

Transferring Your Home with a Transfer on Death Deed (TOD) - What You Need to Know

CANHR is a private, nonprofit 501(c)(3) organization dedicated to improving the quality of care and the quality of life for long term care consumers in California.

In 2016 the California legislature created a Revocable Transfer on Death Deed (“TOD Deed”) as a way for California residents to transfer residential property to named beneficiaries, effective upon death. In 2021, the legislature passed SB-315 to update the law on TOD deeds and address some problems in the earlier law. Deeds that were executed before January 1, 2022 are still valid, even if they differ from the additional requirements of the new law.

The stated purpose of the TOD Deed, according to the author of the bill, is to allow seniors and individuals whose estates consist primarily of a home to avoid costly and/or complicated probates or trust administrations. In short, a TOD Deed, when properly executed, notarized and recorded is supposed to be a simple and inexpensive way to transfer residential property. The new law, however, gives the probate court authority to interpret TOD deeds in order to correct errors, which defeats the stated purpose of avoiding the costs and delays involved when court intervention is needed.

Definitions:

1. **Grantor:** The individual who transfers property through the TOD Deed
2. **Beneficiary:** The individual who inherits property through the TOD Deed

As with most “simple” and “inexpensive” legal strategies, there are pros and a lot of cons to the TOD Deed.

The Disadvantages:

The TOD Deed:

- Offers no protection from the Grantor’s creditors. Therefore, the beneficiary may end up with nothing if the debts of the Grantor are larger than the worth of the property. Additionally, because there may be unsatisfied creditor’s claims against a property, some title companies are not willing to issue title insurance to the beneficiary until three years after the Grantor’s death.
- Can only be used to transfer one to four residential dwelling units or condominium units, a single-family residence with less than 40 acres of agricultural land or a mobile home that is a “fixture” according to Section 18551 of the Health and Safety Code.
- Cannot be used to transfer residential property held as Joint Tenancy or as Community Property with Right of Survivorship, and cannot be used to create split interests such as a life estate.
- Does not permit the designation of beneficiaries by class description (e.g., “my children”); the beneficiary or beneficiaries have to be specifically named.
- Cannot designate “contingent beneficiaries”: if a beneficiary dies before the Grantor, the property goes to the other surviving beneficiaries in equal shares or, if no other beneficiaries, then it reverts to the Grantor’s estate and may then require a probate.

- Can subject the Grantor (particularly elders with dementia) to undue influence and elder abuse, or cause resentment among family members. Additional signing requirements have been added, but while a beneficiary is discouraged from serving as a witness to the signing, it is not prohibited.
- Although the TOD deed was created to minimize the use of attorneys, because of the problems that the updated law attempts to address, attorneys and the probate court are more likely to be necessary. A consumer who signs and records a TOD deed may unwittingly void the transfer because of an error or create confusion that can only be resolved in the probate court.

The Advantages:

- The new TOD Deed may be less expensive than a living trust, and may **eliminate the waiting and expense of a probate.**
- The TOD Deed can be revoked at any time during the lifetime of the Grantor.
- A TOD Deed should simplify the transfer process at death, as long as the deed is not voided by a drafting error on the part of the Grantor, there is at least one living beneficiary, and there is no ambiguity that requires interpretation by a probate court.
- A TOD Deed retains the tax advantages of a transfer via trust or inheritance under a will.

Signing and Recording:

- A revocable TOD deed is not effective unless the Grantor signs and dates the deed before a notary public and two witnesses. If one of the witnesses is a beneficiary, it creates a presumption that there was undue influence in creating the deed. Take note that a notary is not a lawyer and cannot advise you whether or not the deed is prepared correctly.
- The deed does not need to be delivered to the beneficiary but after the death of the Grantor, the beneficiary must serve notice on the heirs of the Grantor.
- The deed must be recorded 60 days or less from the time it is signed. The “Common Questions” portion of the statutory form does **not** need to be recorded.
- If more than one beneficiary is named in the TOD, the ownership interests must be divided equally.

Revoking a TOD Deed:

- The TOD Deed may be revoked by the Grantor at any time, but the Grantor must record a revocation form or another deed. The new law allows 120 days after the death of the Grantor to record a revocation. This means that the transfer that supposedly occurs at the time of death of the Grantor is not finalized until up to 120 days later.
- The TOD Deed can be revoked at any time and a new estate planning strategy can be pursued.
- A TOD Deed may be revoked by recording a new and different TOD deed, as the law allows more than one revocable TOD deed, and provides that the effective deed will be the one which has the most recent recording date.
- A TOD Deed may be revoked by transferring the property to someone else by any type of legally valid deed, and recording that deed, prior to the transferor's death. Leaving the property to someone else in a will does not revoke the TOD deed.

Where to Find the Form:

The new law requires use of a specific form. The form is available for online download at a number of county sites (see for example Sacramento County's form):

<https://saclaw.org/wp-content/uploads/form-TOD-deed.pdf>

The statutory deed form and revocation form are in the California Probate Code, Sections 5642 and 5644.

Note: SB 315 directs the California Law Revision Commission to study the effect of the TOD Deed as to whether the deed is working effectively, whether it has been used to perpetuate financial abuse, whether it needs changes and whether it should be continued, and to report back to the Legislature no later than January 1, 2031. Unless the Legislature acts otherwise, the law will sunset on January 1, 2032, but that would not invalidate any revocable TOD Deed executed before that date.