

A New Estate Planning Strategy for 2012: Transfer-on-Death Deeds

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When properly prepared, an estate plan that enables your loved ones to transfer assets without probate may save time and money. Property owners may use a variety of methods to transfer property without involving the probate process. For example, the holder of a bank account may use a pay-on-death designation to provide a beneficiary with account ownership after the original owner's death.¹

Recently, Oregon enacted a law that allows owners to transfer real property using a pay-on-death designation on a transfer-on-death (TOD) deed.² This new law became effective January 1, 2012. As with a pay-on-death designation for a bank account, a real property owner executes a deed that names a beneficiary to succeed to ownership after the initial owner's death. A TOD deed is one of many tools available to use in conjunction with wills and trusts, which remain the cornerstones of effective estate plans. In no way do TOD deeds supplant the need for wills in trusts.

1. Advantages and Disadvantages

TOD deeds are an attractive option for people who want to retain control of real property during their lives and possibly avoid probate at death. While naming a person as a beneficiary on a deed gives that person a current property interest, naming a TOD deed beneficiary creates no current interest in the beneficiary. Thus, the real property is not subject to the beneficiary's creditors. Moreover, a property owner may revoke the beneficiary designation at any time. As a result, there is no completed gift for federal gift tax purposes.

TOD deeds also have disadvantages to consider. A TOD deed may conflict with an estate plan that identifies the same property. For example, a TOD deed might direct a property transfer to a property owner's son, while the will devises the same property to the property owner's daughter. In this scenario, the property transfers to the son because a validly recorded and unrevoked TOD deed controls, and the will would have no effect on the TOD deed. Another drawback is that creditors have up to 18 months to enforce a liability against property transferred via a TOD deed.³ This wait time may cause difficulties for beneficiaries selling the property during that period.⁴ For these reasons, obtaining title insurance might require an affidavit with indemnity provisions and a higher title insurance premium. Additionally, it is hard to predict how financial institutions will treat TOD deeds when financing property. Beneficiaries who receive property from a TOD deed are subject to the encumbrances, liens and restrictions associated with the property.

¹ Pay-on-death designations may also apply to other assets, such as securities.

² OREGON S.B. 815 (2011).

³ *Id.* § 15. Claimants also have up to 18 months to set aside a TOD deed based on lack of capacity, fraud, duress, or undue influence. *Id.* § 8.

⁴ See WENDY JOHNSON, REAL PROPERTY TRANSFER-ON-DEATH ACT WORK GROUP REPORT, at 13 (February 8, 2011).

2. Execution and Revocation

A TOD deed contains most formalities required for any properly recorded deed.⁵ A property owner may designate primary and alternate transferees by name. If an owner names multiple beneficiaries, then the property will transfer in equal shares to those beneficiaries unless the TOD deed specifies otherwise. Notably, the new law prevents a property owner from designating a class of beneficiaries, trusts or entities. Like other deeds, individuals must execute and record TOD deeds.⁶

Revoking a TOD deed also requires a recorded document.⁷ It is insufficient to merely tear up the deed or write “cancel” on it. A property owner may revoke the TOD deed by recording another deed, TOD deed or express revocation.⁸

This article is for general informational purposes only; readers should not rely on it for legal advice. Before executing or revoking a TOD deed, we recommend you consult a qualified lawyer and a qualified tax advisor. Please contact a lawyer at Kell, Alterman & Runstein, L.L.P if you have questions about the new law’s effect on your estate plan.

⁵ S.B. 815 § 7.

⁶ *Id.* § 9.

⁷ *Id.* § 11.

⁸ A divorce or annulment also revokes the former spouse as a TOD deed beneficiary.