

The California T.O.D. Deed

There are several ways by which an owner of California real property can direct who will become the new owner when the current owner dies. Most common among these are: by will; through creation of a trust; or, by owning either in joint tenancy with right of survivorship or as community property with right of survivorship.

Pay on Death (POD) financial accounts have been around for many years. What about authorizing a Transfer on Death (TOD) form of deed to make the transfer of real property easier as well?

That idea has been kicking around the CA Legislature for the last 10 years or so until authorizing legislation was finally enacted in 2015. This new legislation became effective as of January 1, 2016 and will remain in effect until January 1, 2021, unless that date is extended.

The underlying rationale for this form of deed has been stated as:

The most common form of real property transfer upon death, a will, must pass through probate, a lengthy legal process... The process is often grueling, can take up to a year, and often results in statutory probate fees in the thousands of dollars. Similarly, establishment of a revocable trust can cost upwards of \$2,000. For seniors and individuals whose estate consists primarily of the home, the money to establish a trust is out of the question. [The] revocable transfer on death deed (revocable TOD deed) is the most simple and inexpensive transfer

mechanism on the market today. Furthermore, it may be the only tool available to unmarried homeowners who wish to leave their property to a lifelong partner, family member, friend, or loved one upon death, but who cannot afford to set up a trust.

You may now make a TOD deed to transfer ownership of your real property upon your death to the person(s) you designate as beneficiaries. Following your death, the beneficiaries change ownership into their name(s) by recording an affidavit of death with a certified copy of the owners' death certificate attached. This type of transfer does not require probate, nor does it require the use of a living trust. Hence, it can be used with POD financial accounts, joint tenancy ownership, etc. as a "poor man's estate plan."

The T.O.D. deed follows a statutory format, it must be notarized, and it must be recorded within 60 days of signing. The grantor may revoke the deed any time during his or her lifetime. If there is one named beneficiary at the time of the grantor's death that did not survive the grantor, then no transfer will occur and title will remain in the grantor's estate. If there are multiple beneficiaries named and one does not survive the grantor, then the surviving beneficiaries will receive the property interest.

These deeds can be used ~~only~~ be used for residential property of up to 4 units, or a single tract of agricultural land that is 40 acres or less that is improved with a single family residence.

There are 3 ways to alter a TOD deed: recording a revocation of the deed; recording a new and different TOD deed; or transfer of the property to a third party, provided that deed is recorded prior to the grantor's death. If the grantor records more than one TOD deed, the one with the most recent recording date prevails. In addition, the deed can be set aside if it is shown that the property owner did not have legal capacity at the time the deed was signed. The capacity standard is that prescribed for making a contract.

Creditors Rights: The TOD deed in itself does not avoid claims of creditors. The property remains subject to debts that are secured by the property, such as the owner's mortgage, debts incurred by the grantor before death that remain unpaid, and certain post-death liens, such as a recovery lien of the State where the owner received MediCal benefits that the State may reclaim.

Although the TOD transfer avoids probate, the property remains subject to claims of creditors that are allowed against estate an estate by the Probate Code. When there is a probate of the owner's estate, the executor may demand restitution of the property or its equivalent value to the probate estate if its value is needed to satisfy claims against the estate. The personal representative's demand for restitution to the estate may be made up to 3 years after the decedent's death. This could be tragic if the beneficiary has, for example, paid off the existing mortgage. There is no provision in this law for reimbursing the beneficiary, so these investments may be completely lost.

There is some protection where the beneficiary has made a "significant improvement" to the property. Beyond that, the beneficiary becomes liable for any secured obligations, which transfer with ownership of the property to the beneficiary. These issues are unique to TOD deeds.

Spousal Rights: A TOD deed cannot defeat the rights of a spouse to community property. Therefore, a TOD deed made by one spouse for the family home may be invalid unless either the other spouse consents to or joins in the TOD deed, or if the spouse making the TOD deed survives the other spouse. If the non-consenting spouse is the survivor, then the TOD deed is ineffective.

Incapacity: Older clients who have limited capacity risk losing their property where a third party (family member or caregiver, for example) persuades the elder to make a TOD deed in their favor.

This is a prime opportunity for elder abuse.

Unless you are the elder client's conservator, you have no standing to contest the transfer while the elder is still living. If the spouse or other close family member is not appointed as the conservator, they have no standing until the elder relative dies. In any event, you are going to incur the cost and delay of getting the matter in front of a

Knowing the limitations of T.O.D. allows you to assess whether it is an appropriate estate-planning tool for your particular situation. If you have trouble making this assessment, you should

consult with an estate planning or real estate lawyer for assistance.