



# Transfer on Death Deeds: A Useful Tool in the Right Places

This will substitute for transferring real property interests is gaining acceptance in state statutes, but transfer-on-death deeds have their limitations.

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**P**ractitioners who work with families, individuals, or fiduciaries have pondered various methods for transferring real property without needing to involve the probate processes in the jurisdiction where the real property is located. The methods may range from the simplest (such as joint-title ownership) to the sophisticated (such as family entities established to hold title ownerships). The main disadvantage of either of these methods continues to be the loss of control over the property by the property owner.

This lack of control coupled with the need to keep things simple ushered in a new form of transfer that addressed the issues of simplicity and retention of control during the owner's lifetime. This new transfer technique has come to be known as the transfer-on-death deed (TODD). It is fairly new when compared to other transfer techniques. Its use has taken hold in most jurisdictions only within the last decade.

California is one of the newest states to join the TODD family, having joined effective on 1/1/2016. They are now in use in the following 25 U.S. jurisdictions—24 states plus the District of Columbia.

1. Alaska.
2. Arizona.
3. Arkansas.
4. California.
5. Colorado.
6. District of Columbia.
7. Hawaii.
8. Illinois.
9. Indiana.
10. Kansas.
11. Minnesota.
12. Missouri.
13. Montana.
14. Nebraska.
15. Nevada.
16. New Mexico.

17. North Dakota.
18. Ohio.
19. Oklahoma.
20. Oregon.
21. South Dakota.
22. Texas.
23. Virginia.
24. Washington.
25. Wisconsin.

## Description

A TODD is a specific type of deed that can be used to designate and convey future real property interests to beneficiaries. Visually, the deed looks much like other deeds, but there are unique characteristics that must be reviewed and considered before using the TODD. This deed does not immediately vest or convey immediate possessory interest on the grantee beneficiary. The grantee beneficiary will potentially acquire title to the property upon the satisfaction of a condition precedent.

The condition is that the grantor (i.e., current owner) must be

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deceased before the transfer can be complete. Another often-overlooked condition is that the executed deed must be recorded during the lifetime of the grantor owner. The deed is ineffective to transfer the property interest if it is presented for recording after the death of the grantor, even if the grantor signed the deed before passing on.

### **Compliance with other laws applicable to real property**

In most jurisdictions, the use of TODDs must be consistent with other laws applicable to real property transfers, and must protect and preserve the legitimate claims of creditors or other third parties—such as secured lenders. For instance, in Minnesota, the grantee-beneficiary must satisfy survivorship requirements as well. Such requirements include surviving the grantor by 120 hours in order for the transfer to be effective. Also, state or county agencies must be able to recover medical assistance payments made on behalf of the grantor.<sup>1</sup>

Practitioners should also analyze the impact of any spousal rights in community property and non-community property states alike as there may be dire consequences to a surviving spouse who joins in the execution of a TODD.

### **Most common uses**

TODDs may be used in lieu of a will, a trust, or joint tenancy with rights of survivorship to accomplish transfer of a full or partial real property interest. For example, TODDs can be used to avoid probate with small, uncomplicated estates in which any other assets are passed using “payable upon death,” “transfer on death,” or

joint title with right of survivorship—or where real property is the only asset. In Minnesota, the statute authorizing the use of TODDs also permits the transfer of interests to several individuals and more than one generation by using the same descriptors and language currently used to devise property under a will or in a trust. A TODD can be a wonderful tool when used to simplify estate planning and to avoid ancillary probates for real property interests in other states.

### **Misconceptions**

Quite often, practitioners are faced not only with the task of introducing clients to the existence of this type of deed but also clarifying the misunderstandings often associated with this property transfer technique. Some of these misunderstandings are:

- Use of this deed to avoid a medical assistance claim.
- Use of this deed to avoid the need for a will or trust.
- Use of this deed at any age.
- Use of language in this deed to control a beneficiary’s behavior

*Use of a TODD to avoid medical assistance claim.* TODDs have shown to be very useful in the appropriate circumstances. Using a TODD, however, does not defeat claims of state agencies for recovery of medical assistance payments made on behalf of the decedent.

In Minnesota for instance, a transfer of real property with a TODD is similar to a determination of a descent proceeding whereby the transfer of title is not allowed unless the sale proceeds are made subject to a proper medical assistance claim or alternatively, a clearance certificate is obtained from the department of human services. The responsible county agency in each jurisdiction should be able

to provide the necessary medical assistance clearance following a properly filed application for clearance when the grantor owner of a TODD dies.

*Use of TODD in lieu of a will or trust.* A transferor may wish to attach various conditions or restrictions to the transfer of real property, such as the timings of distributions of proceeds from the sale of the property. A TODD may not adequately accomplish this. A will or trust may be the more appropriate technique for such circumstance.

In addition, a trustee of a trust that is funded with the property can manage the property for the grantor in instances of incapacity of the grantor. A TODD remains with the grantor during the grantor’s incapacity, and the property may become subject to conservatorship if the grantor is incapacitated. In addition, a will or trust may appropriately describe alternate transferees where the original transferee is deceased. Conversely, if the grantee beneficiary of a TODD is deceased (i.e., does not survive the grantor), the property will revert to the grantor’s estate, and intestate proceedings may be necessary to transfer the property.

*Use of TODD by grantor at any age.* TODD transfers are subject to much of the same restrictions as apply to other transfers of real property. Transferors must be of the age of majority to execute real property transfers. Although grantors who satisfy the age requirement are able to use TODDs, it may not always be advisable to use a TODD if the grantor is young and may not own or occupy the property upon his or her demise. If, for instance, the property subject to a TODD is sold during the lifetime of the grantor,

<sup>1</sup> For references to the Minnesota TODD statute, see Minn. Stat. 507.071.

the TODD is essentially extinguished. So care must be taken to inform the potential grantor of the ramifications of using a TODD in light of the grantor's age or propensity to re-locate.

**Use of language in TODD to control beneficiary behavior.** Grantors who wish to transfer real property to a child or children using TODDs may have some limitations in their desires to control the grantee beneficiaries' behaviors. Policing the behavior of a beneficiary can best be accomplished using the traditional estate planning techniques of wills or trusts. Practitioners working with clients who wish to use TODDs in combination with restrictive language, such as the provisions in the following scenarios, may need to thoroughly explain the difficulties or in some cases the impossibilities of enforcing such languages:

- *Scenario 1.* Multiple heirs or descendants, and the deed reads: "Upon my death, I leave a  $\frac{1}{5}$  interest to all my children and in the event one of my children shall predecease me, that child's share shall pass to the then living descendants of my deceased child."
- *Scenario 2.* A grantor may attempt to be creative in attaching conditions. For example: "I direct transfer of  $\frac{1}{5}$  of the real property to my granddaughter provided she does not marry Johnny. The  $\frac{1}{5}$  interest to my son, Jamie, shall vest only if he is sober at the time of my death."

Most state statutes fail to provide for someone to confirm which beneficiaries died, to identify and locate the names and addresses of remainder beneficiaries, or to mon-

itor whether a beneficiary complies with a condition—such as marriage or sobriety. Such determinations must be made by a third, but yet undefined party. Additionally, the granddaughter in Scenario 2 may simply delay her marriage to Johnny long enough to get the property before the wedding occurs.

#### **Jointly held properties**

Some grantors may attempt to execute and record a TODD on a jointly held property with right of survivorship. In such situations, the joint tenant who survives the decedent grantor is entitled to the entire property, thus making a TODD worthless. If the statute in a particular jurisdiction allows for the severance of a joint tenancy upon filing of a TODD by one of the joint owners, it may be possible to do so. A more appropriate solution when one joint owner wishes to designate a grantee beneficiary, however, is to sever the joint tenancy and then execute the TODD. Alternatively, two separate TODDs may be used if the grantee beneficiaries are different.

#### **Rights of creditors**

A TODD cannot be used as a way to avoid payment of mortgages, liens, etc. on a property subject to a TODD. The grantee beneficiary essentially takes over the ownership of the property and all the debts and encumbrances that came with the property. Most state statutes are clear on the protection of the rights of creditors. In Minnesota for instance, the statutory language reads as follows:

The interest transferred to a beneficiary under a transfer on death deed after the death of a grantor owner is transferred subject to all effective conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, judgments, tax liens, and any other mat-

ters or encumbrances to which the interest was subject on the date of death of the grantor owner, upon whose death the transfer becomes effective including, but not limited to, any claim by a surviving spouse who did not join in the execution of, or consent in writing, to the transfer on death deed....<sup>2</sup>

In their practice, the authors have seen grantee beneficiaries ecstatic about inheriting a piece of property through a TODD only to later learn that the property is completely indebted to banks and lien holders such that the property itself has no equity value. If the grantee-beneficiary is unable to remove the debt, the property may end up in foreclosure as the lien holders attempt to recover on their liens.

#### **Revocation of TODDs**

The interest in the real property transferred using a TODD passes only upon the death of the grantor owner. Therefore, the grantor owner can revoke a TODD during his or her lifetime. In most states, the revocation can simply be done by executing a new TODD and recording it, or transferring the property to a different beneficiary.

#### **Conclusion**

In sum, there is great flexibility and advantages in using TODDs in property transfers. A grantor is able to avoid the need for probate on the property subject to a TODD, and is also able to achieve flexibility in that the grantor can change his or her mind and revoke the TODD at any time prior to death. A grantor can also maintain control and ownership of the property during the grantor's lifetime so the property is available for the grantor's use without limitations. ■

<sup>2</sup> Minn. Stat. § 507.071, subd. 3.