

**TECHNIQUES FOR AVOIDING PROBATE FOR REAL
ESTATE: OLD FOUNDATIONS, NEW FOUNDATIONS,
OR WRECKING BALLS**

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I. INTRODUCTION

If I had a dollar for every time a client has said they want to avoid probate, I would own my dream villa in Italy by now. I am sure all estate planners have to spend countless hours debunking the well-intentioned advice of financial advisors, bankers, insurance agents, accountants, in-laws, next door neighbors, etc. about payable on death accounts (“PODs”), transfer on death accounts (“TODs”), joint tenants with right of survivorship agreements (“JTWROS”), and beneficiary designations for vehicles.¹ First, debunking the myth that the cost of probate will drain their estate to the last penny so that only the lawyers and court system benefit from their estate. Then second, explaining that creating a well-coordinated estate plan means that most of their non-retirement assets will go through probate to ensure that when life gives them lemons, their estate plan still makes lemonade (for example, if their beneficiaries die or become disabled, their plan is still carried out). Unfortunately, some clients look at me like I am telling them this so that I (or my colleagues) can make more money in the long run. But the well-coordinated estate plan means they may spend less money in the long run, and they will not have to contact all the different entities that have their assets to try to change beneficiaries in a time when the last thing they are thinking about is changing beneficiaries. Chances are high that they will not remember they need to change beneficiaries anyway as many people hardly remember to contact their lawyer to change their Will when their situation changes, much less contact numerous banks, financial advisors, life insurance companies, former employers, etc. When the estate plan falls apart due to lack of coordination, true eye-popping expenses occur.

Here’s the flip side of the argument. In 2014, fifty-one percent of Americans between fifty-five and sixty-four years of age did not have a Will, and sixty-two percent of Americans between forty-five to fifty-four years of age did not have a Will.² That is a lot of

people whose families may be stuck in some sort of intestate succession proceeding which is usually more expensive than probate with a Will. But it is worse than that. After Hurricane Ike and Hurricane Dolly hit the Texas coast, it became abundantly clear that most people had not done anything to clear up title on real estate after the death of a loved one.³ In trying to provide aid for people to rebuild their homes or relocate, the federal government and various legal aid groups discovered that the person living in the home was often not the owner or not the sole owner. Low-income families are less likely to have Wills and less likely to have cleared title with formal intestate succession proceedings; further, improperly drafted Lady Bird Deeds, likely created without lawyers, helped exacerbate the problem. Clearing title required significant resources prior to rebuilding or relocating some of the lowest income Texans.⁴

To address these problems, Texas enacted its own version of the Uniform Real Property Transfer on Death Act (“URPTODA”), known as the Texas Real Property Transfer on Death Act (“TRPTODA”), to allow individuals to transfer real property at death without going through probate in 2015.⁵ According to the Texas Access to Justice Commission website, all Texans, but especially low-income homeowners, will benefit substantially from this law by avoiding probate.⁶ And in theory, TRPTODA does provide a simple process for the non-probate transfer of real estate.

When I heard about a deed allowing an individual to transfer real property without consulting a lawyer and without going through probate, I initially presumed the worst. Another chance for an individual’s not so well thought out estate plan to meet the wrecking ball of life. After some research, I have decided it is possible the latest save-me-from-probate instrument is not the newest wrecking ball to the well-coordinated estate plan but perhaps, a new foundation which can be used in coordination with other tried and true techniques by an experienced estate planner.

This paper will examine several non-probate transfer techniques for real property including transfer

¹ In 2017, Texas added a statute allowing cars to pass outside of probate through a beneficiary designation. TEX. ESTATES CODE § 115.001 *et seq.* There are several other states that have a similar law, including Arizona, Arkansas, California, Connecticut, Delaware, Illinois, Indiana, Kansas, Missouri, Nebraska, Nevada, Ohio, Vermont, and Virginia. Mary Randolph, *Avoiding Probate with Transfer-on-Death Accounts and Registrations*, <http://www.nolo.com/legal-encyclopedia/avoid-probate-transfer-on-death-accounts-29544.html>.

² Richard Eisenberg, *Americans’ Ostrich Approach to Estate Planning*, *Forbes* (Apr. 9, 2014),

<https://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/#1f96120a5217>.

³ See Lucy Wood, *Transfer on Death Deeds in Texas: High Time for the TODD*, State Bar of Texas, Advanced Elder Law Course, 5.1 & 5.7 (2016); Jerry Frank Jones, *Transfer on Death Deeds*, State Bar of Texas Advanced Real Estate Drafting Course, 22.1 (2016).

⁴ See Lucy Wood, *Transfer on Death Deeds in Texas: High Time for the TODD*, State Bar of Texas, Advanced Elder Law Course, 5.1 & 5.7 (2016); Jerry Frank Jones, *Transfer on Death Deeds*, State Bar of Texas Advanced Real Estate Drafting Course, 22.1 (2016).

⁵ See TEX. ESTATES CODE § 114.001 *et seq.*

⁶ <http://www.texasatj.org/transfer-death-deed>

on death deeds, Lady Bird Deeds, joint tenant with right of survivorship deeds, and revocable trusts. In doing so, the advantages and disadvantages of each technique will be set out. Further, this paper will examine how transfer on death deeds and Lady Bird Deeds are viewed by national title underwriters and then explore potential landmines that could be encountered with each technique. Finally, this paper will recommend when each technique is best employed, in my humble opinion.

Notably, none of the techniques discussed in this article remove an asset from an individual's gross estate. However, with a \$11.18 million and growing estate tax exemption, most American citizens will not need to engage in sophisticated tax planning.

II. TRANSFER ON DEATH DEEDS

The Uniform Law Commission recognized an emerging trend as states, starting with Missouri in 1989, began enacting statutes authorizing transfer on death deeds (herein referred to as "TODDs" but also referred to as TOD deeds or beneficiary deeds).⁷ The Uniform Law Commission completed URPTODA in 2009 to bring uniformity and clarity to the use and operation of TODDs, which had been enacted in thirteen states by that time.⁸ Now, twenty-five states and the District of Columbia have enacted a statute allowing some form of a transfer on death deed. Those states are Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Virginia, Washington, West Virginia, and Wyoming.⁹ Although legislators in five states introduced some form of URPTODA in 2017, none of those states enacted their URPTODA bills.¹⁰

⁷ UNIF. REAL PROP. TRANSFER OF DEATH ACT PREFATORY NOTE (2009).

⁸ <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act>.

⁹ ALASKA STAT. § 13.48.010 *et seq.*; ARIZ. REV. STAT. § 33-405; ARK. CODE ANN. § 18-12-608; CA. PROB. CODE § 5600 *et seq.*; COLO. REV. STAT. § 15-15-401 *et seq.*; D.C. CODE § 19-605.01 *et seq.*; HAW. REV. STAT. § 527-1 *et seq.*; 755 ILL. COMP. STAT. 27/1 *et seq.*; IND. CODE § 32-17-14-1 *et seq.*; KAN. STAT. ANN. § 59-3501 *et seq.*; MINN. STAT. § 507.071; MO. REV. STAT. § 461.025; MONT. CODE ANN. § 72-6-121; NEB. REV. STAT. § 76-3401 *et seq.*; NEV. REV. STAT. § 111.655 *et seq.*; N.M. STAT. ANN. § 45-6-401 *et seq.*; N.D. CENT. CODE § 30.1 *et seq.*; OHIO REV. CODE ANN. § 5302.22 *et seq.*; OKLA. STAT. TIT. 16, § 17.4; OR. REV. STAT. § 93.948 *et seq.*; S.D. CODIFIED LAWS § 29A-6-401 *et seq.*; TEX. ESTATES CODE § 114.001 *et seq.*; VA. CODE ANN. § 64.2-621 *et seq.*; WASH. REV. CODE § 64.80.010 *et seq.*; W. VA. CODE § 36-12-1 *et seq.*; WYO. STAT. ANN. § 2-18-101 *et seq.*

¹⁰ <http://www.uniformlaws.org/Act.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act>.

Given the newness of this technique and that half of the states still do not have a transfer on death deed option, more detail will be given on how it works than other non-probate transfer techniques discussed herein to help determine when and if this technique should be used by attorneys.

A TODD is a non-testamentary instrument to transfer an individual's interest in real property to one or more beneficiaries effective at the transferor's death.¹¹ A Texas TODD can only be a deed executed and acknowledged on or after September 1, 2015, by a transferor who dies on or after September 1, 2015.¹² Although many are referring to a TODD as a statutory Lady Bird Deed, the two instruments are not the same.

A. Requirements

To be effective, a TODD must meet the following requirements: (1) contain the essential elements of a recordable inter vivos deed except as provided in paragraph (2); (2) state that the transfer of an interest in real property to the designated beneficiary is to occur on the death of the transferor; and (3) be recorded in the deed records in the county clerk's office in the county in which the real property is located prior to the transferor's death.¹³

Although called a deed, a TODD is unlike any other Texas deed. Notably, the Texas statute and promulgated forms never use the terms "Grantor" and "Grantee." Instead, the typical grantor is referred to as the "Transferor" and the typical grantee is called a "Beneficiary," "Designated Beneficiary," or "Transferee." In fact, one essential element for a deed is specifically not required for a TODD. Although a deed usually must be delivered and accepted by the grantee,¹⁴ a TODD is effective without notice or delivery to or acceptance by the designated beneficiary during the transferor's life.¹⁵

B. Who Can TODD or Be TODDED To

One or more individuals, referred to herein as a transferor or transferors, may execute a TODD.¹⁶ Although the word "individual" is not defined in URPTODA or TRPTODA, common sense would lead us to conclude an "individual" more than likely does not include a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity as those

¹¹ TEX. ESTATES CODE §§ 114.051 & 114.053.

¹² TEX. ESTATES CODE § 114.003.

¹³ TEX. ESTATES CODE § 114.055.

¹⁴ TEX. PROP. CODE § 5.021.

¹⁵ TEX. ESTATES CODE § 114.056

¹⁶ TEX. ESTATES CODE §§ 114.002(a)(7) & 114.0057(d).

entities/relationships cannot die under the traditional meaning of the word.

As with any document, the mere fact that an individual executes a TODD does not mean it is effective.

A transferor must have the capacity required to make a contract in order to make or revoke a TODD.¹⁷ Texas diverged from URPTODA on capacity which only requires a transferor to have the capacity to make a Will.¹⁸

An agent under a power of attorney may not create a TODD.¹⁹ The statute does not mention whether an agent under a power of attorney may revoke a TODD or convey or encumber the property. An argument can be made that an agent who has the power to change beneficiaries, sell or mortgage real property, and make gifts should be able to revoke a TODD or convey or encumber the property.

If a transferor is a joint owner under a right of survivorship agreement, the TODD will be effective at the transferor's death only if the transferor is the last surviving joint owner.²⁰ Otherwise, the interest of the transferor belongs to the surviving joint owner or owners at the transferor's death.²¹

A beneficiary of a TODD can be a person, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.²²

URPTODA provides that states should consider extending the rules governing survival and simultaneous death, anti-lapse, and elective share to non-probate mechanisms, like TODDs in order to harmonize the rules governing probate and non-probate.²³

Texas has addressed survival and simultaneous death for its TODDs. The designated beneficiary has to survive the transferor by 120 hours, just like for a Will.²⁴ If the designated beneficiary does not survive the transferor, his/her interest will lapse and pass to the alternate beneficiary, if one is named.²⁵

Additionally, Texas has made the TODD statute subject to the anti-lapse statute as if the TODD were a devise made by a Will.²⁶ Specifically, if a designated beneficiary predeceased the transferor but is a

descendant of the transferor or the transferor's parents, the descendants of the designated beneficiary who survive the transferor by 120 hours would take the designated beneficiary's share of the real property.²⁷ However, the optional form provided in the Texas Estates Code makes clear the transferor can opt out of the anti-lapse statute.²⁸

The Texas version does not mention the effect of elective share on the TODD. For example, can a designated beneficiary's interest be temporarily suspended while the surviving spouse who is a non-owner lives? Many clients who are asking me about TODDs are concerned that when the first spouse dies, the surviving spouse will remarry and then die before the new spouse. They do not want the new spouse to have the ability to make a homestead election and so stay in the house rather than the house going to the first couple's children. Merely putting the share of the first spouse to die in an irrevocable trust for the benefit of the surviving spouse does not solve this problem when both spouses own an interest in the home. If the elective share can be avoided with a TODD, a TODD can be a very useful technique. As the Texas elective share statute is found under a chapter titled Probate Assets, it is possible that the non-probate transfer accomplished by a TODD avoids a homestead election.²⁹ However, clarification in the next legislative cycle would be helpful.

A designated beneficiary may disclaim all or part of the designated beneficiary's interest as provided by Chapter 122 of the Texas Estates Code.³⁰ A designated beneficiary cannot avoid being disqualified for Medicaid benefits by disclaiming. Texas Medicaid rules treat the property as if it were received by the person disclaiming it and then immediately transferred.³¹

C. What Can Be TODDED

Any real property interest located in the state of Texas can be transferred using a TODD.³² After filing a TODD, the transferor still retains all of his interest and rights while living.³³ However, a TODD cannot transfer real property with any warranty of title even if the deed states that it does.³⁴ This means if the transferor did not have good title, then the designated beneficiary will have no right to assert a claim against the transferor and, through that claim, reach the

¹⁷ TEX. ESTATES CODE § 114.054.

¹⁸ See UNIF. REAL PROP. TRANSFER ON DEATH ACT § 8 (2009).

¹⁹ *Id.*

²⁰ TEX. ESTATES CODE § 114.103(b).

²¹ *Id.*

²² TEX. ESTATES CODE §§ 114.051 & 114.002(a)(1) & (a)(5); TEX. GOV'T CODE § 311.005(2).

²³ UNIF. REAL PROP. TRANSFER ON DEATH ACT at § 13 legislative note.

²⁴ TEX. ESTATES CODE § 114.103(a)(1).

²⁵ *Id.*; TEX. ESTATES CODE § 114.151.

²⁶ TEX. ESTATES CODE § 114.103(a)(2).

²⁷ *Id.*

²⁸ *Id.* at § 114.151.

²⁹ *Id.* at § 102.005.

³⁰ TEX. ESTATES CODE § 114.105.

³¹ 42 U.S.C. § 1396p(h)(1); Texas Medicaid for the Elderly and People with Disabilities Handbook § E-3372.

³² TEX. ESTATES CODE § 114.051 & 114.002(a)(5).

³³ TEX. ESTATES CODE § 114.101(1).

³⁴ TEX. ESTATES CODE § 114.103(d).

transferor's owner title policy. Similar to a Will, the designated beneficiary gets only the title the transferor had.

D. Revocable or Not

A TODD is revocable regardless of whether the deed or another instrument states that it is not revocable.³⁵ As the Texas version of URPTODA intended that TODDs be drafted by nonlawyers, it is foreseeable that someone, including a lawyer, may try to make a TODD irrevocable. Words of irrevocability will be figuratively erased from any instrument purporting to make a TODD irrevocable. Because the TODD is revocable, the property remains a part of the transferor's gross estate and receives a basis adjustment at the death of the transferor.

E. How to Revoke

There are numerous ways to revoke a TODD. A TODD can be revoked by one of the following instruments:

- (a) a subsequent TODD that expressly revokes all or part of the preceding TODD or by inconsistency revokes all or part of the preceding TODD or
- (b) an instrument of revocation that expressly revokes all or part of the TODD.³⁶

The instruments that revoke the TODD must be acknowledged by the transferor after the TODD being revoked is acknowledged and must be recorded prior to the transferor's death in the deed records in the county clerk's office of the county where the TODD being revoked is recorded.³⁷

Additionally, the revocation section of TRPTODA specifically states that it does not limit the inter vivos transfer of the real property.³⁸ So a transferor could also revoke a TODD by conveying the real property to someone else effective immediately.

If multiple transferors are involved, the issue of revocation is more complex. If more than one transferor executes a TODD, revocation by one transferor only affects the interest passed by that transferor and does not affect the interest passed by the other transferor or transferors.³⁹ However, if joint owners with right of survivorship execute a TODD, all living joint owners must revoke the TODD in order for the revocation to be effective.⁴⁰ An interesting question is whether if only one joint owner with right of survivorship revokes the TODD and the other joint

owners die prior to the revoking owner's death, does the revocation then become effective?

URPTODA mentions that to harmonize the rules governing probate and non-probate, states should consider extending the rules governing revocation by divorce or homicide to non-probate mechanisms, like TODDs.⁴¹ In Texas, if the transferor and a designated beneficiary are married and their marriage is dissolved after the TODD is recorded, the TODD is revoked as to that designated beneficiary only if notice of the final judgment of the court dissolving the marriage is recorded in the deed records of the county clerk's office of the county where the TODD is recorded prior to the transferor's death.⁴² Unlike other non-testamentary instruments where the mere decree of divorce or annulment is generally sufficient to render the designation of the ex-spouse not effective,⁴³ notice must be recorded.

Family law attorneys have likely revised their intake questionnaires to help insure their clients who recorded TODDs do not end up leaving assets to an ex-spouse. However, since there are pro se divorce forms promulgated by the Texas Supreme Court, individuals may not seek an attorney's assistance in filing for divorce.⁴⁴ The last step of the instructions on how to file an uncontested divorce does advise the pro se divorcee to remember to file deeds at the property records office in the county where the property is located after the divorce is final; however, the instructions do not mention what to do if an individual has already signed a TODD with his/her now ex-spouse.⁴⁵ Perhaps the forms should be revised to mention revoking TODDs to ex-spouses or recording notice of the final judgment in the county clerk's office where the property is located.

TRPTODA is silent on whether homicide by the designated beneficiary revokes his/her interest.

While there are numerous ways to revoke a TODD, a Will is not one of them.⁴⁶

³⁵ TEX. ESTATES CODE § 114.052.

³⁶ TEX. ESTATES CODE § 114.057(a).

³⁷ *Id.*

³⁸ *Id.* at § 114.057(f).

³⁹ TEX. ESTATES CODE § 114.057(d).

⁴⁰ *Id.* at § 114.057(e).

⁴¹ UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13 legislative note (2009).

⁴² TEX. ESTATES CODE § 114.057(c).

⁴³ *See, e.g.*, TEX. ESTATES CODE § 123.052 (revocable trusts); TEX. ESTATES CODE § 123.151 (multiple-party accounts); TEX. FAM. CODE § 9.301 (life insurance); TEXAS FAM. CODE § 9.302 (retirement benefits and other financial plans).

⁴⁴ It should be noted that in each scenario where divorce forms are provided, there is a warning that states "*The information and forms in this toolkit are not legal advice and are not a substitute for the help of a lawyer. It's a good idea to talk with a lawyer about your particular situation.*" <https://texaslawhelp.org/family-divorce-children>.

⁴⁵ *See id.*

⁴⁶ *Id.* at § 114.057(b).

F. Effect on Mortgages or Liens

A beneficiary takes the real property conveyed by a TODD subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the real property is subject at the transferor's death.⁴⁷ The rights of a secured creditor under a TODD are similar to the rights of a secured creditor when the real property passes under a Will. The secured creditor is entitled to notice if a personal representative has been appointed and can make an election to have the claim treated as a matured secured claim or as a preferred debt and lien.⁴⁸ If the creditor elects to have its claim treated as a preferred debt and lien, the creditor can recover the property and may not pursue any other claims or remedies for any deficiency against the transferor's estate.⁴⁹ If the creditor elects a matured secured claim status, section 355.153 of the Texas Estates Code applies as if the TODD were a devise made in a Will and the claim is subject to the procedural provisions of Title 2 of the Texas Estates Code governing creditor claims.⁵⁰ This would mean the personal representative can collect the amount of the debt from the beneficiary and if the personal representative is unable to collect from the beneficiary an amount sufficient to pay the debt, then the representative shall sell the property securing the debt.⁵¹

G. Effect of Insolvent Probate Estate

If the transferor's estate is insolvent and so cannot satisfy a claim against the estate, expense of administration, estate tax owed by the estate, allowance in lieu of exempt property, or family allowance to a surviving spouse, minor children, or incapacitated adult children, a personal representative may use the real property transferred at the transferor's death by the TODD as if the property were part of the probate estate.⁵² A proceeding to enforce liability against the real property must be commenced not later than the second anniversary of the transferor's death; however, the two year limitation does not apply when a secured creditor elects to have the claim treated as a matured secured claim.⁵³ In a proceeding to enforce liability, the court may award costs and reasonable and necessary attorney's fees in amounts the court considers equitable and just.⁵⁴

H. What a TODD Does Not Do

While it is critically important to know what a TODD is, it is equally important to know what a TODD is not. A TODD does not affect the interests or rights of any owner, including the right to transfer or encumber the real property, homestead rights, and ad valorem tax exemptions.⁵⁵ A TODD does not affect an interest or right of a transferee of the real property, even if the transferee has actual or constructive notice.⁵⁶ A TODD does not affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice.⁵⁷ A TODD does not affect the eligibility of the transferor or designated beneficiary for any form of public assistance, subject to applicable federal law.⁵⁸ A TODD does not trigger a "due on sale" clause or similar clause.⁵⁹ A TODD does not invoke statutory real estate notice or disclosure requirements.⁶⁰ A TODD does not create a legal or equitable interest in favor of the designated beneficiary.⁶¹ A TODD does not subject the real property to claims or process of a creditor of the designated beneficiary.⁶²

I. Medicaid Qualification and Recovery

Generally, a principal place of residence is not counted as a resource in determining eligibility for Medicaid.⁶³ However, if an individual transfers any interest in the home, such as a remainder interest, for less than fair market value, within five years of applying for Medicaid or while qualified for Medicaid, penalties may be imposed that will postpone or terminate qualification for Medicaid.⁶⁴ Since the TODD does not affect an interest or right of the transferor while alive, the transferor should not have any Medicaid ramifications for transferring the home by a TODD.⁶⁵ But the TODD statute goes further to state that a TODD does not affect the eligibility of the transferor or designated beneficiary for any form of public assistance, subject to applicable federal law.⁶⁶ So a TODD should not affect qualification for Medicaid benefits by the transferor or the designated beneficiary.

After the federal government threatened to cut off its funding for Texas Medicaid, Texas reluctantly

⁴⁷ TEX. ESTATES CODE § 114.104(a).

⁴⁸ TEX. ESTATES CODE § 114.104(b).

⁴⁹ TEX. ESTATES CODE § 114.104(c).

⁵⁰ TEX. ESTATES CODE § 114.104(d).

⁵¹ TEX. ESTATES CODE § 355.153.

⁵² TEX. ESTATES CODE § 114.106(a).

⁵³ TEX. ESTATES CODE § 114.106(e).

⁵⁴ TEX. ESTATES CODE § 114.106(f).

⁵⁵ TEX. ESTATES CODE § 114.101(1).

⁵⁶ TEX. ESTATES CODE § 114.101(2).

⁵⁷ TEX. ESTATES CODE § 114.101(3).

⁵⁸ TEX. ESTATES CODE § 114.101(4).

⁵⁹ TEX. ESTATES CODE § 114.101(5).

⁶⁰ TEX. ESTATES CODE § 114.101(6).

⁶¹ TEX. ESTATES CODE § 114.101(7).

⁶² TEX. ESTATES CODE § 114.101(8).

⁶³ 1 TEX. ADMIN. CODE § 358.348.

⁶⁴ *Id.*

⁶⁵ TEX. ESTATES CODE § 114.101(1).

⁶⁶ TEX. ESTATES CODE § 114.101(4).

created its Medicaid Estate Recovery Program. Currently, the Texas Medicaid Estate Recovery Program (“MERP”) only seeks to recover against a Medicaid recipient’s probate estate.⁶⁷ While this could change at any time, this allows individuals who transfer their homes using TODDs to essentially avoid MERP as they will likely have no probate estate at their time of death. However, federal law allows for a state to recover non-probate assets,⁶⁸ and it is possible Texas may revise its policy on MERP to allow recovery of non-probate assets.⁶⁹ So while a TODD works to avoid MERP now, it may not in the future.

J. How to TODD

TRPTODA sets out a form TODD which is attached as Appendix A.⁷⁰ Additionally, the Texas Access to Justice Commission has provided a complete TODD toolkit for do-it-yourselfers which is attached as Appendix B.⁷¹ Of course, these are not the only acceptable ways to draft a TODD and, as time goes by, TODDs drafted by attorneys may lead to many variations which may lead to confusion.

K. Summary of Advantages and Disadvantages

To assist with assessing the usefulness of a TODD, this section summarizes the advantages and disadvantages compared with other techniques.

1. Advantages

The advantages of the TODD over other non-probate real property transfer techniques are numerous and include the following.

A TODD is revocable. Because it is revocable, a taxable transfer has not been made; therefore, no gift tax will be due, and no gift tax return will need to be filed. Because no transfer is made until death, the property is still in the transferor’s gross estate and so receives a basis adjustment at the transferor’s death. Again, because the transfer does not occur until the transferor’s death, the transferor still maintains his homestead creditor protection and his ad valorem exemptions after signing a TODD.

Additionally, even if a TODD is drafted by an attorney, it will cost very little in comparison with

some of the other techniques. A TODD is ridiculously cheap, on the front end at least, if no attorney is used.

Property conveyed by a TODD does not pass through probate.

A transferor can still qualify for Medicaid even though she has signed a TODD in Texas. Property passing under the TODD should not be subject to MERP at the transferor’s death in Texas.

Property passing under a TODD is not subject to the creditors of the beneficiaries while the transferor is alive.

A TODD should not interfere with disaster relief for the transferor.

Finally, TODDs allow for more flexibility in designating beneficiaries than a traditional deed although there are still limitations. Due to the anti-lapse statute, the death of the beneficiary does not necessarily wreck the transferor’s plan as the beneficiary’s descendants can take the deceased beneficiary’s share. Additionally, a TODD allows for alternate beneficiaries.

2. Disadvantages

However, no technique can be perfect, and a TODD is no different. The disadvantages of a TODD include the following.

A TODD is not as flexible as a Will or trust can be in addressing changes in the family situation, such as mental disability and inheritance by minors.

Further, a TODD cannot warrant title impairing a designated beneficiary’s right to recover if a cloud on the title is discovered while he/she owns the property.

An agent under a power of attorney cannot execute a TODD.

A personal representative can come back and recover the property from the designated beneficiary for up to two years and possibly more after the death of the transferor leaving title in a state of flux (a clawback provision).

One of its biggest disadvantages, although many see this as one of the major advantages, is that an individual can prepare a TODD without an attorney. When an individual sees an attorney about her transfer plans, the attorney can spot tax issues and other issues, such as the possibility of the surviving spouse revoking the TODD and leaving the property to someone else, counsel the individual on the advantages and disadvantages of other methods, and ensure sure there is an overall well-coordinated estate plan. Fill in the blank forms off on the internet are not able to do that.

III. LADY BIRD DEED

Since Lady Bird Deeds are not statutory and the case law in Texas is virtually non-existent, we do not have the well-developed basics as we do with TODDs.

There is a lot of confusion as to how this type of deed was named. According to Professor Gerry Beyer,

⁶⁷ 1 TEX. ADMIN. CODE § 373.105(6).

⁶⁸ 42 U.S.C. § 1396p(b)(4)(B).

⁶⁹ Not too long ago, an individual could qualify for Medicaid even though his principal place of residence was in a revocable trust as it was a non-countable resource. Texas Health and Human Services Commissions revised section F-3210 of the Medicaid for the Elderly and People with Disabilities Handbook to treat a principal place of residence in a revocable trust as a countable resource.

⁷⁰ TEX. ESTATES CODE § 114.151.

⁷¹ <https://texaslawhelp.org/toolkit/i-want-pass-my-house-or-land-without-will>

the myth going around that President Lyndon Baines Johnson used this type of deed to transfer property to his wife “Lady Bird” Johnson is not true.⁷² Instead, this type of deed was named because the Florida attorney who drafted the first Lady Bird Deed around 1982, Jerome Ira Solkoff, used a fictitious group of characters named Linton, Lady Bird, Lucie, and Lynda in his book and lecture materials explaining how to use the deed.⁷³ The use of Lady Bird’s name in reference to the deed stuck.⁷⁴ Solkoff’s main concern in creating Lady Bird Deeds was Medicaid eligibility.⁷⁵

Generally, Lady Bird Deeds, also known as enhanced life estate deeds or revocable life estate deeds, transfer the grantor’s interest but retain a life estate with the ability to occupy and use the property for the grantor’s lifetime with no liability for waste and retain the ability to sell, convey, lease, or mortgage the property without the consent of the remainder beneficiaries and without sharing the proceeds, if any, with the remainder beneficiaries. Some even directly allow the grantor to change the remainder beneficiaries.

The ability to convey the property allows a grantor to adapt to several different situations that could not be done if the grantor conveyed the property through a traditional deed or a life estate deed. For example, the grantor could take away a remainderman’s interest if he failed to show up for Thanksgiving dinner or failed to call on the grantor’s birthday. The grantor could also take away the remainderman’s interest if creditors of the remainderman threaten action. So long as the grantor is not also a debtor of those creditors, this will not be a fraudulent transfer. Additionally, the grantor could take away a remainderman’s interests if the remainderman develops a disability requiring long-term care which may lead to Medicaid at some point for her, even if she has long-term care insurance.

A. Advantages

The Lady Bird Deed has several advantages. A Lady Bird Deed is revocable. Because it is revocable, a taxable transfer has not been made; therefore, no gift tax will be due and no gift tax return will need to be filed. Because no transfer is made until death, the property is still in the grantor’s gross estate and so receives a basis adjustment at the grantor’s death. Again, because the transfer does not occur until the grantor’s death, the grantor still maintains his

homestead creditor protection and his ad valorem exemptions after signing a Lady Bird Deed.

Additionally, the cost for a Lady Bird Deed is relatively low.

Property conveyed by a Lady Bird Deed does not pass through probate as the property passes to the remaindermen upon the death of the grantor. Usually, the remaindermen need only file an affidavit of death in the property records to show the transfer of title.

The transfer should not be considered a gift or transfer by Medicaid because the grantor retains the right to take back the property. However, Medicaid caseworkers are to have all Lady Bird Deeds reviewed by the regional attorney.⁷⁶ If the Lady Bird Deed is not revoked, the real property passes outside of probate and so should not be subject to MERP.

Property passing under a Lady Bird Deed should not be subject to the creditors of the remaindermen while the grantor is alive as the deed is revocable.

Unlike a TODD, there is no prohibition against a Lady Bird Deed containing certain provisions. Thus, a Lady Bird Deed can include a warranty of title. Also, a Lady Bird Deed can be executed by an agent under a power of attorney.

Also, unlike a TODD, there is no statute authorizing a personal representative to sell property conveyed by a Lady Bird Deed when necessary to pay estate expenses in an insolvent estate. So, a personal representative presumably cannot reach the property conveyed by a Lady Bird Deed and bring it back into the probate estate.

B. Disadvantages

There are also several disadvantages to the Lady Bird Deed. A Lady Bird Deed is not flexible as a Will or trust can be in addressing changes in the family situation, such as mental disability and inheritance by minors. Further, no statute authorizes the anti-lapse statute to apply. So, if a mother leaves her property to her two children through a Lady Bird Deed and one child predeceases her, the surviving child will own one hundred percent of the real property and the deceased child’s children will own nothing. Also, a Lady Bird Deed cannot provide for alternate beneficiaries. If one of the remaindermen become disabled and qualifies for Medicaid after the deed is recorded and the grantor cannot revoke the deed, the disabled remaindermen will lose his benefits. A Will or trust could have avoided this result. More problems with the lack of flexibility will be set out in Article VII.C.

⁷² Gerry W. Beyer & Kerri M. Griffin, *Lady Bird Deeds: A Primer for the Texas Practitioner*, Estate Planning Developments for Texas Professionals (2011) available at <http://ssrn.com/abstract=1736862>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Medicaid Eligibility for the Elderly and People with Disabilities Handbook Glossary defining Enhanced Life Estate Deeds.

Additionally, there is some concern that a Lady Bird Deed gives the remaindermen a vested right.⁷⁷ By using the grantor/grantee language, in contrast with the altogether different language of a TODD, this argument may be bolstered. From discussing this with a friend who owns a title company, I understand that if the grantor of a Lady Bird Deed later decides to sell the property, his underwriters are requiring the remaindermen to sign the deed even though the Lady Bird Deed specifically states that “the grantor reserves a life estate with full power and authority, without the joinder of any other person, to sell, convey, mortgage, lease and otherwise dispose of the property in fee simple with or without consideration....” This is a huge down side as my clients want to retain the right to get rid of their home and do not want to have to ask the kids for permission. Although there may be a title company not requiring the remaindermen to sign, a better solution is to have a revocable living trust as the grantee of the Lady Bird Deed. However, that will increase the cost if a client does not already have a revocable living trust.

IV. JOINT TENANT WITH RIGHT OF SURVIVORSHIP DEEDS

Often when clients come from other states, they are surprised that real property is rarely held through joint tenancy with right of survivorship. Historically, the use of joint tenancy with right of survivorship deeds in Texas has been rare.⁷⁸ It is possible for two or more persons who jointly hold an interest in property other than community property to agree in writing that their real property interest shall transfer to the surviving joint owner.⁷⁹ Additionally, spouses can agree in writing that their community property shall pass to the surviving spouse and the rights under a community property survivorship agreement are set out in detail in the Texas Estates Code.⁸⁰ However, since a community property with right of survivorship deed will not help get the property to the next generation, this mechanism will not be discussed further in this paper.

For convenience, I will refer to the instrument that creates a right of survivorship in multiple owners as a joint tenant with right of survivorship deed (“JTWROS Deed”) even though it may take a couple of

instruments to create this kind of tenancy.⁸¹ The JTWROS is common law technique rather than a legislative creation even though some statutes address it. This creates uncertainty with this type of instrument for planning to move real property to children or other non-spouses.

A. Advantages

A JTWROS Deed has several advantages. The cost to draft and record a JTWROS Deed is usually low. A JTWROS Deed avoids probate for the property passing through it. There is no statute allowing a personal representative of a grantor to reach the real property conveyed by a JTWROS Deed if the probate estate is insufficient to pay creditors, administration expenses, taxes, and allowances. Additionally, there is no statute prohibiting a JTWROS Deed from having a warranty clause or from being executed by an agent under a power of attorney. The grantor should still have homestead protection from creditors if he stays in the home.

B. Disadvantages

However, there are numerous disadvantages to JTWROS Deeds. One disadvantage if a grantor transfers his interest to his children using a JTWROS Deed is that the children’s creditors can reach the real property as they now have a present interest.

Another disadvantage is the grantor has made a present gift which is subject to gift tax or at least gift tax reporting. Although a low net worth individual making such a transfer will likely not care about gift taxes with a \$11.18 million exemption, a high net worth individual will.

Additionally, the grantor will likely be disqualified for Medicaid if he makes the transfer within five years of applying for Medicaid because the children have received a present gift.⁸² However, if the grantor receives Medicaid assistance after the five year look back period runs, the property conveyed by the JTWROS Deed will not be subject to MERP in states where MERP only recovers probate assets, assuming the grantees outlive the grantor.

This technique is not very flexible. First, this technique will not work well in most families as only the surviving child ends up with the property. For instance, if mom signs a JTWROS Deed giving her two children an interest in her home and one child dies

⁷⁷ Jerry Frank Jones, *Transfer on Death Deeds*, State Bar of Texas, Advanced Real Estate Drafting Course, 22.3 (2016).

⁷⁸ For a discussion of why joint tenancies of land are rare in Texas, see Stanley Johanson, TEXAS ESTATES CODE ANNOTATED, commentary to § 111.001 (2017).

⁷⁹ TEX. ESTATES CODE § 111.001.

⁸⁰ TEX. ESTATES CODE § 112.051 *et al.*

⁸¹ Merely having a deed state that the conveyance is to grantees as joint tenants with right of survivorship is insufficient to create a right of survivorship in the property. The parties must also agree in writing that their real property interest shall transfer to the surviving joint owner. TEX. ESTATES CODE § 111.001.

⁸² Medicaid Eligibility for the Elderly and People with Disabilities Handbook § I-1500.

after mom but before the property can be sold, the deceased child's children receive nothing and the surviving child gets one hundred percent of the home. Further, if mom signs a JTWR0S Deed to her two children and one becomes disabled, that child may otherwise qualify for Medicaid except for her undivided interest in mom's house. The loss of Medicaid benefits could have been avoided with a different technique.

Although the grantor will likely keep his ad valorem exemptions for the share of the property which he still owns, the joint owners will not have them unless they also live in the home and are over 65 years of age. So, if a dad signs a JTWR0S Deed conveying part of the property to his children who are all under 65 and do not live with him, the kids may have a very unpleasant property tax liability associated with the gift.

Additionally, a JTWR0S Deed is a standard deed and so is not revocable. To reverse its effects, all joint owners would have to sign a deed to return the property to the initial grantor which would be a gift for gift tax and Medicaid purposes. So, the initial grantor will not be able to unilaterally revoke the deed as she could for a TODD and theoretically, for a Lady Bird Deed.

Finally, the owner of a house can sell the property and not pay income taxes on any capital gains.⁸³ However, the grantees likely will not have satisfied the use test, that is, used the property as their primary home for two of the last five years, and therefore will recognize capital gain on the sale.

V. REVOCABLE TRUSTS

A revocable trust is a commonly used non-probate technique. A revocable trust is merely "a trust in which the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income."⁸⁴ Attorneys in many states with high probate costs commonly use revocable trusts as the foundation for their clients' estate plans rather than Wills. With more banks rejecting powers of attorney, even Texas attorneys may begin to recommend them.

A. Advantages

An obvious advantage to a revocable trust is that it is revocable. A revocable trust also allows an individual to avoid probate if all the assets of the settlor are in the trust at her death.

Once an individual transfers property into the trust, then the trust's creditors can reach the property. However, the creditors of the trust's beneficiaries cannot reach the property.

Without statutes or common law providing otherwise, the revocable trust should be safe from some of the problems with a TODD. For instance, the settlor can warrant title when conveying property to the revocable trust. Further, title insurance should cover the transfer from an individual to the individuals' trust.⁸⁵ So long as the power is granted by the power of attorney, an agent should be able to convey property to a revocable trust. The personal representative of the settlor's estate should not be able to reach the assets to pay estate creditors, excepting possibly the Department of the Treasury.

There is not a taxable transfer when property is conveyed to the revocable trust. Therefore, no gift tax is owed and no gift tax return has to be filed. Everything in a revocable trust will receive a basis adjustment at the settlor's death.

The Settlor can ensure his dispositive plan is carried out after death as the plan is already in place and cannot be legally overturned without the consent of the beneficiaries and the trustee. With a Will, the plan will not go into effect until the Will has been admitted to probate, and the executor/family may choose not to probate his Will, especially if they do not receive all the assets.

The Settlor will maintain protection of his homestead in the revocable trust as well as his ad valorem exemptions if certain provisions are included in the trust instrument.

Additionally, trusts allow for creative beneficiary designations just like a Will allows, such as class gifts or per stirpes distribution to non-family members, which TODDs and other deeds do not.⁸⁶ Revocable trusts can create contingent trusts in case the beneficiary becomes disabled or is under a certain age. Revocable trusts also allow for a long list of alternate beneficiaries.

B. Disadvantages

The revocable trust has disadvantages too. A major disadvantage for many individuals is the cost and hassle of creating and funding a revocable trust. In states with a costly probate process, the cost of creating the trust may not be a disadvantage; however, the

⁸⁵ See, e.g., TEX. INS. CODE § 2703.101(g).

⁸⁶ The NCCUSL has cautioned in its commentary "[n]otwithstanding this freedom of disposition, transferors are encouraged as a practical matter to avoid formulating dispositions that would complicate title. Dispositions containing conditions or class gifts, for example, may require a court proceeding to sort out the beneficiaries' interests. Other estate planning mechanisms, such as trusts, may be more appropriate in such cases." NCCUSL Comment to § 5 of the UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT available at http://www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf.

⁸³ 26 USCA § 121 (Publ. 523).

⁸⁴ *Black's Law Dictionary* 1740 & 1746 (10th ed.).

hassle of retitling and remembering to title new assets in the trust name will still be frustrating for many clients.

Also, if a home is in a revocable trust, the grantor will have to deed it out of the home before she can qualify for Medicaid. Unless she then uses a TODD or a Lady Bird Deed, the home will be part of the probate estate and so subject to MERP.

Finally, although a revocable trust is less likely to need it than the deeds discussed herein, anti-lapse statutes do not apply unless the trust specifically provides that they do.

VI. WHAT ARE TITLE COMPANIES DOING

One of my first lessons when I started focusing my practice on estate planning and probate was that sometimes it really does not matter what the law is, but rather it matters what the title company will accept and insure. While neat tricks and new statutes learned about at advanced CLE courses are interesting, they are useless to me if my client is going to come back to me and say the title company will not accept what I drafted and want me to fix it for free. So, the point of this next section is to prepare you for the aftermath of your non-testamentary drafting choice so that you do not end up doing unintentional pro bono.

A. For TODDs

1. Underwriting Guidelines

Obviously, TODDs are still pretty new in relation to most Texas law, but national title insurance companies have developed underwriting guidelines as TODDs have been around a while. Although the guidelines vary among underwriters, the most common guidelines involve the following issues:

- Confirm whether a TODD or a revocation of a TODD was filed before the owner's death.
- Closely review any divorce of a TODD owner and the recording of the divorce decree or notice of the decree in the property records before the owner's death.
- Confirm that no disclaimer has been filed by the designated beneficiary.
- Check the owner's Will for any bequest of the property to a different beneficiary and require a quitclaim from the Will beneficiary if the owner's estate is probated (deciding not to put any faith in the statute providing that a Will cannot revoke or supersede a TODD).
- Obtain confirmation that all debts of the owner's estate have been paid if the sale by the designated beneficiary is within two years of the owner's death.

- Do not issue title policies to a TODD beneficiary prior to the death of the owner/transferor.
- A TODD will not trump a joint tenancy with right of survivorship agreement. If the transferor is not the last surviving joint tenant, the TODD beneficiary receives nothing.⁸⁷

2. Continuation of Title Insurance Coverage

But what if a cloud on the title arises once the designated beneficiary becomes the owner? Will a TODD preserve title insurance protection from the transferor? At this point, the statute is so new we do not know what position the claims adjusters will take. Several lawyers are raising the question as to whether a designated beneficiary under a TODD is covered by the definition of "Insured" under the Texas Insurance Code or the Basic Manual for Title Insurance. Strictly speaking, the answer may be no.

Under the Texas Insurance Code, the commissioner shall adopt terms that provide for continuation of coverage for:

- (1) a person who inherits the original named insured's title on the original named insured's death;
- (2) the original named insured's spouse who receives title in a dissolution of marriage with the original named insured;
- (3) the trustee or successor of a trust established by the original named insured to whom the original named insured transfers title after the date of policy; or
- (4) the beneficiaries of a trust described by Subdivision (3) on the death of the original named insured.⁸⁸

So, then the question becomes is the definition of "inherit" broad enough to include a TODD.

There is no legislative history available showing the legislature's intent with respect to the definition of "inherit" in the original act. In construing statutes, the ordinary significance of a word is to be applied when there is no legislative definition.⁸⁹ According to Black's Law Dictionary, "inherit" means to receive property from an ancestor under the laws of intestate succession upon the ancestor's death.⁹⁰ As if to

⁸⁷ Michael Lucksinger, *Transfer on Death Deed, Survivorship Agreements, Lady Bird Deeds*, Texas Land Title Institute, p. 4 (2015).

⁸⁸ TEX. INS. CODE § 2703.101(g).

⁸⁹ *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009); *Deason v. Rogers*, (Tex. Civ. App. – Corpus Christi, 1973, no writ).

⁹⁰ *Black's Law Dictionary* 903 (10th ed.).

recognize the loose usage of the word, the second definition of inherit is to receive property as a bequest or devise.⁹¹ Of course, bequests and devises refer to property passing through a Will.⁹² A TODD designated beneficiary does not receive the property through intestate succession or a bequest or devise. So while a definite argument can be made that a TODD designated beneficiary should be covered by the owner's title policy, a strict construction view would find that a designated beneficiary is not covered.

The actual language the commissioner adopted gives more hope for the argument that a TODD designated beneficiary is covered. One form defines "Insured" as "successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives or next of kin."⁹³ However, another form goes back to the same language as the statute by stating "we insure your transferee or assignee only as follows...a person who inherits the original named insured's title on the original named insured's death."⁹⁴

If the designated beneficiary is to be covered, it would be helpful for the statute to be amended to provide that the commissioner will adopt terms that provide for continuation of coverage for a designated beneficiary under a TODD. Otherwise, we may have to wait a long time for an answer from the courts as low-income designated beneficiaries will likely not be able to afford to use the court system to get an answer.

B. For Lady Bird Deeds

1. Underwriting Guidelines

After speaking with an owner of a title company, I understand that title insurance underwriting guidelines for Lady Bird Deeds are much simpler after the death of a grantor. Generally, the underwriters require only: (1) a death certificate and (2) an affidavit of facts to be filed in the real property records regarding the death and payment of all debts of the decedent's estate. However, he stated that is generally the case.

2. Continuation of Title Insurance Coverage

The potential problem with continuation of title insurance coverage for a TODD designated beneficiary can be avoided by using a Lady Bird Deed in which a warranty clause will allow the grantee to assert a claim against the grantor and through that claim, access coverage under the grantor's owner title policy.

VII. POTENTIAL LANDMINES: CONCERNS ABOUT USING TODDS, LADY BIRD DEEDS, AND OTHER ALTERNATIVES TO PROBATE

While the motives for creating TODDs and Lady Bird Deeds are laudable, each technique runs the risk of leaving potential issues that would not exist with a Will or trust. Below are a few examples of how a TODD, a Lady Bird Deed, and a JTWROS Deed can make a mess to clean up which may result in more attorney fees than a typical independent administration.

A. Designated Beneficiary Selling TODDED Property

In this example, the transferor has died, and the designated beneficiary is now trying to sell the property. But there is the possibility the personal representative can claw back the property. Will a title company insure the sale? The answer is easy if there is an administration open and someone with authority to sign an affidavit that all debts have been paid or there are sufficient assets to pay all debts. But what if there is no administration open? Will a title company accept an affidavit from the designated beneficiary that states that all debts have been paid? Will the title company instead or additionally require an affidavit from all heirs that there are sufficient assets to pay taxes and all creditors? What if the designated beneficiary is a child of the transferor and the other children are mad that their parent left the property only to the designated beneficiary? Are they going to be willing to sign an affidavit even if it is true? What if the designated beneficiary is not related to the transferor at all and the children of the transferor are really mad?

B. Personal Representative Selling TODDED Property

As stated in Section IIG, the personal representative can sell real property transferred under a TODD for any debt, expense of administration, estate tax, or allowance for up to two years after the death of the transferor when the estate is insolvent. For matured secured claims, the personal representative has the authority to sell the real property transferred under a TODD for over two years. If a personal representative exercises that right in an independent administration, what will the title underwriter require? Perhaps just an affidavit from the independent executor that there are debts? Or will a personal representative have to commence a declaratory judgment action to ensure a title policy can be issued for the sale. Of course, that is a costly proposition when the whole point of a TODD is to reduce costs.

⁹¹ *Id.*

⁹² *Id.* at 189 and 547.

⁹³ Owner's Policy of Title Insurance (Form T-1).

⁹⁴ Texas Residential Owner's Policy of Title Insurance One-to-Four Family Residences (T-1R).

C. Unintended Consequences of Nontestamentary Transfers

As most estate planning and probate attorneys know, the best intentions with nontestamentary transfers often end up leading to the worst results. The cry regarding the costs of probate from well-intentioned bankers, financial planners, accountants, and others has led many of our clients to open accounts with designations such as JTWRROS, PODs, and TODs. At times, the well-designed estate plan is unfunded or underfunded due to assets passing to different beneficiaries than under a Will or trust. For example, a Will with a special needs trust or marital trust may be relegated to an interesting read when the primary asset is life insurance or a retirement plan, and the client fails to follow the attorney's advice to change the beneficiary.

Now, it is possible property transferred using a JTWRROS, POD, and TOD can work out the way the transferor planned. So long as nothing changes in the lives of our clients and their intended beneficiaries between the time of signing of these documents and our clients' deaths, these designations can work well. However, as Patti Loveless sang "life's about changin', nothin' ever stays the same." Now in addition to concerns about nontestamentary transfers of liquid assets, estate planners must ask clients if they have deeded any property and retained an interest in it.

Below are a few potential epic fails of a TODD drafted by a layperson or a lawyer that I foresee.

- If the transferor uses a TODD to deed his home to his daughter and her husband who subsequently divorce, the TODD is still effective to the ex-son-in-law unless the transferor revokes it. Merely filing the final judgment dissolving the marriage or notice of the final judgment in the county clerk's office will not work to revoke the TODD in this situation. Daughter is unhappy with the lawyer who drafted the TODD, which if she is also the transferor's executor, could be synonymous with plaintiff.
- If the transferor uses a TODD to deed her home to her son who subsequently develops dementia and needs long term care, the home may be subject to the Medicaid Estate Recovery Program at son's death unless the transferor revokes it. If a Will or a revocable living trust with a supplemental needs trust for the son had been used instead, this result could have been avoided.
- If the transferor uses a TODD to deed her home to her two children and one stepchild whom she raised from childhood but never legally adopted, and the stepchild predeceases the transferor leaving two children, the home

will be owned by the two children with nothing to the stepchild's children as the transferor may have wished. If a Will or revocable trust had been used instead, it could have been drafted to leave stepchild's interest to her descendants. However, to do this in a TODD would require all designated beneficiaries to be named rather than identified as a class and if the stepchild is still capable of bearing or adopting children, some descendants may still be left out.

- Transferor widow uses a TODD to deed her home to her two children. One of the children is a minor when mom dies. The children cannot afford property taxes and insurance and need to sell the home. They may be able to utilize an attorney ad litem or guardian ad litem to apply for an order to sell if the minor's interest in the home does not exceed \$100,000.⁹⁵ However, if a client of modest or high wealth finds the form on the internet and uses it, a guardianship may be necessary to accomplish the sale creating more problems than it solves.

Of course, Lady Bird Deeds can lead to epic fails too. In addition to the ones mentioned above which can all occur when a TODD is replaced with a Lady Bird Deed, there are other epic fails for the unwary attorney. As mentioned previously, the anti-lapse statute does not apply to Lady Bird Deeds.

- Grantor mom uses a Lady Bird Deed to deed her home to her two children both of whom have children of their own. One child dies. The surviving child will inherit all of the home and will not split it with the deceased child's children. Of course, mom can revoke the Lady Bird Deed if she has capacity or her agent can. But this requires mom to go back to her attorney, and mom will likely not remember her attorney cautioned her about this scenario. Deceased child's children are unhappy with the lawyer who drew up the Lady Bird Deed.
- Grantor dad uses a Lady Bird Deed to deed his home to his four children. Later, dad realizes the home is too much upkeep for him and wants to downsize. He finds a buyer but while going through closing, the title company insists that his four children also sign off on the deed even though the Lady Bird Deed specifically states the consent of the children is not necessary. One of the children refuses to sign as his share of the larger house will give him more in assets when dad dies. The deal falls through. Dad is unhappy with the lawyer who drew up the Lady Bird Deed.

⁹⁵ TEX. ESTATES CODE § 1351.001 *et seq.*

- Grantor mom who lives on the coast uses a Lady Bird Deed to deed her home to her three children. A category four hurricane comes through and destroys mom's house. FEMA refuses to give mom relief and requires her to undo the Lady Bird Deed so she is the sole owner in its view. Mom is unhappy with the lawyer who drew up the Lady Bird Deed.

The JTWROS Deed is virtually doomed to fail in most traditional estate plans as mentioned previously. But consider the usefulness in the following situations which might not be as obvious.

- Grantor Dad and second wife have two homes which they owned prior to their marriage. Dad's home is on the coast and second wife's home is in the hill country. They spend their time travelling back and forth. Dad wants to ensure second wife gets the home rather than his kids from a first marriage as they have designated the hill country home as their homestead. He uses a JTWROS Deed to convey his separate property home to his second wife. Dad dies. Wife began developing dementia prior to Dad's death and eventually needs long term care. After a couple of year, her countable resources would qualify her for Medicaid but for the gift under the JTWROS Deed. Second wife will be forced to sell and spend the proceeds before Medicaid qualification. Had Dad used a supplemental needs trust for his second wife through a Will or revocable trust, she could have still had the coast home.
- Mom and Dad use a JTWROS Deed to convey their bay home to their only child who has a home of his own. After a long day teaching school, the exhausted only child rear ends a school bus full of the varsity basketball team on its way to a playoff game. A judgment is entered against him in the amount of one million dollars. Mom and Dad's bay home is subject to the judgment creditor of the only child as it is not the only child's homestead.

D. Discrepancies with a Will

Even though touted as an alternative to a Will, TODDs may be used in conjunction with Wills. Currently, Lady Bird Deeds are often used in conjunction with a Will. An attorney should inquire about whether a new client has deeded any interest in real property but kept the ability to live there. Hopefully, the client will remember doing so and give the attorney a copy of the deed. The attorney should caution the client about the potential unintended consequences of such a deed, ensure that the Will and the deed are consistent, and advise the client that if she

decides to revoke the TODD or Lady Bird Deed, she should probably amend the Will too, given the underwriting guidelines as they are now.

VIII. WHEN TO USE WHICH TECHNIQUE

After all this, you may be wondering if attorneys should be drafting TODDs or Lady Bird Deeds at all. It may be safest to leave this arena to the do-it-yourselfers. However, drafting a TODD or a Lady Bird Deed that names a revocable trust as the beneficiary allows an attorney to combine the advantages of each while minimizing the disadvantages.

Determining which clients will appreciate your suggestion is the difficult decision. Most truly low-income clients will probably not seek out an attorney although you may work with them through legal aid clinics. And if they do, they will not like your suggestion that to avoid some of the problems, they should create a revocable trust and name the revocable trust as the beneficiary or grantee of a TODD or Lady Bird Deed. For most clients of modest or large wealth, a TODD and a Lady Bird Deed have the potential to create more problems than they solve if used without a revocable trust. Middle income clients who do not have long term care insurance and who do not have enough assets to self-insure their potential long-term care needs are the group who are most likely to seek out an attorney and who can benefit the most from TODDs and Lady Bird Deeds.

In trying to determine whether to draft a TODD or Lady Bird Deed for a client, the well-developed law for a TODD tips the scales in favor of a TODD especially with its easy revocable. However, if the owner no longer has capacity to sign a deed but she has an agent under a power of attorney who can convey the property, a TODD will not work and a Lady Bird Deed is the only option. Also, if the transferor has title insurance and there is a concern about future title problems that outweighs the certainty of the law for a TODD, a Lady Bird Deed will be the better option. Further, if the Transferees may want to sell the property within two years of the Transferor's death, a Lady Bird Deed is the better option.

As far as a JTWROS Deed, this is a good technique to use to when two or more people already own the property, do not want the property to go to children at the death of the first one, and do not want the deed to be revocable. For instance, a longtime married couple who may have children from a prior relationship who want the survivor to have the home outright may be well-suited for this technique. Likewise, two business partners who want to ensure their brick and mortar store is owned by the survivor rather than the survivor's spouse may use a JTWROS

Deed in combination with a key man life insurance policy. However, as with a TODD and a Lady Bird Deed, the inflexibility of the JTWROS Deed to adapt to changing circumstances, such as mental disability of the joint owner, severely limits its usefulness.

A revocable trust is a versatile estate planning technique and as opposed to the three deed options, are accepted everywhere. It allows for flexible beneficiaries, adapting to mental disability and a minor becoming a beneficiary. If paying for long term care is a concern, a revocable trust may best be used in conjunction with a TODD or Lady Bird Deed.

Whichever choice you favor, do not forget to document this advice. Sadly, the new client will likely not want to pay for your cover-your-assets letter. The statute of limitations for an estate planner may not start to run for thirty years or more due to the holding in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). It may be beneficial to have a paper trail to show you cautioned about the

ways in which the technique you are recommending could backfire, especially if you are just recommending a TODD or Lady Bird Deed on its own.

To assist you in your analysis over which technique to use, I have included a chart comparing them as Appendix C.

IX. CONCLUSION

The TODD joins the ranks of the Lady Bird Deed, JTWROS Deed, and revocable trust as useful techniques to transfer real property outside of probate. When used carelessly, it is true that the first three can easily turn into wrecking balls for the well-coordinated estate plan. However, used with careful precision, these techniques can become the foundation of a well-coordinated estate plan.

§ 114.151. Optional Form For Transfer On Death Deed.

Texas Statutes

Estates Code

Title 2. Estates Of Decedents; Durable Powers Of Attorney

Subtitle C. Passage Of Title And Distribution Of Decedents' Property In General.

Chapter 114. TRANSFER ON DEATH DEED

Subchapter D. FORMS FOR TRANSFER ON DEATH DEED

Current through 2017 Special Session

§ 114.151. Optional Form For Transfer On Death Deed

The following form may be used to create a transfer on death deed.

REVOCABLE TRANSFER ON DEATH DEED

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

IMPORTANT NOTICE TO OWNER: You should carefully read all the information included in the instructions to this form. You may want to consult a lawyer before using this form.

MUST RECORD DEED: Before your death, this deed must be recorded with the county clerk where the property is located, or it will not be effective.

MARRIED PERSONS: If you are married and want your spouse to own the property on your death, you must name your spouse as the primary beneficiary. If your spouse does not survive you, the property will transfer to any listed alternate beneficiary or beneficiaries on your death.

1. Owner (Transferor) Making this Deed:

Printed name Mailing address

2. Legal Description of the Property:

3. Address of the Property (if any) (include county):

4. Primary Beneficiary (Transferee) or Beneficiaries (Transferees)

I designate the following beneficiary or beneficiaries, if the beneficiary survives me:

Printed name Mailing address

5. Alternate Beneficiary or Beneficiaries (Optional)

I designate the following alternate beneficiary or beneficiaries, if the alternate beneficiary survives me:

Printed name Mailing address

6. Transfer on Death: (Choose an option under both A and B below, and if you have designated any alternate beneficiaries, choose an option under C.)

At my death, I grant and convey to the primary beneficiary or beneficiaries my interest in the property, to have and hold forever.

A. IF AT LEAST ONE PRIMARY BENEFICIARY SURVIVES ME (Select either option (1) or (2) by placing your initials next to the option chosen. If you do not choose an option, then option (1), which is the anti-lapse election, will apply.)

If at least one primary beneficiary survives me, I grant and convey the primary beneficiaries' share or shares of the property, to have and hold forever, as follows:

____ (1) Anti-Lapse Election. To the surviving primary beneficiary or beneficiaries, but if a deceased primary beneficiary, if any, was a child or other descendant of mine or of one or both of my parents, that deceased primary beneficiary's share will pass to the surviving children or other descendants of that deceased primary beneficiary.

____ (2) Surviving Primary Beneficiaries Election. To the surviving primary beneficiary or beneficiaries only. If a deceased primary beneficiary, if any, was a child or other descendant of mine or of one or both of my parents, I do not want that deceased primary beneficiary's share to pass to the children or other descendants of that deceased primary beneficiary.

B. IF NO PRIMARY BENEFICIARY SURVIVES ME (Select either option (1) or (2) by placing your initials next to the option chosen. If you do not choose an option, then option (1), which is the anti-lapse election, will apply.)

If no primary beneficiary survives me, I grant and convey the share of the property

that would have transferred to a deceased primary beneficiary, to have and hold forever, as follows:

____ (1) Anti-Lapse Election. To the surviving children or other descendants of the deceased primary beneficiary, if the deceased primary beneficiary was a child or other descendant of mine or of one or both of my parents.

____ (2) Surviving Alternate Beneficiaries Election. To the alternate beneficiary or beneficiaries designated above. If the deceased primary beneficiary was a child or other descendant of mine or of one or both of my parents, I do not want that deceased primary beneficiary's share to pass to the children or other descendants of that deceased primary beneficiary.

If no primary beneficiary survives me and the anti-lapse election is not chosen or that election is chosen, but a deceased primary beneficiary is not a child or other descendant of mine or of one or both of my parents, I grant and convey to the alternate beneficiary or beneficiaries my share in the property that otherwise would have transferred to the deceased primary beneficiary, to have and hold forever. If I have not designated alternate beneficiaries, this transfer on death deed shall be considered cancelled by me.

C. IF AN ALTERNATE BENEFICIARY DOES NOT SURVIVE ME (Select either option (1) or (2) by placing your initials next to the option chosen. If you do not choose an option, then option (1), which is the anti-lapse election, will apply.)

If an alternate beneficiary does not survive me, I grant and convey that alternate beneficiary's share of the property as follows:

____ (1) Anti-Lapse Election. To the surviving alternate beneficiary or beneficiaries, but if the deceased alternate beneficiary was a child or other descendant of mine or of one or both of my parents, that deceased alternate beneficiary's share will pass to the surviving children or other descendants of that deceased alternate beneficiary.

____ (2) Surviving Alternate Beneficiaries Election. To the surviving alternate beneficiary or beneficiaries only. If the deceased alternate beneficiary was a child or other descendant of mine or of one or both of my parents, I do not want that deceased alternate beneficiary's share to pass to the children or other descendants of that deceased alternate beneficiary.

If no alternate beneficiary survives me and the anti-lapse election is not chosen or that election is chosen, but no deceased alternate beneficiary was a child or other descendant of mine or of one or both of my parents, this transfer on death deed

shall be considered cancelled by me.

7. Printed Name and Signature of Owner Making this Deed:

Printed Name Date

Signature

BELOW LINE FOR NOTARY ONLY

Acknowledgment

STATE OF _____

COUNTY OF _____

This instrument was acknowledged before me on the _____ day of _____, 20____,

by _____.

Notary Public, State of After recording, return to:

(insert name and mailing address)

INSTRUCTIONS FOR TRANSFER ON DEATH DEED

DO NOT RECORD THESE INSTRUCTIONS

Instructions for Completing the Form

1. Owner (Transferor) Making this Deed: Enter your first, middle (if any), and last name here, along with your mailing address.
2. Legal Description of the Property: Enter the formal legal description of the property. This information is different from the mailing and physical address for the property and is necessary to complete the form. To find this information, look on the deed you received when you became an owner of the property. This information may also be available in the

office of the county clerk for the county where the property is located. Do NOT use your tax bill to find this information. If you are not absolutely sure, consult a lawyer.

3. Address of the Property: Enter the physical address of the property.
4. Primary Beneficiary or Beneficiaries: Enter the first and last name of each person you want to get the property when you die. If you are married and want your spouse to get the property when you die, enter your spouse's first and last name (even if you and your spouse own the property together).
5. Alternate Beneficiary or Beneficiaries: Enter the first and last name of each person you want to get the property if no primary beneficiary survives you.
6. Transfer on Death: You should carefully read the language describing the options and choose an option under both A and B of Paragraph 6, and if you have listed any alternate beneficiaries, choose an option under C of Paragraph 6 .
7. Printed Name and Signature of Owner: Do not sign your name or enter the date until you are before a notary. Include your printed name.
8. Acknowledgment: This deed must be signed before a notary. The notary will fill out this section of the deed.

Cite as Tex. Estates § 114.151

History. Amended by Acts 2017, Texas Acts of the 85th Leg. - Regular Session, ch. TBD, Sec. 2, eff. 9/1/2017.

Added by Acts 2015, Texas Acts of the 84th Leg. - Regular Session, ch. 841, Sec. 1, eff. 9/1/2015.

Transfer on Death Deed Kit

GENERAL INSTRUCTIONS

This Transfer on Death Deed Kit contains forms and instructions for: 1) creating a transfer on death deed, 2) canceling a transfer on death deed, and 3) creating an affidavit of death.

WHAT IS A TRANSFER ON DEATH DEED?: A Transfer on Death Deed is a simple, inexpensive way to transfer real estate to someone else upon your death. It does not involve going through probate court, which can be a lengthy and costly process. It works similarly to a life insurance policy or a payable on death account at a bank because the asset passes to your named beneficiary upon your death outside the probate system.

WHEN TO USE A TRANSFER ON DEATH DEED: You may want to use a transfer on death deed when you own real property, such as a house or land, and you want to give that property to someone else when you die.

THINGS TO KNOW ABOUT USING A TRANSFER ON DEATH DEED:

1. **A transfer on death deed does not affect any of your property rights during your lifetime.** It only takes effect after your death. You can sell the property, use it as collateral on a loan, get property tax exemptions, and enjoy all the other property rights you currently have.
 - The named beneficiary has no legal right to the property until your death. If you decide to sell the property, the named beneficiary cannot stop you from doing so. The sale simply “voids” the transfer on death deed and it is as if the transfer on death deed never existed.
2. **You can only give someone the portion of the property that you own.** For example, if you and your spouse own the property in equal shares and you file a transfer on death deed giving the property to someone, like a child or a friend, that person only gets your share of the property. Your spouse still has her share.
3. **A transfer on death deed trumps a will.**
 - If you already have a will that gives the property to someone else, this transfer on death deed “trumps” the will. The beneficiary named in the transfer on death deed gets the property, not the person named in your will. If you already have a will, it is best to talk to an attorney about the pros and cons of using a transfer on death deed.
 - If you make a will at some point in the future that gives the property to a different person than the beneficiary listed in this transfer on death deed, that provision does not override the deed. The beneficiary named in this transfer on death deed still gets the property. If you change your mind about who you want to get the property, you need to complete the cancellation of transfer on death deed in the will (see below) or file an updated transfer on death deed.
4. **A transfer on death deed does not protect the property from creditor claims.** You may use a transfer on death deed even if there is a debt or lien, such as a mortgage, against the property. However, upon your death, your beneficiary takes the property subject to all mortgages, liens and claims and will be responsible for paying those debts on the property. Also, if the property owner dies and has other unpaid debts, the property could be tied up in probate court until those debts are resolved.
5. **The transfer on death deed beneficiary must survive you by at least 120 hours.** If not, the property is treated as if the transfer on death deed did not exist.
6. **A transfer on death deed cannot be created by a person acting under a property owner’s power of attorney,** however, that person can cancel the transfer of death deed.

Transfer on Death Deed Kit

GENERAL INSTRUCTIONS

IMPORTANT INFORMATION: Carefully read all instructions for each form. It is best to talk to a lawyer before using these forms. Do not file the instructions.

- **Each Form Must be Signed In Front of a Notary:** Each form in this packet, if used, must be signed before a notary. If two people own the property, both need to sign before a notary.
- **Must Record Transfer on Death Deed Before Your Death to be Effective:** You must file this transfer on death deed with the county clerk where the property is located before your death or it will not be effective.
- **If You Change Your Mind, You Must Cancel the Transfer on Death Deed Before You Die:** If you decide you do not want the listed primary or alternate beneficiaries to own the property upon your death, you may cancel (or revoke) the transfer on death deed by filing:
 1. **A Cancellation of Transfer on Death Deed** with the county clerk where you filed the original transfer on death deed before your death, or
 2. **A New Transfer on Death Deed Naming New Beneficiaries** with the county clerk where you filed the original transfer on death deed before your death, or
 3. **As Appropriate, Your Divorce Decree.** If the transfer on death deed names your former spouse as a beneficiary and you were awarded the property in the divorce, you may file your divorce decree to remove your spouse as a beneficiary on the transfer on death deed. However, you must do so before your death.

If you do not file one of the above documents before your death, the property will go to the person(s) listed as the primary or alternate beneficiaries in the transfer on death deed upon your death. Tearing up or destroying your copy, or the beneficiary's copy, of the transfer on death deed will not cancel the deed. A will that names someone else as the beneficiary does not trump the transfer on death deed even if it is executed after the transfer on death deed.

The cancellation applies ONLY to the portion of the property owned by the person signing this cancellation.

- **Beneficiary Must File Affidavit of Death to Get Deed:** After your death, your beneficiary **must** file an affidavit of death with the county clerk where the property is located to get the deed to the property and become the legal owner of the property.
- **Social Security Number and Driver's License Number Not Required:** For privacy reasons, do not put your social security number or driver's license number on these forms.
- **Personal Identification May Be Required:** The county clerk may require you to show personal identification before you file the transfer on death deed, the cancellation of transfer on death deed, or the affidavit of death.

Transfer on Death Deed

INSTRUCTIONS

IMPORTANT NOTICE TO PROPERTY OWNER: Carefully read all instructions for this form. It is best to talk to a lawyer before using this form. For privacy and identity theft reasons, you should not put your social security number or driver's license number on this form.

WHAT IS A TRANSFER ON DEATH DEED?: A Transfer on Death Deed is a simple, inexpensive way to transfer real estate to someone else upon your death. It does not involve going through probate court, which can be a lengthy and costly process. It works similarly to a life insurance policy or a payable on death account at a bank because the asset passes to your named beneficiary upon your death outside the probate system.

WHEN TO USE A TRANSFER ON DEATH DEED: You may want to use a transfer on death deed when you own real property, such as a house or land, and you want to give that property to someone else when you die.

THINGS TO KNOW ABOUT USING A TRANSFER ON DEATH DEED:

- 1. A transfer on death deed does not affect any of your property rights during your lifetime.** It only takes effect after your death. You can sell the property, use it as collateral on a loan, get property tax exemptions, and enjoy all the other property rights you currently have.
 - The named beneficiary has no legal right to the property until your death. If you decide to sell the property, the named beneficiary cannot stop you from doing so. The sale simply "voids" the transfer on death deed and it is as if the transfer on death deed never existed.
- 2. You can only give someone the portion of the property that you own.** For example, if you and your spouse own the property in equal shares and you file a transfer on death deed giving the property to someone, like a child or a friend, that person only gets your share of the property. Your spouse still has her share.
- 3. A transfer on death deed trumps a will.**
 - If you have a will that gives the property to someone else, this transfer on death deed "trumps" the will. The beneficiary named in the transfer on death deed gets the property, not the person named in your will. If you already have a will, it is best to talk to an attorney about the pros and cons of using a transfer on death deed.
 - If you make a will at some point in the future that gives the property to a different person than the beneficiary listed in this transfer on death deed, that provision does not override the deed. The beneficiary named in this transfer on death deed still gets the property. If you change your mind about who you want to get the property, you need to complete the cancellation of transfer on death deed in the will (see below) or file an updated transfer on death deed.
- 4. A transfer on death deed does not protect the property from creditor claims.** You may use a transfer on death deed even if there is a debt or lien, such as a mortgage, against the property. However, upon your death, your beneficiary takes the property subject to all mortgages, liens and claims and will be responsible for paying those debts on the property. Also, if the property owner dies and has other unpaid debts, the property could be tied up in probate court until those debts are resolved.
- 5. The transfer on death deed beneficiary must survive you by at least 120 hours.** If not, the property is treated as if the transfer on death deed did not exist.
- 6. A transfer on death deed cannot be created by a person acting under a property owner's power of attorney,** however, that person can cancel the transfer on death deed.

Transfer on Death Deed INSTRUCTIONS

REQUIRED:

- **Must Sign in Front of a Notary:** Do not sign or date the transfer on death deed until you are standing in front of a notary public.
 - **Must Record Transfer on Death Deed Before Your Death:** You **must** record (*file*) this deed **before** your death with the county clerk where the property is located or it will not be effective.
1. **Property Owner (Transferor) Making this Deed:** Enter your first, middle (if any), and last name, along with your mailing address. Write your name exactly as it appears on the deed you received when you became an owner of the property. If you now go by a different name, write your name as listed on the deed, followed by AKA (also known as) and your current name. If more than one person owns the property, each person must do this.
 2. **Legal Description of the Property:** Enter the legal description of the property, which is different from the mailing or physical address of the property. This information is on the deed you received when you became an owner of the property and is also available at the county clerk's office in the county where the property is located. Do NOT use the legal description listed on your property tax bill because it is usually incomplete. **IT IS VERY IMPORTANT THAT THIS INFORMATION IS CORRECT.** If you are not absolutely sure, talk to a lawyer.
 3. **Address of the Property:** Enter the physical address of the property.
 4. **Beneficiary or Beneficiaries:** A "beneficiary" is the person who will own the property when you die. You must check the box for A, B, or C. Check **ONLY ONE** box and fill in the blanks in that section.
 - A. **If you are married and you and your spouse own the property together:**
 - *Fill out Section A if you want the surviving spouse to get your share of the property upon your death.* You may list alternate beneficiaries, who would get the property when both you and your spouse die, but it is not required.
 - *Fill out Section C if you want someone other than your spouse to get your share of the property upon your death.* Enter the name of each person you want to own your property when you die. You may also list alternate beneficiaries, but it is not required.
 - B. **If you are married and you own all or part of the property by yourself (your spouse doesn't own any part of it):**
 - *Fill out Section B if you want your spouse to get the property upon your death.* You may list alternate beneficiaries, who would get the property if your spouse is deceased at the time of your death, but it is not required.
 - *Fill out Section C if you want someone other than your spouse to get the property upon your death.* Enter the name of each person you want to own your property when you die. You may also list alternate beneficiaries, but it is not required.
 - C. **If you are not married, fill out Section C.** Enter the first and last name of each person you want to own your property when you die. You may also list alternate beneficiaries, who would get the property if your primary beneficiary is deceased at the time of your death, but it is not required.

Transfer on Death Deed INSTRUCTIONS

5. Transfer on Death: You do not need to fill out anything in this section.
6. Signature of Owner: This deed must be signed before a notary. **Do not sign your name or enter the date until you are in front of a notary.** If two people own the property, both need to sign before a notary.
7. Acknowledgement: You do not need to fill out anything in this box. The notary will fill it out.
8. "After Recording, Return to" Section: Fill in the property owner's name and address here. Once the transfer on death deed has been recorded, it will be returned to the property owner with the specific information (the volume, page number, and/or deed number) on where the deed has been recorded in the county's clerk office so that it can be located later. Keep the transfer on death deed in a safe place.
9. File the Deed (NOT these Instructions) in the County Clerk's Office:
 - **Bring Original and One Copy**: Bring the original and at least one copy of the complete and notarized transfer on death deed to the County Clerk's office in the county where the property is located.
 - **Bring Personal Identification**: The county clerk may require you to show personal identification before you file this document.
 - **Bring Money**: The County Clerk will charge a fee to file the transfer on death deed, which is typically a per page fee. Many County Clerks do not accept checks. You may want to call the County Clerk's office and find out how much the charge will be and whether they accept checks before you go. The File the original and ask them to return a copy of the original with the recording information on it to the owner.
 - **Do Not File the Instructions**: If you file the instructions, it may cause confusion and will also cost you more money.

Transfer on Death Deed

IMPORTANT NOTICE TO PROPERTY OWNER: Carefully read all instructions for this form. It is always best to talk to a lawyer before using this form. For privacy reasons, do not put your social security number or driver's license number on this form. Do not file these instructions.

REQUIRED:

- **Must Sign and Date Transfer on Death Deed In Front of A Notary.**
- **Must Record Transfer on Death Deed Before Your Death:** You must record (*file*) this deed before your death with the county clerk where the property is located or it will not be effective.

1. **Property Owner(s) (Transferors) Making this Deed.** Enter your first, middle (if any), and last name here, along with your mailing address. If more than one person owns the property, all owners must list this information.

Property Owner's Printed Name

Second Owner's Printed Name (If Applicable)

Mailing Address:

Mailing Address:

Address 1

Address 1

Address 2

Address 2

City State Zip

City State Zip

2. **Legal Description of the Property.** The legal description is not the mailing or physical address of the property. The legal description is listed on the deed to the property, which you should have gotten when you became an owner. This information may also be available at the county clerk's office in the county where the property is located. Do NOT use the legal description listed on your property tax bill because it may be incorrect. IT IS VERY IMPORTANT THAT THIS INFORMATION IS CORRECT. If you are not absolutely sure, talk to a lawyer.

Print legal description of the property.

3. **Address of the Property (if any).** This is the physical address of the property. Include county.

Address City County State Zip Code

Transfer on Death Deed

4. Primary and Alternate Beneficiaries. **MUST CHECK AND COMPLETE A, B, OR C (Check ONE and ONLY ONE):**

- A "beneficiary" is the person who you want to own the property when you die.
- Section A: Fill out this section if you are married, and you and your spouse own the property together, and you want your spouse to own the property when you die.
- Section B: Fill out this section if you are married and you own the property by yourself – your spouse doesn't own any part of it – and you want your spouse to own the property when you die.
- Section C: Fill out this section in all other situations. See #4 in the detailed instructions to this form.

A. Both Spouses Own the Property and Want to Leave to Surviving Spouse: Fill out this section if you are married, and you and your spouse own the property together, and you want your spouse to own the property when you die. Both spouses must sign the transfer on death deed.

1) Primary Beneficiary is Surviving Spouse: The owners of this property are married to each other and are both signing this deed. If one of us dies and the other is living, the living spouse will be the sole owner of the property.

2) Alternate Beneficiary or Beneficiaries: Enter the first, middle (if any), and last name of each person you want to get the property when both you and your spouse have died. This person(s) will be named the "beneficiary(ies)." You may list more than two beneficiaries by attaching a page with their name and mailing address.

When we are both deceased, we want the following person(s) to own our property. This person(s) may or may not be our child, descendant, or a member of our family. If more than one alternate beneficiary is listed, they will own the property in equal shares.

Alternate Beneficiary
Print Name

Second Alternate Beneficiary (Optional)
Print Name

Mailing Address:

Mailing Address:

Address 1

Address 1

Address 2

Address 2

City State Zip

City State Zip

Transfer on Death Deed

B. Only One Spouse Owns the Property: *Fill out this section if you are married and you own all or part of the property by yourself – your spouse doesn't own any part of it – and you want your spouse to own the property when you die.*

1) Primary Beneficiary: I designate my spouse as the primary beneficiary if I die before my spouse:

Spouse's Printed Name

Mailing Address:

Address 1

Address 2

City State Zip

2) Alternate Beneficiary or Beneficiaries: *Enter the first, middle (if any), and last name of each person you want to get the property if your spouse dies before you. You may list more than two alternate beneficiaries by attaching a page with their name and mailing address.*

If my spouse dies before me, I want the following person(s) to own my property when I die. This person(s) may or may not be my child, descendant, or a member of my family. If more than one alternate beneficiary is listed, they will own the property in equal shares:

Alternate Beneficiary

Print Name

Mailing Address:

Address 1

Address 2

City State Zip

Second Alternate Beneficiary (Optional)

Print Name

Mailing Address:

Address 1

Address 2

City State Zip

Transfer on Death Deed

- C. Other:** Fill out this section if neither section A or B apply to you, including if you are married and you do not want your share of the property to go to your spouse.

- 1) **Primary Beneficiary:** Enter the first, middle (if any), and last name of each person you want to get the property when you die. This person or people will be named the "beneficiary". You may list more than two primary beneficiaries by attaching a page with their name and mailing address.

I want the following person(s) to own my property. This person(s) may or may not be my child, descendant, or a member of my family. If more than one primary beneficiary is listed, they will own the property in equal shares:

Primary Beneficiary

Print Name

Mailing Address:

Address 1

Address 2

City State Zip

Second Primary Beneficiary (Optional)

Print Name

Mailing Address:

Address 1

Address 2

City State Zip

- 2) **Alternate Beneficiary or Beneficiaries:** Enter the first, middle (if any), and last name of each person you want to get the property if all primary beneficiaries die before you. You may list more than two alternate beneficiaries by attaching a page with their name and mailing address.

If the primary beneficiary or beneficiaries die before me, I want the following person(s) to own my property. If more than one alternate beneficiary is listed, they will own the property in equal shares:

Alternate Beneficiary

Print Name

Mailing Address:

Address 1

Address 2

City State Zip

Second Alternate Beneficiary (Optional)

Print Name

Mailing Address:

Address 1

Address 2

City State Zip

Transfer on Death Deed

5. Transfer on Death

At my death, I convey to (*give*) the primary beneficiary or beneficiaries my interest in the property to have and hold forever. If all my primary beneficiaries die before I do, I grant and convey to (*give*) any listed alternate beneficiary or beneficiaries, my interest in the property to have and hold forever. If no primary or alternate beneficiary is alive when I die, this deed is canceled and has no force and effect, as if it had never been executed.

6. Signature of Property Owner(s) Making this Deed: *Do not sign or date below until you are in front of a notary public.*

Owner's Signature

Second Owner's Signature (If Applicable)

Date

Date

FOR NOTARY TO COMPLETE Acknowledgement

STATE OF _____

COUNTY OF _____

This instrument was acknowledged before me on the _____ day of _____, 20____, by

Notary Public's Signature

After recording, please return to:

Owner's Name

Owner's Mailing Address:

Address 1

Address 2

City

State

Zip

Cancellation of Transfer on Death Deed

INSTRUCTIONS

IMPORTANT NOTICE TO PROPERTY OWNER: Carefully read all instructions for this form. It is best to talk to a lawyer before using this form. For privacy reasons, do not put your social security number or driver's license number on this form. Do not file these instructions.

WHEN TO USE THIS FORM:

- If you change your mind and decide you do not want the primary or alternate beneficiaries listed in your transfer on death deed to own the property upon your death, use this form to cancel the Transfer on Death Deed. *See the General Instructions to the Transfer on Death Deed Kit for information on cancelling a transfer on death deed by filing a new transfer on death deed or after a divorce.*
- Tearing up or destroying your copy or the beneficiary's copy of the transfer on death deed will not cancel the deed.

IMPORTANT INFORMATION:

- **The Cancellation Applies ONLY to the Portion of the Property You Own.** For example: Joe and Sue own property together. They both sign and file a transfer on death deed naming Ann as the beneficiary. Sue changes her mind and files a cancellation of transfer on death deed but Joe doesn't. When Joe dies, Ann will get his share of the property but not Sue's share.
- **If more than one owner wants to cancel the transfer on death deed,** it is best if each owner completes a separate Cancellation of Transfer on Death Deed.
- Cancellation of a transfer on death deed is sometimes called a "revocation" of a transfer on death deed.

REQUIRED:

- **Must Sign in Front of a Notary:** Do not sign or date the transfer on death deed until you are standing in front of a notary public.
- **Must Record Cancellation Form Before Your Death:** You must file this Cancellation of Death Deed form with the county clerk where the property is located before your death. If you don't, the property will go to the person(s) listed as the primary or alternate beneficiaries in the transfer on death deed upon your death. NOTE: Tearing up or destroying your copy or the beneficiary's copy of the transfer on death deed will not cancel the deed.

COMPLETING THE CANCELLATION OF TRANSFER ON DEATH DEED FORM:

1. Property Owner (Transferor) Making this Cancellation:

- A. The person who currently owns the property must complete this Cancellation form.
- B. If more than one person owns the property, each property owner who wants to cancel the transfer on death deed for their share of the property should complete a cancellation of transfer on death deed form.

Cancellation of Transfer on Death Deed INSTRUCTIONS

2. Legal Description of the Property: Enter the legal description of the property exactly as it appears on the original transfer on death deed. IT IS VERY IMPORTANT THAT THIS INFORMATION IS CORRECT. If you are not absolutely sure, talk to a lawyer.

3. Address of the Property: Enter the physical address of the property.

4. Cancellation: You do not need to fill out anything in this section.

5. Signature of Owner: The cancellation must be signed before a notary. **Do not sign your name or enter the date until you are standing in front of a notary.**

6. Acknowledgement: You do not need to fill out anything in this box. The notary will fill it out.

7. “After Recording, Return to” Section: Fill in your name and address. Once the transfer on death deed has been recorded, it will be returned to you with the specific information on where the cancellation of the transfer on death deed has been recorded in the county’s clerk office so that it can be located later. Keep the cancellation of transfer on death deed in a safe place.

8. File the Cancellation of Transfer on Death Deed (NOT these Instructions) in the County Clerk’s Office:
 - A. **Bring Original and One Copy**: Bring the original and one copy of the complete and notarized Cancellation of Transfer on Death Deed to the County Clerk’s office in the county where the property is located.
 - B. **Bring Money**: The County Clerk will charge a fee to file the Cancellation of Transfer on Death Deed and may not take a check. You may want to call the County Clerk’s office and find out how much the charge will be before you go. File the original and ask them to return a copy of the original with the recording information on it to the owner.
 - C. **Do Not File the Instructions**: If you file the instructions, it may cause confusion and will also cost you more money.

Cancellation of Transfer on Death Deed

IMPORTANT NOTICE TO PROPERTY OWNER:

- Carefully read all instructions for this form. You may want to talk to a lawyer before using this form.
- **The Cancellation Applies ONLY to the Portion of the Property Owned by the Person Signing this Cancellation.** For example: Joe and Sue own property together. They both sign and file a transfer on death deed naming Ann as the beneficiary. Sue changes her mind and files a cancellation of transfer on death deed but Joe doesn't. When Joe dies, Ann will get his share of the property but not Sue's share.
- **Must Record Cancellation Before Your Death:** You **must** file the completed Cancellation of Death Deed form with the county clerk where the property is located **before** your death. If you don't, the property will go to the person(s) listed as the primary or alternate beneficiaries in the transfer on death deed upon your death. **NOTE:** Tearing up or destroying your copy or the beneficiary's copy of the transfer on death deed will **not** cancel the deed.

1. **Property Owner (Transferor) Making this Cancellation.** *Enter your full name (the [s] may be omitted) on the first line. If you are a married couple, you must enter the name of the person or persons you are naming as the beneficiary, and if you are a trust, you must enter the name of the trust on the second line. State of the property which is comprised or described by the deed on the third line.*

Property Owner's Printed Name

Owner's Mailing Address:

Address 1

Address 2

City

State

Zip

2. **Legal Description of the Property.** *Enter the legal description of the property exactly as it appears on the original transfer on death deed. IT IS VERY IMPORTANT THAT THIS INFORMATION IS CORRECT. If you are not absolutely sure, talk to a lawyer.*

Print legal description of the property.

3. **Address of the Property (if any).** *This is the physical address of the property. Include county.*

Address

City

County

State

Zip Code

Cancellation of Transfer on Death Deed

4. Cancellation.

I cancel all my previous transfers of this property by transfer on death deed.

5. Printed Name and Signature of Owner (Transferor) Making this Cancellation. Do not sign your name or enter the date until you are standing in front of a notary.

Owner's Signature

Date

Owner's Printed Name

**FOR NOTARY TO COMPLETE
Acknowledgement**

STATE OF _____

COUNTY OF _____

This instrument was acknowledged before me by the above named Owner on the _____ day of _____, 20____,

By _____
Notary Public, State of _____

After recording, return to:

Owner's Name

Owner's Mailing Address:

Address 1

Address 2

City State Zip

Affidavit of Death Form

INSTRUCTIONS

IMPORTANT NOTICE TO PROPERTY OWNER: Carefully read all instructions for this form. It is best to talk to a lawyer before using this form. For privacy reasons, you do not need to put your social security number or driver's license number on this form. Do not file these instructions.

WHEN TO USE THIS FORM:

- When the property owner who created the transfer on death deed dies, this form is used by a named beneficiary to get legal ownership of the property.
- Title to the property does not pass to the beneficiary(ies) until the affidavit of death is filed. Without legal title, you cannot sell the property, or get property tax exemptions, or use the property as collateral on a loan.

IMPORTANT INFORMATION:

- **Primary Beneficiary Takes Before Alternate Beneficiary.** If any primary beneficiary is alive for more than 120 hours after the property owner who created the Transfer on Death Deed dies (now called the "Decedent"), no alternate beneficiary will get the property. An alternate beneficiary can only get the property if all primary beneficiaries have died before the decedent's death or within 120 hours after the decedent's death.
- **Proof of Death:** After the Affidavit of Death is filed, you will need to provide acceptable proof that the Decedent has died, such as a death certificate or an obituary, to the title company before the property can be sold, used as collateral for a loan, or otherwise encumbered.

REQUIRED:

- **Must Sign In Front of A Notary:** Do not sign or date the Affidavit of Death until you are in front of a notary.
- **Must Record Affidavit of Death for Property Title to Transfer to Beneficiary:** You **must** record (*file*) this Affidavit of Death with the county clerk where the property is located for title to the property to legally transfer to the named beneficiary(ies) listed in the transfer on death deed.

COMPLETING THE AFFIDAVIT OF DEATH FORM:

1. **Information of Person Signing Affidavit:** Enter your first, middle (if any), and last name. You are the affiant (the person filling out and signing the affidavit).
2. **Legal Description of the Property:** Enter the legal description of the property **exactly** as it appears on the original Transfer on Death Deed. IT IS IMPORTANT THAT THIS INFORMATION IS CORRECT. If you are not absolutely sure, talk to a lawyer.

Affidavit of Death Form

INSTRUCTIONS

3. Transfer on Death Deed Filed by Decedent:
 - a. Enter the name of the person who signed the Transfer on Death Deed and has now died exactly as it appeared in the Transfer on Death Deed in the chart. This person is now called the “Decedent.”
 - b. Enter the date the Transfer on Death Deed was filed, and the county the deed was filed in the appropriate blanks.
 - c. Enter the volume and page number where the Transfer on Death Deed was filed. This can be found on a file-stamped copy of the Transfer on Death Deed. Some counties have stopped using volume and page numbers. If the file-stamped copy does not have a volume and page number, use the instrument or document number instead. If you don’t have a stamped copy of the Transfer on Death Deed, you can get a copy at the county clerk’s office in the county where it was filed.
4. Information of Person Who Signed the Transfer on Death Deed: Enter the date the Decedent died, and the city, county, and state where they died in the chart.
5. Affiant’s Signature: This affidavit must be signed before a notary. **Do not sign your name or enter the date until you are standing in front of a notary.**
6. Acknowledgement: You do not need to fill out anything in this box. The notary will fill it out.
7. “After Recording, Return to” Section: Fill in the name and address of the beneficiary, who is a new owner of the property now that the Decedent has died, here. Once the affidavit is recorded, it will be returned to the beneficiary with a document number or a volume and page number so that it can be located later.
8. File the Affidavit of Death (NOT these Instructions) in the County Clerk’s Office:
 - **Bring Original and One Copy:** Bring the original and at least one copy of the complete and notarized Affidavit of Death to the County Clerk’s office in the county where the property is located.
 - **Bring Personal Identification:** The county clerk may require you to show personal identification.
 - **Bring Money:** The County Clerk will charge a fee to file the Affidavit of Death and may not accept a check. You may want to call the County Clerk’s office and find out how much the charge will be before you go.
 - **Do Not File the Instructions:** If you file the instructions, it may cause confusion and will also cost you more money.

**AFFIDAVIT OF DEATH
FOR TRANSFERING TITLE ON PROPERTY LISTED IN A TRANSFER ON DEATH DEED**

THE STATE OF TEXAS

COUNTY OF _____

I swear that the following statements are true:

1. **Information of Person Signing Affidavit (Affiant)**. *Print your first, middle (if any), and last name here.*

My name is _____. I am at least eighteen (18) years old or older and am competent to make this affidavit. I am familiar with the past ownership and occupancy of the real property described below in this affidavit.

2. **Legal Description of the Property**. *The legal description is not the mailing or physical address of the property. The legal description is listed on the deed to the property, which can be found on the Transfer on Death Deed as well as at the county clerk's office in the county where the property is located.*

Print legal description of the property.

3. **Transfer on Death Deed Filed by Decedent**.

- *Print the first, middle and last name of the deceased person who signed the transfer on death deed for the property exactly as it appeared on the Transfer on Death Deed. This person is now called the "Decedent."*
- *Print the date the transfer on death deed was filed and the county where the transfer on death deed was filed. Print the volume and page number where the Transfer on Death Deed was filed, or if not available, print the transfer on death deed's document or instrument number.*

_____ (Decedent) signed a transfer on death
First Middle Last

deed regarding this property on _____. The transfer on death deed was
Date

filed with the county clerk in _____ County, Texas, on _____
Date

and can be found in Volume _____, Page _____ of the county clerk's records, or if not available

under document or instrument number _____.

**AFFIDAVIT OF DEATH
FOR TRANSFERING TITLE ON PROPERTY LISTED IN A TRANSFER ON DEATH DEED**

4. Information of Deceased Person Who Signed the Transfer on Death Deed (Decedent).

- *Print the date the person died, and the county and state where they died.*

The information regarding the death of the above named Decedent is as follows:

Date of Death			Date and Place of Death		
Month	Day	Year	City	County	State

5. Affiant's Signature. **Do not sign or date until you are standing in front of a notary.** Once the Affidavit of Death is signed and notarized, you must file it with the county clerk in the county where the property is located.

 Affiant's Signature

 Date

**FOR NOTARY TO COMPLETE
Acknowledgement and Affidavit**

STATE OF _____

COUNTY OF _____

This instrument was acknowledged and sworn to before me on the _____ day of _____, 20____, by _____.

By _____
 Notary Public, State of _____

After recording, please return to:

Beneficiary's Name:

Beneficiary's Mailing Address:

 Address 1

 Address 2

 City

 State

 Zip

COMPARISON OF DIFFERENT TECHNIQUES

	TODD	Lady Bird Deed	Joint with Right of Survivor Deed	Revocable Trust
Revocable	Yes	Yes	No	Yes
Low Cost initially	Yes	Yes	Yes	No
Avoids probate	Yes	Yes	Yes	Maybe
Qualify for Medicaid	Yes	Yes	Not for five years after transfer	No
Not subject to MERP	Yes	Yes	Yes	N/A
Not subject to creditor of beneficiary while Transferor/Grantor lives	Yes	Maybe	No	Yes
Warranty for Beneficiary/Grantee	No	Yes	Yes	Yes
Executable by agent under power of attorney	No	Yes	Yes	Yes
Non-taxable event for gift taxes	Yes	Yes	No	Yes
Basis adjustment at death of Transferor/Grantor	Yes	Yes	Partly	Yes
Transferor/Grantor maintains homestead rights	Yes	Yes	Yes	Yes
Transferor/Grantor maintains ad valorem exemptions	Yes	Yes	Maybe	Yes
Transferor/Grantor eligible for disaster relief	Yes*	Maybe	Maybe	Yes
Safe from personal representative selling property when necessary to pay estate creditors	No	Yes	Yes	Yes
Flexible beneficiary designations allowing for drafting to avoid disability and death	No	No	No	Yes
Anti-lapse statute applies	Yes	No	No	No
Allows for alternate beneficiaries	Yes	No	No	Yes

* Presuming third parties follow the law as written which does not always happen.