

# Karen S. Gerstner & Associates, P.C.

## Estate Planning Insights

May 15, 2025

### A Focus on Some Real Property Matters

Many people own real property. The most common type of real property that people own is their primary residence. Usually, the state where an individual's primary residence is located is that individual's legal domicile. An individual can have multiple residences, but only one legal domicile. Legal domicile is a more permanent concept than residence.

Some people own other types of real property, such as a vacation home, a farm or ranch, an undeveloped lot held for future sale or development, and residential or commercial rental property. Mineral interests, whether leased or not, are also a type of real property in Texas.

Good Legal Title. It is important to have "good legal title" to real property. Legal title to real property is basically changed in one of two ways:

1. Conveyance by Deed. A living owner of real property (the "Grantor") executes and records a Deed (with or without a warranty of some type) in which the real property owned by the Grantor is conveyed (legally transferred) to the new owner (the "Grantee") and then that Deed is filed and recorded in the "Official Public Records of Real Property" (a/k/a the "deed records") in the county in which the real property is located. In the case of the vast majority of Deeds, the Grantee's right to possess the property becomes effective upon recording of the Deed, although we will discuss some Deeds in which the Grantor retains the right to continue to use the property until the Grantor's death.
2. Conveyance By Will or Will Substitute. Obviously, an individual who dies (the "decedent") owning real property cannot sign a Deed after his death conveying his real property to a new owner. However, if the decedent dies with a valid Will and that Will is admitted to probate (determined by the court to be valid), then simply probating the Will causes the Will to have the same legal effect as a Deed. If the disposition of the real property is clear from the terms of the Will, a separate Deed signed by the Executor of the decedent's estate should not need to be prepared and filed because, as noted, a probated Will has the same legal effect as a Deed. Of course, some owners of real property die without having a valid Will. The ownership of that real property will need to be changed after the owner's death (because a decedent cannot own anything), but the procedure for doing that will be far more complicated compared to the case when the owner dies with a valid Will. We will not discuss that procedure in this newsletter.

Reminder: Often, when someone mentions “probate,” the reaction is that probate is something horrible that should always be avoided. That is a gross overstatement. In addition, many people think that everything that must be done when someone dies is because of probate. That is also not true. There are usually three “parts” to the post-death process that the Executor (or other person legally deemed to be in charge) must handle when someone dies: (i) probate, (ii) federal tax matters (primarily, estate tax and various income tax matters), and (iii) retitling and distributing the decedent’s assets, including setting up and funding trusts that are beneficiaries of the decedent’s estate.

Gaps in the “Chain of Title”. A useful analogy with respect to the title of real property is a chain link fence. If you look at a chain link fence, you can see that each link connects to another link. With respect to legal title to real property, there should not be any “gaps” in the “chain of title.” Thus, a title examiner is going to trace the title of real property, from inception through the present day, from one owner to the next. Hopefully, there are no gaps in the chain of title because a gap can mean that the person assumed to be the current owner of the property does not actually have good legal title to the property. What the title examiner is looking for is both recorded Deeds and probated Wills (or substitutes for probated Wills) in the real property records relating to that property. Recorded Deeds and probated Wills are the primary documents forming the links in the chain of title to real property.

Probate is an Efficient Way to Transfer Real Property in Texas if the Will is Clear. Approximately thirty U.S. states have a fairly onerous probate process. Thus, individuals domiciled in those states usually do not use a Will as their primary estate planning vehicle because, in order for a Will to be considered a valid transfer document, it must be probated. In those states, individuals who own real property and other probate assets (i.e., assets transmissible by Will at death) create a revocable trust (a/k/a living trust) and then convey all their real property and other probate assets to their revocable trust. When those individuals die, the Trustee of their revocable trust must convey the real property out of the trust to the individual(s) entitled to that real property per the terms of the trust agreement. Thus, an individual domiciled in one of the thirty “bad probate states” incurs legal fees and expenses to create the revocable trust and legal fees and expenses to prepare and record Deeds conveying all of his real property to his revocable trust, and, after his death, legal fees and expenses are incurred to prepare and record Deeds conveying the decedent’s real property out of the trust to the new owners of that real property pursuant to the terms of the decedent’s trust agreement. Hence, that “non probate process” actually requires multiple steps that incur multiple fees and expenses.

In contrast, if an individual lives in Texas, which is one of the approximately twenty U.S. states that have a fairly simple probate process, and all of that individual’s real property is located in Texas, that individual does not need to create a revocable trust, does not need to change the title of all his real property (and other probate assets) while he is living and, if his Will is admitted to probate after his death, no Deed should have to be prepared to convey his real property to the individual(s) who are inheriting that real property pursuant to his Will. Again, that is because a probated Will has the same legal effect as a Deed. When a Texas decedent dies with a valid Will that is admitted to probate, the probate process is a more efficient and less expensive way to convey title to Texas real property owned by that decedent upon his death than the revocable

trust process. If the decedent owned real property in more than one county in Texas, after his Will is admitted to probate in the county of his domicile, certified copies of his probated Will and the Order Admitting the Will to Probate would simply be filed in the deed records in the other Texas counties where the decedent owned real property. In cases in which the only probate asset owned by the decedent is Texas real property, an even simpler probate process can be used: probating the decedent's Will as a "muniment of title." Using that procedure gives the probated Will the same legal effect as a Deed, which is sufficient, legally, to convey good legal title to the individuals inheriting that real property per the decedent's Will, but without resulting in an Executor being appointed to handle the post-death matters for the decedent's estate.

Of course, as efficient as the Texas probate process is compared to most other states, if an individual owns multiple real properties (which can include multiple mineral interests) in many different Texas counties, then this process is not going to seem very efficient because of the number of counties involved. In that case, the decedent might want to create a legal entity, such as a Limited Liability Company (LLC), and convey all of his real property (other than his personal residence) and mineral interests to that entity prior to his death.

Difference Between the Deed Records and the Appraisal District Records. Many people mistakenly believe the county appraisal district records are the same as the real property records and that the appraisal district records show the actual owner of the property. That is not true. The legal title of real property is determined per the deed records and the probate records—not the appraisal district's records. The appraisal district's records are simply a government agency's records showing who the purported owner of real property is for property tax purposes. We have encountered numerous cases where the appraisal district's records did not correctly show the legal owner of the property. The appraisal district does not particularly care whether its records are correct as far as the actual legal ownership of the property. It just cares about having information that will enable it to send property tax bills for the property and, hopefully, the person who receives that bill will pay those property taxes (whether that person is the true legal owner of the property or not).

Note that, in preparing a Deed to convey real property or to make a gift of real property in a Will, one should not use for the legal description in the Deed or Will the "abbreviated" legal description from the county appraisal district records. The description of real property in the appraisal district's records does not include the "recording information" relating to the property. For example, if you look at the legal description included in the Deed to your home (assuming the Deed was prepared by a knowledgeable lawyer), that Deed will contain information regarding the prior Deed by which the Grantor obtained title to the property (remember the chain of title, discussed above). In contrast, the appraisal district records do not show that "recording information." A properly drafted Deed and a properly described gift of real property in a Will should include the full legal description of the real property, which, for example, is more than the lot, block and subdivision of the property. In other words, a proper legal description should include the *full* legal description of the property, which means it should include the recording information.

Updating the Appraisal District Records When the Legal Owner of Real Property Changes. Even though the appraisal district records are not the same as the real property records and cannot be relied on to tell you the actual owner of real property, every time the legal owner of real property

changes (whether as a result of a recorded Deed or a probated Will), the new owner of that real property should provide the new owner information to the appraisal district for the county where the property is located. The appraisal districts in some counties have their own forms that must be used to update the owner of real property. Many of those forms can be completed online. Some of the smaller counties seem to take note of changes in the legal title of real property due to Deeds that are recorded and Wills that are probated. However, it is always incumbent on the new owner of real property to make sure the appraisal district's records are updated to reflect the change in the owner of real property.

In addition, if the particular property constitutes the new owner's primary residence, the new owner will need to elect all applicable property tax exemptions for the property, such as the homestead exemption and the over-65 exemption, making sure the county appraisal district receives all relevant documentation to grant those property tax exemptions for the property now that the property has a new owner. Note that if a residence was jointly owned by a married couple and one spouse has died, leaving her interest in the residence to the surviving spouse, that constitutes a change in the owner of the property (from both spouses as joint owners to the surviving spouse as sole owner). Thus, the appraisal district needs to be notified of this change in ownership of the property and the surviving spouse will need to re-elect all applicable property tax exemptions. Most county appraisal districts have their own forms for this purpose.

Transfer on Death Deeds and Lady Bird Deeds. Two of the most common types of Deeds for transferring real property outside of the probate process are called Transfer on Death Deeds (TODDs) and Lady Bird Deeds. Both types of Deeds allow the Grantor to retain control of the real property during his lifetime. In other words, the transfer to the Grantee does not become effective until the Grantor's death. However, there are some notable differences between these two types of Deeds. A Lady Bird Deed does not allow for alternate beneficiaries, while a TODD allows for inclusion of alternate beneficiaries in the event the primary beneficiary dies prior to or at the same time as the Grantor. However, a Lady Bird Deed is more flexible in other ways, including the fact that it may be created by an individual with a power of attorney over the Grantor, while a TODD may only be created by the Grantor himself. Additionally (and, arguably, most importantly), a Lady Bird Deed may be drafted as a general warranty deed or a special warranty deed (or a deed with no warranty), but a TODD does not come with a warranty of title. Not having a warranty of title for real property can result in a serious problem, so it is crucial to consider whether the ease of using a TODD outweighs the risks.

One issue that may arise when using a TODD (or a Lady Bird Deed with no warranty) relates to title insurance. Title insurance can be very valuable if the legal title to real property is contested (i.e., challenged). If the purported owner of the property has title insurance, the title company that issued that policy will defend the purported owner's title to the property. By issuing a title insurance policy, the title company has researched the "chain of title" and determined that there are no "gaps" or other impediments to the Grantee obtaining good legal title to the property. A typical title insurance policy may not be assignable or automatically continue after a transfer of the property takes place. Despite this, some title companies may be willing to amend an existing title policy to add an additional insured for a nominal fee. In fact, as of November 1, 2024, a change made to Procedural Rule 57 in the Basic Manual of Title Insurance allows an additional

named insured to be added if the insured is acquiring title to property through an “estate planning vehicle.” However, the request must be made within 90 days after the document conveying title to the additional insured is recorded and the document conveying title must contain a warranty of title. As discussed above, this will not work in the case of a TODD or a Lady Bird Deed with no warranty, and thus, a new title insurance policy would need to be purchased in that case, which can be expensive. Because this is a fact-specific inquiry, we recommend discussing these issues with a real estate attorney and the title insurance company that issued the title insurance policy for the particular property you wish to convey prior to executing a TODD or a Lady Bird Deed.

Conveying Real Property to a Revocable Trust. Some individuals who are domiciled in Texas own real property in one of the thirty “bad probate states.” Thus, even though those individuals are domiciled in Texas and even though Texas has one of the simplest probate processes of all fifty states, those individuals usually create a revocable trust to avoid an “ancillary” (secondary) probate process in the other state(s) where they own real property. In addition, even some individuals who only own real property in Texas want to put their real property (and other probate assets) into a revocable trust to avoid the Texas probate process on their death. A revocable trust is usually a superior way to avoid probate compared to using a TODD or a Lady Bird Deed. However, it is never enough simply to create a revocable trust. Once the trust has been created, the individual must execute and record a Deed that conveys her real property to the trust—or, at least, all non-Texas real property if she is trying to avoid ancillary probate. If she is trying to avoid probate for all her assets, then all assets that would otherwise be probate assets (i.e., assets transmissible by Will at death) will need to be retitled into the name of her trust before she dies. Only real property (and other probate assets) actually titled in the name of the individual's trust at the time of her death will avoid probate upon her death.

Some Risks when Real Property is Conveyed to a Revocable Trust. There are at least two primary risks of putting real property into a revocable trust: (i) acceleration of all payments due on the mortgage secured by the real property and (ii) loss of homeowner's, liability and/or fire insurance due to the change in the owner of the property.

Acceleration of All Mortgage Payments. Be careful if the real property you wish to convey to your revocable trust (“Trust”) has a mortgage on it (or is otherwise security for a debt or loan). In that case, you should not transfer that property to your Trust until you speak with the mortgage company or lien holder about the “due on sale” clause in the mortgage or lien document. When the title to real property that is subject to a mortgage or other lien is changed without prior notice to the lender and without obtaining the lender's specific approval, the lender can decide to invoke the “due on sale” clause in the mortgage document, which makes the full balance of the mortgage loan due and payable at that time.

Loss of Homeowner's, Liability and Fire Insurance. Also note that, if you re-title your real property into the name of your Trust, while it is true that your Trust is a “grantor trust” for federal income tax purposes, which means that, basically, you are still considered to be the owner of the property for federal tax purposes, ownership for state law purposes and contractual purposes is not necessarily the same as for federal tax purposes. Therefore, you should check the definition of “the Insured” in all insurance policies insuring the property owned by your Trust. You want to be sure that homeowner's, liability and fire insurance policies that you had with respect to that

property before you conveyed it to your Trust are still fully in effect and will apply despite the change in the title of the property. NOTE: This risk (loss of insurance coverage) can also apply when using TODDs and Lady Bird Deeds.

We discussed a sad case in our newsletter dated April 30, 2021 in which the niece of the decedent, who inherited the decedent's home via a Lady Bird Deed when the decedent died, was not able to receive the proceeds of a homeowner's insurance policy the decedent owned on the property before he died when the home was destroyed by a fire set by the decedent's ex-wife after his death. If the niece had inherited the property pursuant to the decedent's Will, the existing homeowner's insurance policy would likely have continued to apply to the property. However, because the niece inherited the property via a Lady Bird Deed and the niece was not covered by the definition of the "Insured" in the insurance policy in effect at the time of the decedent's death, that policy did not apply to her.

Also note: Even if the decedent had homeowner's insurance on his home at the time of his death, if no one is living in his home after his death and the Executor does not notify the insurance company of that fact and the home burns down, the insurance company can deny coverage because the existing policy might not be the correct type of policy for that situation.

### **The Corporate Transparency Act - Another Update**

After over a year of updating you on the status changes and requirements associated with the Corporate Transparency Act (the "CTA"), we are pleased to report that the Financial Crimes Network ("FinCEN") has issued an interim final rule removing the requirement for domestic companies and U.S. persons to report beneficial ownership information to FinCEN pursuant to the CTA. Effective March 26, 2025, FinCEN now limits reporting requirements to foreign reporting companies; however, even foreign reporting companies are not required to report beneficial ownership information relating to U.S. persons who are beneficial owners. Any foreign reporting companies existing prior to March 26, 2025 were required to file beneficial ownership reports by April 25, 2025. FinCEN has stated its intention to issue a final rule by the end of this year, so we will report on that final ruling when issued.

**New Website.** We have updated the law firm's website: [www.gerstnerlaw.com](http://www.gerstnerlaw.com). Check it out!

#### **Contact us:**

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone (713-520-5205), fax (713-520-5235) or email sent to:

Karen S. Gerstner\*\*  
[karen@gerstnerlaw.com](mailto:karen@gerstnerlaw.com)

Libby Mosher  
[libby@gerstnerlaw.com](mailto:libby@gerstnerlaw.com)

---

\*\*Board Certified, Estate Planning & Probate Law, Texas Board of Legal Specialization  
Fellow, American College of Trust and Estate Counsel (ACTEC)