or beneficiaries of the interest. **The deed shall transfer ownership of the interest upon the death of the owner.**”¹⁰

“Grantee beneficiaries of a transfer-on-death deed take the interest of the record owner in the real estate **at the death of the grantor owner**”¹¹

10. 58 O.S. § 1252(A).

11. 58 O.S. § 1255(A). *Cf.* 58 O.S. Supp.2010 § 1255(A).

RESEARCH AGENDA

Part II – Mechanics of Transfer

Q: Exactly when does an accepted interest transfer?

- But a grantee-beneficiary must accept an interest before it transfers, so the interest cannot transfer *immediately* upon death.
 - Similar to how deeds become operative only upon acceptance,¹² “no final property interest transfers to the beneficiary of a TODD prior to... acceptance.”¹³
 - Yet the property interest conveyed under the TOD deed is not subject to probate administration during the time prior to acceptance.¹⁴
- Is there a way to harmonize these contradictory qualities?

12. *May v. Archer*, 1956 OK 144, ¶ 16, 302 P.2d 768.

13. *In the Matter of the Estate of Stites*, 2020 OK CIV APP 51, ¶ 13, 476 P.3d 934 (citing *JOYCE PALOMAR, 2 PATTON AND PALOMAR ON LAND TITLES* § 333 (3d ed. 2018 update)).

14. See 58 O.S. § 1258.

RESEARCH AGENDA

Part II – Mechanics of Transfer

Q: Exactly when does an accepted interest transfer?

- Can we use the same legal fiction as “regular” deeds and say that acceptance relates back to the time of delivery?¹⁵
 - Courts generally refuse to apply this rule where “an interval elapses” between the time the deed leaves the grantor’s possession and the time the grantee accepts.¹⁶
 - There are also constructional problems of determining when a TOD deed is “delivered” to the grantee-beneficiary for this purpose.
- Still, law seems to require that while the interest does not transfer until acceptance, for all other purposes it is deemed to transfer at death.

15. 23 AM JUR 2D *Deeds* § 332, at 294 (1983).

16. *Id.*

RESEARCH AGENDA

Part II – Mechanics of Transfer



RESEARCH AGENDA

Part II – Mechanics of Transfer

- **Question #1:** What is required for a grantee-beneficiary to accept an interest under a TOD deed?

Affidavit filed by each beneficiary within 9 months of death.

- **Question #2:** Exactly when is an accepted interest deemed to have transferred to the grantee-beneficiary?

Upon acceptance, which relates back to death of owner.

- **Question #3:** Once transferred, can an interest received under TOD deed be divested?

See Part III.

RESEARCH AGENDA

Part III – Effect of Nonacceptance

- **Question #1:** What is the nature and effect of the estate's reversionary interest under the NTPA?

RESEARCH AGENDA

Part III – Effect of Nonacceptance

Question #1: What is the nature and effect of the estate's reversionary interest under the NTPA?

“The grantee shall attach a copy of the record owner’s death certificate to the beneficiary affidavit . . . [and] 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**”¹⁷

reversion
↓
future
interest

A BRIEF REVIEW OF ESTATES IN LAND

Estates in Land:

- Estates are divided into two categories, present interests vs. future interests, to denote when the holder comes into possession.
- Present possessory estates are either freehold (life estate, fee) or nonfreehold (lease).
- The granting of a freehold estate constituting a lesser interest than a fee simple results in a corresponding future interest.¹⁸
- Future interests are retained by the grantor or given to a grantee.

18. 28 AM JUR 2D *Estates* § 171, at 298-299 (1966).

A BRIEF REVIEW OF ESTATES IN LAND

Present Interest	Future Interest if in Grantor	Future Interest if in Grantee
Fee simple absolute	N/A	N/A
Fee simple determinable	Possibility of reverter	Executory interest
Fee simple subject to a condition subsequent	Right of entry	Executory interest
Life estate	Reversion	Remainder

Which of these future interests is most closely analogous to the interest of the grantor-owner's estate under the NTPA?

RESEARCH AGENDA

Part III – Effect of Nonacceptance

Q: What is the nature of the estate's reversionary interest?

- Remember: “No final property interest transfers to the beneficiary of a TODD prior to death *and* acceptance.”¹⁹
 - If no one else holds a possessory interest prior to acceptance, then the grantor's estate is the de facto owner in possession until then.
 - An interest that is possessory *right now* is a present—not a future—interest.
- So, the estate doesn't actually have a future reversionary interest but a vested present interest subject to divestment (by grantee acceptance).

19. *In the Matter of the Estate of Stites*, 2020 OK CIV APP 51, ¶ 13, 476 P.3d 934 (citing *JOYCE PALOMAR, 2 PATTON AND PALOMAR ON LAND TITLES* § 333 (3d ed. 2018 update)) (emphasis in original).

RESEARCH AGENDA

Part III – Effect of Nonacceptance

Q: What is the nature of the estate's reversionary interest?

- Whether the estate has a present or future interest in TODD property can have substantial consequences.
- Ex: O leaves a TODD naming A as beneficiary of Blackacre. O dies on January 1. On March 1, X is injured by a condition on Blackacre which arose after January 1. On June 1, A files an affidavit accepting Blackacre.
 - If X sues A for negligence, does A have a right of indemnification or contribution with respect to O's estate?
 - If the estate merely has a reversionary (*future*) interest, then arguably not, since the estate would have had no duty because it was not in possession.

RESEARCH AGENDA

Part III – Effect of Nonacceptance

Q: What is the nature of the estate's reversionary interest?

- There are a few things we can say for certain about the estate's interest in TODD property under the NTPA:
 - It operates or solidifies automatically, if no acceptance within 9 months.²⁰
 - Whatever the nature of the estate's interest prior to acceptance by the beneficiary, the interest is not subject to probate administration.²¹
 - It is divested only upon timely acceptance by the beneficiary.²²

20. 58 O.S. § 1252(D).

21. See 58 O.S. § 1258.

22. See 58 O.S. § 1252(C), (D).

RESEARCH AGENDA

Part III – Effect of Nonacceptance

- **Question #1:** What is the nature and effect of the estate's reversionary interest under the NTPA?
More akin to present interest subject to divestment.
- **Question #2:** What happens to a life estate interest granted under a TOD deed if not accepted by the grantee-beneficiary?

RESEARCH AGENDA

Part III – Effect of Nonacceptance

Q: What happens to a life estate that is not accepted?

- An estate is created through a granting instrument such as a deed.
- The requirements of a valid deed are:

Formalities²³ + Delivery²⁴ + Acceptance²⁵

- If any of these elements is missing, the deed is invalid.
- If the deed is not valid, no estate is created → **no life estate.**
- What does that mean for B and C?

23. See generally 16 O.S. §§ 1-53.

24. *Carlile v. Carlile*, 1992 OK 57, ¶ 5, 830 P.2d 1369.

25. *McKinney v. Bluford*, 1921 OK 92, ¶ 2, 197 P. 430; 23 AM JUR 2D *Deeds* §§ 173, 362 (1983).

RESEARCH AGENDA

Part III – Effect of Nonacceptance

Q: What happens to a life estate that is not accepted?

- The failure of a life estate raises the issue of acceleration.
- Where there is a life estate followed by a vested remainder, and the life estate fails to come into existence or terminates prematurely, the remainder interest can “accelerate” into present possession.²⁶
 - Acceleration traditionally applied only where the life estate and remainder were devised by will.
 - In cases where a life estate and remainder were conveyed by deed, common law held that refusal of a life tenant to accept the interest destroyed the remainder.²⁷

26. 28 AM JUR 2D *Estates* § 304 (1966).

27. *Id.*

RESEARCH AGENDA

Part III – Effect of Nonacceptance

Q: What happens to a life estate that is not accepted?

- However, Oklahoma statute changed the common law so that failure of a preceding estate no longer automatically destroyed a remainder.²⁸
- This exact issue arose in *Maynard v. Hustead* when the grantee of the life estate refused to accept his interest.
 - Oklahoma Supreme Court held that where the grantor is deceased at the time delivery is refused, “there can be no question as to whether the refusal of the life tenant to accept his estate accelerated the estate of the remaindermen.”²⁹
 - Is there any reason the same principle would not apply to TOD deeds?

28. 60 O.S. § 28.

29. *Maynard v. Hustead*, 1939 OK 224, ¶ 20, 90 P.2d 30.

RESEARCH AGENDA

Part III – Effect of Nonacceptance

- **Question #1:** What is the nature and effect of the estate's reversionary interest under the NTPA?

More akin to present interest subject to divestment.

- **Question #2:** What happens to a life estate interest granted under a TOD deed if not accepted by the grantee-beneficiary?

If followed by a remainder which has been accepted, the life estate fails and the remainder accelerates into possession.

RESEARCH AGENDA

Part III – Effect of Nonacceptance

- **Question #1:** What is the nature and effect of the estate's reversionary interest under the NTPA?

More akin to present interest subject to divestment.

- **Question #2:** What happens to a life estate interest granted under a TOD deed if not accepted by the grantee-beneficiary?

If followed by a remainder which has been accepted, the life estate fails and the remainder accelerates into possession.

- **Question #3:** Once accepted by a grantee-beneficiary, can an interest received under TOD deed be divested?

Nothing under the NTPA (or analogous common law) that would indicate this can happen.

CONCLUSIONS

To summarize:

- O executed a valid transfer-on-death deed for Blackacre.
- B and C accepted their remainder interests by filing a timely affidavit.
- A failed to accept her life estate within the 9-month window.
- Because the life estate never came into being, B and C's remainders accelerated into present possession.
- **Ergo, B and C are fee simple owners of Blackacre.**

QUESTIONS? DISAGREEMENT?



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