

## **A New Tool for Estate Planners: Minnesota's Transfer on Death Deed**

With the advent of Minnesota's law authorizing transfer on death deeds, attorneys have a new tool to use in estate planning. But how does it work and when is it useful? This article will examine key provisions of the TODD under Minn. Stat. § 507.071 and analyze important considerations before one uses it. The TODD offers advantages over previous options available, but it is not for everyone and alternatives may be better in certain situations.

Though the TODD is new to Minnesota, the principles behind the TODD are familiar. Conceptually, the TODD is like a pay on death designation for a bank account. The beneficiary takes ownership of the property upon the death of the present owner.

In its simplest form, an owner of real property designates a beneficiary to receive real property described in the deed upon the owner's death. In this example, the TODD statute refers to the owner as a "grantor owner" and the beneficiary as the "grantee beneficiary." Where more than one person owns an interest in real property, it is possible that an owner is not also a "grantor owner" for purposes of the statute. A grantor owner is "an owner named as a grantor in a transfer on death deed upon whose death the conveyance or transfer of the described real property is conditioned."<sup>1</sup> For example, if A and B hold property as tenants in common and only A executes and records a TODD to convey the property upon his death, A is a "grantor owner" while B is merely an owner. Accordingly, upon A's death, the TODD will be effective as to A's interest, but B's interest in the property will remain unchanged.

In order to be valid, the TODD must be recorded in a county where at least part of the property described in the deed is located, and recorded before the death of the grantor owner upon whose death the conveyance is effective. Since the TODD is not effective until the death of the designated grantor owner, it is not necessary to deliver the deed to the grantee beneficiary during the life of the grantor owner. Indeed, as the statute states, the grantee beneficiary need not consent to or even receive notice of the TODD during the life of the grantor owner.<sup>2</sup> No deed tax is required upon recording, nor a certificate of real estate value (CRV).

As one might expect, the interest transferred to a grantee beneficiary under a TODD is transferred subject to all mortgages, liens, judgments, and other encumbrances. These include claims by a grantor owner's surviving spouse, or by the state or county for medical assistance benefits, if the assets of the deceased owner's estate are insufficient to pay the amount of such claim.

A TODD may have multiple grantor owners. Extra care needs to be taken where the grantor owners own the property as joint tenants. In this case, the interest conveyed to the grantee beneficiary or beneficiaries transfers only after the death of the last surviving grantor owner. If the last surviving

joint tenant owner did not execute the TODD, the TODD is void and ineffective in transferring the property to the stated grantee beneficiaries.

A TODD may have multiple beneficiaries. The TODD may designate that the beneficiaries take title as joint tenants, tenants in common, or in any other form that is valid under Minnesota laws. The TODD may also designate one or more successor grantee beneficiaries by name or as a class, stating the condition under which the interest vests.

When naming beneficiaries, caution should be exercised to avoid unwanted transfers under the statute's antilapse provisions.<sup>3</sup> In order for a grantee beneficiary to take an interest in property designated in a TODD, the beneficiary must survive the designated grantor owner by 120 hours.<sup>4</sup> While a thorough discussion of the various scenarios possible under the statute's antilapse provisions is beyond the scope of this article, it should be noted that issue of a grantee beneficiary take his or her interest if: (1) the grantee beneficiary is a grandparent or lineal descendant of a grandparent of the grantor owner; (2) the grantee beneficiary fails to survive the grantor owner; and (3) the issue survive the grantor owner. For example, Father owns Blackacre and executes and records a valid TODD naming Son as the grantee beneficiary. Son predeceases Father, survived by Son's daughter (Granddaughter). Father then dies. Granddaughter will take Son's interest under the TODD. This common situation could cause a minor to obtain an interest in the property and thus significantly increase the complexity of the ongoing management of the property. This result can be avoided by conditioning the conveyance by inserting words of survivorship such as those listed in the statute.<sup>5</sup>

Finally, a grantee beneficiary can be a person or an entity. More creative attorneys will no doubt find ways to take advantage of this benefit of the TODD law. Possible uses could be to name a nonprofit as a grantee beneficiary in order to take advantage of the charitable deduction for estate tax purposes or perhaps naming as a successor beneficiary the trustee of an inter vivos or testamentary trust to coordinate other facets of an individual's estate plan. These scenarios may raise other issues, and alternative arrangements could prove more effective.

As needs change, an individual may want to revoke his or her previously recorded TODD. There are multiple ways to do so. The most straightforward way to revoke is to execute and record prior to the death of the grantor owner a written revocation of the TODD in the county where at least part of the property is located. Sample language is included in the statute and a Minnesota Uniform Conveyancing Blank has already been developed.<sup>6</sup> In this manner, transfer on death deeds may be revoked at any time by the grantor owner. If there is more than one grantor owner, any of them may revoke the TODD, though the revocation must be recorded before the death of the grantor owners who execute the revocation. However, if the property is owned as joint tenants and the revocation is not executed by all the grantor owners, the revocation is not effective unless it is executed by the last surviving grantor owner.<sup>7</sup> For example, Blackacre is owned by A and B as joint tenants, who join in executing and recording a valid TODD. B later executes and records a revocation of the TODD. B dies with A surviving. The revocation is ineffective since it was not executed by A. On the other hand, if A died first, the revocation would be effective. These results are intuitive since the property is owned as joint tenants and we would not expect a TODD to upend the joint tenancy.

A second way to revoke a TODD is to record a subsequent TODD conveying the same or a greater interest in the real property. The TODD that has the latest acknowledgment date and is recorded prior to the death of the designated grantor owner is effective and all other transfer on death deeds with earlier dates are void.

A third way to revoke or partially revoke a TODD occurs when a grantor owner conveys to a third party by means other than a TODD all or part of his or her interest in the real property described in a previously recorded TODD. For example, if A records a valid TODD for his entire interest in Blackacre and later conveys his entire interest by quit claim deed to B, the TODD is ineffective to transfer Blackacre upon the death of A since A no longer has an interest in Blackacre. However, if Blackacre consisted of several parcels, for instance, and A had instead conveyed only a partial interest in Blackacre to B (e.g. one parcel), the previously recorded TODD would remain effective for A's remaining interest in Blackacre.

Fourth, unless the TODD specifies otherwise, a TODD naming a spouse as the grantee beneficiary may be revoked by dissolution of marriage or annulment under Minn. Stat. § 524.2-804 since it is a "governing instrument."<sup>8</sup>

Finally, it should be noted that the statute specifically states that a TODD cannot be revoked by will.

After the death of the grantor owner, the evidence used to establish that a transfer has occurred to the grantee beneficiary is similar to the evidence necessary when a joint tenant dies, with one important extra requirement. An affidavit of identity and survivorship along with a certified record of death (death certificate) must be recorded. In addition, a clearance certificate must be recorded. The clearance certificate is obtained by applying to the county department designated to recover medical assistance benefits where the property is located. The procedure to obtain a clearance certificate is accomplished in the same manner as obtaining a clearance certificate in a decree of descent proceeding under Minn. Stat. § 525.313, except that a notice of hearing is not required to accompany the application.

Once the necessary documents are obtained, they can be recorded as one document or separately. They must be recorded in each county in which the property described in the clearance certificate is located. Note that this differs from the recording of the TODD. The TODD may have been recorded in only one county even though the property is located in more than one county.

If it is necessary to establish that a grantee beneficiary predeceased the grantor owner, an affidavit of identity and a certified death certificate for the grantee beneficiary need to be recorded.

The most important thing to keep in mind when using a TODD is that it is not effective until the death of the grantor owner or grantor owners, as the case may be. This highlights one of the main advantages of using the TODD. The grantor owner retains full ownership of the property while living and can revoke the TODD on a whim.

A TODD will most often be used for individuals with estates that are not in need of estate tax planning and where the only asset that would be subject to probate is the home. In the past, many

individuals and couples sought to avoid the probate of their home by re-titling the home in various ways. Some of these techniques were more prudent than others. Too often estate planning attorneys have heard well-intentioned, but naïve parents say, “We want to put our kids on the title to our house to avoid probate.” Rarely do the parents understand the consequences of this idea even when the property is not the homestead. Problems could include gift tax issues, issues of the control and ultimate disposition of the property, the difficulty of “revoking” such a plan, potential medical assistance planning issues, and, on property that is applicable, the danger of the property being used to satisfy children’s creditors’ claims.

The TODD alleviates these concerns. Since there is no transfer of the property until the designated grantor’s death, there are no gift tax implications upon recording the TODD. Regarding income tax issues, the TODD will allow the children to obtain stepped-up basis (at least, as the tax code stands currently) upon the parent’s death. The parents retain full ownership of the home once a TODD is recorded, can change the grantee beneficiaries by executing a new TODD, or can scrap the idea altogether by revocation as discussed above. While the TODD cannot be used to avoid medical assistance liens or claims, merely recording a TODD will not suddenly make otherwise eligible medical assistance recipients ineligible. Lastly, the fear of children’s creditors is relieved since the property does not transfer to the children until the death of the grantor owners.

However, the TODD is not without its shortcomings. Many times it is not helpful for a mass of individuals to receive property that is not easily divided, such as naming multiple beneficiaries on lake cabin property. Imagine the complications that could arise if mom and dad use a TODD to leave the lake cabin to their bickering children. Though probate may be avoided, the parents have perhaps made things worse. A trust is more likely a better tool for such a situation.

Furthermore, a property owner’s continued capacity is not guaranteed, so the risk of incapacity should not be overlooked. Minimally, clients who execute a TODD should also execute powers of attorney. Even so, trusts remain superior tools to manage the property of incapacitated individuals.

While the TODD gives estate planning attorneys additional flexibility and a low-cost option for probate avoidance for many clients, it is not suitable in all circumstances. Before recommending to clients that they use a TODD, attorneys should study the statutes carefully since there are various nuances to this new law that could cause unintended consequences. As a result, the TODD is a helpful addition to an attorney’s estate planning toolbox only after appropriate forethought.

#### **Notes**

1 Minn. Stat. § 507.071, subd. 1(c).

2 Minn. Stat. § 507.071, subd. 18.

3 Minn. Stat. § 507.071, subd. 11.

4 See Minn. Stat. §§ 507.071, subd. 2 and 524.2-702.

5 Minn. Stat. § 507.071, subd. 11(b).

6 See Minn. Stat. § 507.071, subd. 25 for sample language and [www.practicelaw.org](http://www.practicelaw.org) for forms.

7 This statement assumes that the TODD was executed by all joint tenants.

8 A TODD also may be revived just like other “governing instruments” under the same statute.

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