

New Tool in the Toolbox

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August 31, 2017

Publication 2179



Who will get the house when I'm gone? It's a thought many have, but may not like to face. Many people avoid it altogether, at least until they *are* gone, and then the question remains.

Many Texans—particularly low-income Texans—pass real estate informally for generations, resulting in land titles that are a mess. The problem eventually shows up. The owners may need to prove their title to qualify for property tax benefits, or there may be a dispute about ownership that arises after one family member has paid property taxes for many years. After floods and hurricanes, FEMA benefits can't be paid due to unclear titles.

In 2015, the legislature addressed this by passing the Texas Real Property Transfer on Death Act, (Chapter 114 of the Estates Code). In 2017, the legislature made some modifications to the law and to the statutory forms. These acts put a new tool in the do-it-yourself estate planner's toolbox—the *transfer on death deed (TODD)*.

How a TODD Works

Before we talk about what it is, let's talk about what it's not. Prior to passage of the act, there were a couple of

The Takeaway

A transfer on death deed was created to help people of modest means pass on their real estate with a clear title and without using a lawyer. However, a lawyer can help you avoid potential pitfalls.

similar tools: a *deed reserving a life estate*, and a special revocable deed reserving a life estate (commonly called an *enhanced life estate deed* or a *Lady Bird deed*). These deeds still exist and are still in the toolbox. The biggest issue with them is that the person who receives the deed (the *remainderman*) gets a vested, although nonpossessory, future interest (called a *remainder*). In a Lady Bird deed, the remainder is subject to divestment (see What is a Remainder?). When these deeds are used, the "owner" actually only owns a *life estate*, and may not unilaterally mortgage, lease, or sell the property (except in the case of the Lady Bird deed). Another problem is that those deeds must be *delivered* to the grantee. Often, the grantor does not want to tell the grantee, so the deed sits in a drawer and never becomes effective.

Here's how the new tool works. Using a TODD, an individual (called a *transferor*) may transfer that individual's interest in real property to one or more *designated beneficiaries* effective at the transferor's death. Note that the terminology is different from other deeds, which use the terms *grantor* and *grantee*. The deed is a *nontestamentary instrument*, which basically means that it is not a will and does not have to comply with all the laws that apply to wills. It requires the same mental capacity required to make a contract (which is greater than that required to make a will), but less than a will in terms of written formalities. It works a lot like a beneficiary designation on a bank account, retirement plan, or insurance policy. It is revocable, even if the deed itself, or another instrument, says otherwise.

The TODD must be in writing, signed by the transferor in front of a notary, identify the designated beneficiary, contain a legal description of the property, state that the transfer of an interest in real property to the designated beneficiary is to occur at the transferor's death, and be recorded in the deed records in the county clerk's office of the county where the real property is located. No notice, delivery, or acceptance is required. No consideration is required. A transferor may designate one or more beneficiaries to hold the property concurrently, and may designate primary and alternate beneficiaries.

During the transferor's life, his rights are not affected. A transferor or any other owner may still use the property how he wishes, and may sell, lease, or mortgage the property. A TODD does not create any legal or equitable interest in favor of the designated beneficiary, and does not subject the property to claims or process of a creditor of the designated beneficiary. If the property is sold during the transferor's lifetime, the buyer's interest is not affected; it is as if the TODD never existed, and the designated beneficiary does not get the property or any interest in it. The only requirement in selling the

property is that a valid deed must be recorded in the deed records in the same county where the TODD is recorded.

A TODD does not affect homestead rights or ad valorem tax exemptions. It does not affect the transferor's *or* the designated beneficiary's eligibility for any form of public assistance, subject to applicable federal law. It does not invoke statutory real estate notice or disclosure requirements, and does not trigger a "due on sale" or similar clause. A TODD transfers property without covenant of warranty of title, even if the deed says otherwise. A designated beneficiary may disclaim all or a part of his interest.

Revoking a TODD

A TODD may be revoked in several ways. First, a subsequent TODD may revoke the previous one in whole or in part, expressly or by inconsistency (that is, the same property is transferred to a different beneficiary). Second, an instrument of revocation may expressly revoke the TODD, in whole or in part. In either case, the instrument must be acknowledged by the transferor after the acknowledgment of the deed being revoked, and must be recorded in the county where the deed being revoked is recorded.

If there is more than one transferor, revocation by one transferor does not affect the deed as to the interest of another transferor who does not revoke. If a TODD is made by joint owners with right of survivorship, it may only be revoked by all of the living joint owners. If a transferor and a designated beneficiary are married to each other, a final judgment of divorce revokes the TODD as to that designated beneficiary only, and only if notice of the judgment is recorded in the deed records of the county where the TODD is recorded before the transferor's death. A TODD may not be revoked or superseded by a will.

What is a Remainder?

Even though the person who receives the deed does not actually possess the land until the grantor dies, he does actually own an interest in the land now (a remainder). In a traditional deed reserving a life estate,

the remainder is indefeasibly vested, meaning it is owned by the grantee from that day forward, forevermore, amen. As a practical matter, the land may not be sold or mortgaged without the consent of the remainderman. In a Lady Bird

deed, the vested remainder is subject to divestment, meaning that the remainder may be taken away if the grantor decides to sell the land or revoke the deed. A TODD does not create these interests.

If a valid TODD is executed and recorded, never revoked, and the transferor dies still owning the property, what happens? If the designated beneficiary survives the transferor by 120 hours, the property is transferred to the designated beneficiary. If two or more designated beneficiaries are to receive concurrent interests in the property, they receive it in equal and undivided shares with no right of survivorship.

If a beneficiary dies before the death of the transferor (or before the 120 hours have passed), that beneficiary's share lapses and passes as described in Subchapter D, Chapter 255 of the Estates Code, which includes rules for failed devises in wills. The new forms in the amended statute allow a transferor to make elections with respect to how these interests pass. If the transferor owns the property as a joint owner with right of survivorship and he dies, the survivor (not the designated beneficiary) takes his interest. If a transferor is the last surviving joint owner, the property goes to the designated beneficiary upon his death. Of course, the last surviving joint owner may revoke the TODD if he wishes. Unlike some of the other provisions, all of the rules in this paragraph may be changed by contrary provisions in the TODD or other law.

Beneficiaries take the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. They do not get the property free and clear. For purposes of lien priority, the TODD is deemed to have been recorded at the transferor's death, regardless of when it was actually recorded. It is a good practice to record a certified copy of the transferor's death certificate in the property records of the county where the TODD is recorded.

If there is debt secured by the property, the personal representative of the estate gives notice to the secured creditor, and the creditor may elect to have the claim treated as a matured secured claim or a preferred debt and lien. If treated as a matured secured claim, the beneficiaries may pay the debt, or the property may be sold to pay the debt, with the beneficiaries receiving any remaining proceeds. If the proceeds are not enough, the deficiency is paid from other assets in the estate, if possible.

If treated as a preferred debt and lien, the debt remains a preferred lien against the property, but the creditor may not make any further claim against other estate assets. To the extent the estate is insufficient to satisfy a claim against the estate, expenses of administration, estate taxes, allowances in lieu of exempt property, or family

allowance, the representative may enforce that liability against the property transferred by the TODD. Otherwise, property transferred by a TODD is *not* considered part of the probate estate for any reason, including the Medicaid Estate Recovery Program.

The do-it-yourself estate planner was referred to earlier. The TODD is obviously meant for people who wish to avoid hiring an attorney for estate planning. The statute even comes with forms and instructions for how to use them.

But a tool in the hands of an unskilled craftsman can be a dangerous thing, due to the limitations of the tool itself, and the limitations of the person using it. I'm a lawyer, not a carpenter. I could probably build a house, but you probably wouldn't want to live there.

As with most new statutes, there are some unanswered questions and potential pitfalls to avoid. Here are some of them.

- The forms must be filled out correctly to obtain the desired result.
- A valid legal description is required. Do not assume that what you have is a valid legal description.
- An agent or attorney-in-fact is the person designated in a power of attorney. An agent or attorney-in-fact may not create a TODD by use of the power of attorney. The person making the TODD must actually make it himself. The statute does not say whether an agent may sell, lease, or encumber the property, or cancel the TODD. Absent a prohibition on doing so, he probably may. Other deeds, including deeds reserving a life estate and Lady Bird deeds, may be made by an agent, so there may be better alternatives if capacity is an issue.
- A sale of the property voids the TODD. The deed of the sale is valid as a transfer whether recorded or

fun fact

Legend has it that President Lyndon B. Johnson used a "Lady Bird Deed" to transfer property to his wife upon his death. The legend is wrong. The "inventor" of the "Lady Bird Deed" used a hypothetical illustration to show how it worked. The characters in the illustration included "Lady Bird," and the name stuck.

not, but it must be recorded prior to the transferor's death to void the TODD. What happens if it is not recorded?

- Many people do not realize that they may only convey the interest they own, and many wrongfully think they own the entire interest in the property.
- Title insurance companies may have additional underwriting requirements.
- Many people erroneously believe that tearing up a deed revokes it. It is a recorded document, and the proper procedure must be followed to revoke it.
- There is no warranty of title. Because there is no warranty of title, a designated beneficiary may not be an insured under the existing title policy. Other deeds, including deeds reserving a life estate and Lady Bird deeds, may contain warranties of title, so there may be better alternatives if warranty of title is an issue.
- The statute does not say whether a transferor may give the property to a class of beneficiaries, such as, "all of my children who survive me."
- A TODD signed by a married individual only operates on that individual's interest. Many married couples believe their property automatically passes

to their spouse when they die. This is not true, and couples should plan accordingly.

- A later will does not revoke or supersede a TODD.
- If you want different survival requirements, you must so specify in the TODD. Otherwise, if your designated beneficiary only lives six days longer than you, your property may end up going to someone else.
- TODDs executed and acknowledged prior to September 1, 2017, are governed by the law as it existed before the 2017 amendments.
- This is the big one. You still need a will in order to avoid intestacy as to other property, or in case the beneficiaries die first.

The transfer on death deed was designed to help people of modest means pass their real estate with a clear title without the assistance of a lawyer, and it will probably do so. However, as with any legal matter, it is advisable to consult a lawyer who is knowledgeable about TODDs and how to use them. 🍀

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