Beneficiary Deeds in Colorado—20 Years Later

BY HEIDI J. GASSMAN

Laws permitting the use of beneficiary deeds have been effective for more than 20 years in Colorado. This article traces the development of case law regarding beneficiary deeds and offers practical guidance for naming beneficiaries.

In the 20 years since Colorado enacted laws providing for the use of beneficiary deeds[1]—often referred to as "transfer on death deeds" in other jurisdictions—they have become popular tools for trust and estate practitioners. This article reviews pertinent case law decided in the past few years related to beneficiary deeds, discusses matters of homeowners insurance and title insurance coverage in connection with passing title by beneficiary deeds, and provides practical solutions for identifying and naming trusts and minors as grantee-beneficiaries in those deeds.

Case Law Review and Update

To date, there are only two published cases in Colorado interpreting the transfer of title via a beneficiary deed. The first addressed how the nuanced definition of "grantor" affects who can execute a beneficiary deed, and the second dealt with a third-party claim of an interest in property conveyed by a beneficiary deed.

Fischbach v. Holzberlein

In 2009 in *Fischbach v. Holzberlein*, the Colorado Court of Appeals determined that a beneficiary deed was not valid because it attempted to transfer title from a revocable trust, as the grantor, upon the death of the trust's settlor.[2] The court interpreted statutory references to the death of the "owner"—expressly defined by statute as the "grantor of a beneficiary deed"[3]—as clear evidence that the legislature intended for beneficiary deeds to be executed only by natural persons (these statutory references and definitions are also the reason that this author refers to grantors under beneficiary deeds as "owner/grantors").[4] Practically speaking, while the settlor of the revocable trust herself could die, the trust itself, as an entity, could not. *Fischbach*, of course, does not eliminate the possibility of naming an entity as a grantee-beneficiary, which is discussed later in this article.

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Argo v. Hemphill

Thirteen years later, in *Argo v. Hemphill*,[5] the Colorado Court of Appeals examined whether two grantee-beneficiaries receiving title to property pursuant to a beneficiary deed had actual or constructive notice of a third party's interest in property, and the effect of the third party's failure to record evidence or notice of her claimed interest within four months of the previous owner's death.

The facts of the case are relatively simple. Don Argo signed and recorded a beneficiary deed conveying his real property to his two nieces, Christina and Dianna, upon his death.[6] Three days before Don died, he also signed an agreement granting his wife, Angela, a "lifetime lease" to the same property subject to the beneficiary deed.[7] The agreement stated that it "shall supersede the Beneficiary Deed," but was not recorded until after Don's death.[8]

After Don's death, Christina and Dianna began the process of selling the real property they had inherited under the beneficiary deed. They had no knowledge of the lifetime lease agreement. More than five months after Don died, however, Angela delivered a copy of the agreement to Christina and Dianna and asked them to honor the agreement and allow her to continue to occupy the property.[9] Christina and Dianna declined to do so. Angela then recorded the agreement less than a week before the scheduled closing for the pending sale of the property, and the sale fell through.

Angela filed suit shortly thereafter, seeking an adjudication of rights to the property and enforcement of the lifetime lease agreement.[10] Christina and Dianna counterclaimed, asking the court to find the agreement to be a spurious document and unenforceable, and to quiet title in their names pursuant to the beneficiary deed.[11]

The court determined that the lease agreement was unenforceable under the applicable statutory provisions dealing with actual or constructive notice of interests in property subject to a beneficiary deed.[12] Specifically,

a grantee-beneficiary takes title to property conveyed by a beneficiary deed subject to all encumbrances and other interests affecting title to the property, and also subject to "any interest in the property of which the grantee-beneficiary has either *actual or constructive notice*."[13] A person with an interest in property subject to a beneficiary deed must record evidence or notice of that interest no later than four months after the previous owner's death.[14] If such evidence or notice is not recorded in this short time frame, the person is forever barred from asserting the interest.[15]

Because neither Christina nor Dianna had any actual notice of the lifetime lease agreement, and because Angela did not record the agreement within four months of Don's death, Angela was barred from asserting any interest in the property.[16]

It is worth noting that this case may have been decided differently if CRS § 15-15-409, which expressly provided that a recipient of property under a beneficiary deed was liable to the deceased owner/grantor's estate for a share of the equity in the property to the extent necessary to pay creditor claims and statutory allowances of a surviving spouse, had not been repealed in 2006, and Angela had pursued a creditor claim or statutory allowance in probate.

It is also worth noting that a grantee-beneficiary may still be liable under currently applicable law for a claim in probate under other provisions of Colorado's beneficiary deed statutes that have not been repealed, and under express provisions of the Colorado Probate Code (Code), subject to certain statutes of limitations.[17] Those claims would be filed and prosecuted by a creditor of an estate, other claimants, or heirs and devisees, not by providing or recording notice on record title to the property itself but by proceedings under the Code.

Because Don's attempted transmission of certain rights to Angela under the lifetime lease was a gratuitous transfer, made without consideration, Angela would not have had a claim against Don's estate for breach of contract. Regardless of how Angela might have framed a claim against the estate, she does not appear to have recorded a lis pendens after filing her separate lawsuit (although she may not have considered it to be necessary after recording the agreement). Interestingly, neither Angela nor the court appear to have considered the equitable remedies of a constructive trust or a resulting trust, which may be available in the absence of an express trust to require a person who unfairly holds an interest in property to convey it to another to whom the interest rightfully belongs.[18] A constructive trust, in which interests in property were acquired with or without fraud, but also in which it is unfair for the persons who acquired those interests to retain them,[19] would seem to particularly apply to this situation. The ultimate lesson is that it is important to identify and differentiate between claims of interest in real property asserted against the property itself, outside of probate, and creditor or other claims filed in a probate proceeding.

Strope-Robinson v. State Farm Fire and Casualty Co.

While there is no new case law in Colorado since *Argo* that offers guidance related to beneficiary deeds, a recent unpublished opinion from the Eighth Circuit Court of Appeals in 2021, *Strope-Robinson v. State Farm Fire and Casualty Co.*,[20] sheds light on whether homeowners insurance coverage continues after the death of an insured owner/grantor under a beneficiary deed, and raises some serious considerations for practitioners in every state who work with beneficiary deeds.

Dawn Strope-Robinson inherited a house from her uncle David Strope as a grantee-beneficiary under a "transfer on death" deed in Minnesota.[21] The house was insured under a homeowners insurance policy underwritten by State Farm Fire and Casualty Company (State Farm).[22] Shortly after David's death, David's

ex-wife intentionally set the house on fire, causing damage to the house and to personal property inside the house.[23]

Dawn filed a casualty claim with State Farm under the homeowners insurance policy for the casualty losses to both the house and the personal property, and also for loss of use for the fair rental value of the house.[24] State Farm granted Dawn's claim for the losses to personal property, but denied Dawn's claims for damages to the house and for loss of use.[25] Dawn filed suit against State Farm, State Farm removed the case to federal court, and Dawn amended her complaint to add David's estate as a plaintiff (Dawn had been appointed earlier as personal representative of the estate).[26] The lower court granted summary judgment to State Farm on the bases that David's estate had no interest in the house at the time of the damage and losses, and that Dawn was not a named insured under the homeowners insurance policy.[27]

Dawn appealed, and in a very straightforward opinion, the Eighth Circuit applied Minnesota's law on transfer on death deeds to the disputed claims.[28] Minnesota law provides, just like Colorado's applicable statute,[29] that title transfers to a grantee-beneficiary under a transfer on death deed upon the death of the owner/grantor.[30] The court reasoned that because title transferred by operation of law to Dawn immediately upon David's death, David's estate never had an interest in the house, and therefore also had no insurable interest in the house.[31] Addressing Dawn's claims as the individual grantee-beneficiary under the transfer on death deed, the court referred to the earlier Minnesota case of *Closuit v. Mitby*, which held that insurance policies are akin to personal contracts, do not attach to or run with insured real property, and do not transfer with title to the property to a new owner.[32] Based on these analyses, the Eighth Circuit affirmed the lower court's grant of summary judgment to State Farm.[33]

In Colorado, casualty insurance policies have also been interpreted, pursuant to the more modern rule, to be in the nature of personal contracts.[34] The implications for practitioners are clear: any time title transfers under a beneficiary deed, it would be prudent to review all homeowners insurance policies in effect at the time of the owner/grantor's death to determine whether to continue or transfer insurance coverage to a grantee-beneficiary, or whether to promptly purchase an entirely new policy of insurance naming the grantee-beneficiary as an insured to ensure casualty coverage.

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More options are available if the practitioner can work with an owner/grantor before their death to deal with a possible lapse of casualty insurance coverage. The *Strope-Robinson* court noted that no provision of David's policy "assigned or stipulated transfer to [Dawn] of the insurance contract after the land's conveyance."[35] If an underwriter is not willing to include an express assignment or transfer of an insurance policy to a grantee-beneficiary at the request of an owner/grantor, another option would be to name a grantee-beneficiary as an additional insured under an existing policy of homeowners insurance before the death of the owner/grantor.

Under CRS § 15-12-101, which provides that a decedent's real and personal property devolves upon their death to devisees in a will or to heirs at law in the absence of a will, it could be argued that the *Strope-Robinson* analysis applies not only to insured property passing under a beneficiary deed, but to *any* insured real or personal property passing upon an individual's death. The best practice in the event of the death of any owner of real property may well be to add all persons or entities taking title to the property, as a general class of insureds, to all policies of casualty insurance in force, regardless of how title passes.

Title insurance is not as much of an issue. Unlike a policy of homeowners insurance or other property or casualty insurance, a policy of title insurance issued pursuant to the provisions of the American Land Title Association's (ALTA) standard title insurance policy forms will pass to an individual or entity receiving title as a grantee-beneficiary under a beneficiary deed.[36] Once the four-month claims period discussed above in the *Argo* case has been observed following the death of an owner/grantor in a beneficiary deed,[37] title insurers in Colorado will also issue an owner's policy of title insurance to a purchaser buying property inherited by a grantee-beneficiary, subject to any exceptions relevant to the particular property.

Trusts and Minors as Grantee-Beneficiaries

As discussed above, the owner/grantor of a beneficiary deed must be a natural person and not an entity, such as a limited liability company or a trust.[38] A grantee-beneficiary, on the other hand, may be either a natural person or an entity, but must in any case be "capable of holding title to real property."[39]

A "person" is defined in the Code as an individual or an organization.[40] The Code does not expressly define an "entity," but it does define an "organization" as a corporation, business trust, estate, trust, partnership, joint venture, limited

liability company, association, government or governmental subdivision or agency, or any other legal or commercial entity.[41] "Entity" is expressly defined in Colorado's statutes dealing with titles and interests to real property as a corporation, government or governmental subdivision or agency, business trust, estate, trust, limited liability company, partnership, association, or other legal entity capable of holding title to real property,[42] a definition virtually identical to that of an "organization" under the Code. Therefore, an individual or an "organization," which is essentially an "entity" by definition, may be a grantee-beneficiary under a beneficiary deed.

When choosing either an individual or an entity as a grantee-beneficiary, it is important to remember the requirement that a grantee-beneficiary be able to hold title to real property. For example, the estate of a decedent is not an entity capable of holding title and therefore would not be a valid grantee-beneficiary under a beneficiary deed.[43] As a practical matter, it is also a good idea to confirm that a grantee-beneficiary has the power to take actions with respect to the real property they receive, other than just holding title to it. For example, an individual person must be 18 years of age or older to convey or encumber real property in Colorado.[44] While a person under age 18 is not legally prohibited from holding title to real property in this state, they would not be able to sell or lease the property or use it to obtain a loan without a conservatorship, and the owner would functionally be barred from improving, developing, or possibly even insuring the property.

Lastly, the importance of naming specific, individual grantee-beneficiaries, as opposed to a broad or vague class of persons such as "my children" or "my heirs at law," cannot be overstated.[45]

Transfers to Trusts as Grantee-Beneficiaries

While the estate of a decedent may not itself own real property, Colorado law provides that trusts are entities that may receive title interests in property as grantee-beneficiaries.[46] Colorado law also provides, rather uniquely, that trusts may acquire, convey, encumber, or lease real property or personal property in the name of the trust itself, as opposed to in the name of a trustee on behalf of the trust,[47] which allows practitioners to simply name a trust itself as a grantee-beneficiary.

While a properly created and adequately documented trust is clearly a valid grantee-beneficiary, practitioners should keep in mind certain issues that may arise when a revocable trust is named as a grantee-beneficiary, particularly a testamentary trust. A testamentary trust may be named as a grantee-beneficiary just like a revocable inter vivos trust or an irrevocable trust, and should be expressly identified using the name of the trust as stated in the owner/grantor's will, using language such as "the Family Trust Under the Last Will and Testament of Jane Doe, dated October 1, 2024." However, it is advisable to confirm that the will of an owner/grantor who records a beneficiary deed naming a testamentary trust as a grantee-beneficiary provides sufficiently for the creation and administration of the testamentary trust.[48] In addition, if the owner/grantor revises or revokes their will, or switches to a trust-based estate plan, a previously recorded beneficiary deed naming a testamentary trust as a grantee-beneficiary must be promptly updated by preparing and recording a new beneficiary deed, or revoked by recording a revocation of the previously recorded beneficiary deed, to avoid passing title to a nonexistent entity upon the death of the owner/grantor.

Just like a testamentary trust, revocable inter vivos trusts may be revoked at any time during an owner/grantor's lifetime, which would also require an update to record title with a new beneficiary deed or a revocation of an existing beneficiary deed.

Transfers to Minors as Grantee-Beneficiaries

As noted above, a person under age 18 may not, without the appointment of a conservator, convey or encumber real property, although such a person may hold title to it.[49] Practically speaking, this means that an owner/grantor who wishes to record a beneficiary deed to transfer real property to a person younger than 18 years old could name that person as a grantee-beneficiary, but will be passing property interests to them that may prove more difficult to deal with, at least until the grantee-beneficiary reaches age 18. A rather simple solution to this problem is to name an individual or a trust company as custodian for a minor as the grantee-beneficiary under the Colorado Uniform Transfers to Minors Act.[50] For both legal and practical purposes, if an individual is named as a custodian to hold title to real property on behalf of a person under age 18, that individual must be at least 21 years old.[51] Only one person or trust company may act as custodian, and only for one minor person.[52] A possible downside to this approach, particularly if the property passing to the custodian has substantial value, is that the custodian must transfer the property directly to the minor when they reach age 21.[53]

Instead of a custodian, a conservator may hold title to real property as a grantee-beneficiary on behalf of a person under age 18. The best way to do this would be to establish the conservatorship before the death of the owner/grantor, name the court-appointed conservator as grantee-beneficiary on behalf of the minor in a recorded beneficiary deed, and properly maintain the conservatorship during the owner/grantor's lifetime *and* after their death. Absent the establishment of a conservatorship before the owner/grantor's death, this author speculates that the naming of any "conservator" as grantee-beneficiary would be precatory at best (although it could be interpreted as nominating an individual as a conservator or establishing a form of custodial title). The conservatorship would terminate when the minor reaches age 21, at which point the conservator would be required to transfer title to the individual or obtain a new adult conservatorship, if the individual is disabled.

In the author's opinion, preferred solutions to the problem of naming a minor as grantee-beneficiary include naming a trust created for the benefit of the minor, naming an entity such as a limited liability company set up to hold and maintain the property for the minor and other family members over an extended period of time, or even naming a custodian of a statutory trust under the Colorado Uniform Custodial Trust Act,[54] as the grantee-beneficiary.

In particular, using a trust eliminates issues involved with mandatory transfers of title directly to an individual when they reach age 21; provides substantial control over the administration and eventual disposition of the property; and may be especially beneficial when the underage person is receiving public benefits as a result of a disability, as it allows property to pass directly into a third-party supplemental needs or discretionary spendthrift trust created for the benefit of the person.

Conclusion

Beneficiary deeds are popular among Coloradans because they are viewed as practical, flexible, and effective estate planning tools. They can, however, also pass title to a grantee-beneficiary subject to unknown claims and without the casualty insurance coverage that the owner/grantor previously had in place during their life. To avoid these and other problems, practitioners should carefully consider the four-month claims period that begins upon the death of the owner/grantor and take care to appropriately name grantee-beneficiaries. In addition, to ensure that the property passes according to the owner/grantor's wishes, practitioners should take extra care when the intended recipient is a minor person, a trust, or other entity that may be substantially modified or revoked during the lifetime of the owner/grantor. CL

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NOTES

1. A thorough history and review of the legislation enacting beneficiary deeds in Colorado can be found in Stevens and Benjamin, "Beneficiary Deeds in Colorado: Part I—Overview of Legislation," 34 *Colo. Law.* 79 (June 2005).
2. *Fischbach v. Holzberlein,* 215 P.3d 407, 409–10 (Colo.App. 2009).
3. CRS § 15-15-401(4).
4. *Fischbach*, 215 P.3d at 409.
5. *Argo v. Hemphill*, 521 P.3d 1080 (Colo.App. 2022).
6. *Id.* at 1082–83. The author refers to the parties to this matter by their first names for the sake of simplicity; no disrespect is intended.
7. *Id.* at 1082.
8. *Id*.
9. *Id*.
10. *Id.* at 1082–83.
11. *Id.* at 1083.
12. *Id.* at 1085–86. *See* CRS § 15-15-407(3).
13. CRS § 15-15-407(2) (emphasis added). *Argo*, 521 P.3d at 1085–86.
14. CRS § 15-15-407(3)(a). *Argo*, 521 P.3d at 1085.
15. CRS § 15-15-407(3)(b). *Argo*, 521 P.3d at 1085.
16. *Argo*, 521 P.3d at 1085–86.
17. *See* CRS § 15-15-411 (providing limitations on certain actions and proceedings against grantee-beneficiaries).
18. *In re Marriage of Allen*, 724 P.2d 651 (Colo. 1986).
19. *Page v. Clark*, 592 P.2d 792 (Colo. 1979); *Mt. Sneffels Co. v. Est. of Scott*, 789 P.2d 464 (Colo. App. 1989).
20. *Strope-Robinson v. State Farm Fire & Cas. Co.*, 844 Fed.Appx. 929 (8th Cir. Feb. 5, 2021).
21. *Strope-Robinson*, 844 Fed.Appx. at 1–2. As with the parties in the *Argo* matter, the author refers to the parties in this matter by their first names for the sake of simplicity and intends no disrespect.
22. *Id.* at 2.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id.* at 3–6.
29. *See* CRS § 15-15-407.
30. *Strope-Robinson*, 844 Fed.Appx. at 3.
31. *Id.* at 4.
32. *Id.* at 5 (citing *Closuit v. Mitby*, 56 N.W.2d 428, 431 (Minn. 1953)).
33. *Id.* at 5–6.
34. *See Republic Ins. Co. v. Jernigan*, 753 P.2d 229 (Colo. 1988) (citing *Com. Union Ins. Co. v. State Farm Fire & Cas. Co.*, 546 F.Supp. 543 (D.Colo. 1982), and *Marez v. Dairyland Ins. Co.*, 638 P.2d 286 (Colo. 1981)). *See also Pike v. Am. States Preferred Ins. Co.*, 55 P.3d 212 (Colo.App. 2002) (citing *Chacon v. Am. Fam. Mut. Ins. Co.*, 788 P.2d 748 (Colo. 1990)).
35. *Strope-Robinson*, 844 Fed.Appx. 929.
36. The ALTA 1992 policy forms include as an insured "those who succeed to the interest of the named insured by operation of law." The ALTA 2006 policy forms also include all such persons and entities as insured parties (the "successors to the Title of the Insured by operation of law"). The ALTA 2021 policy forms, the most currently revised set of standard forms, both include this definition and expressly state that a conveyance from the named insured to "a transferee by a transfer effective on the death of an Insured as authorized by law" qualifies that transferee as an "insured" under the existing policy.
37. *See* CRS § 15-15-407.
38. *Fischbach*, 215 P.3d 407.
39. CRS § 15-15-401(3).
40. CRS § 15-10-201(38).
41. CRS § 15-10-201(35).
42. CRS § 38-30-172(2)(a) (citing CRS § 2-4-401(8)).
43. CBA, Colorado Real Estate Title Standards, Standard No. 11.1.2 (2024). Interestingly, estates *are* entities assigned employer identification numbers by the IRS and are capable of paying federal and state taxes that may be due from time to time.
44. CBA, Colorado Real Estate Title Standards, Standard No. 5.4.1 (2024).
45. A review of the importance of naming grantee-beneficiaries individually can be found in Lemke, "Practical Considerations in the Use of Colorado Beneficiary Deeds," 44 *Colo. Law.* 41 (Jan. 2015).
46. CRS § 15-15-401(3); CRS § 15-10-201(35) and (38).
47. CRS § 38-30-108.5(1).
48. It is worth noting that Colorado law sets the bar fairly low for establishing the creation of a testamentary trust. *See* CRS § 15-5-402(1)(a); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo. 1986); *Goemmer v. Hartman*, 791 P.2d 1238 (Colo.App. 1990); and *In re Est. of Vallery*, 883 P.2d 24 (Colo.App. 1993).
49. Notably, while the Code defines a minor as a person who is under 18 years of age (CRS § 15-10-201(32)), Colorado's general legal definition of a minor is a person who is under 21 years of age (CRS § 2-4-401(6)), and the Colorado Uniform Transfers to Minors Act (CRS §§ 11-50-101 et seq.) defines an "adult" as a person age 21 or older (CRS § 11-50-102(1)).
50. CRS § 11-50-104(1) (expressly authorizing the nomination of either an adult or a trust company as custodian in a deed).
51. CRS §§ 11-50-102(1) and -110(1).
52. CRS § 11-50-111.
53. CRS 11-50-121.
54. CRS §§ 15-1.5-101 et seq.