

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.

A new law that became effective January 1, 2016, creates a Revocable Transfer on Death Deed (“TOD Deed”) as a way for California residents to transfer residential property to named beneficiaries, effective upon death.

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, while avoiding the necessity of a living trust or a will that may be subject to probate.

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, including Medi-Cal Estate Recovery for those who die prior to 1/1/2017. **However, based on recently passed CANHR-sponsored legislation, for those who die on or after 1/1/2017, property transferred via TOD Deed will not be subject to Medi-Cal Recovery claims.**
- Because there may be unsatisfied creditor’s claims against the property transferred via TOD Deed, some title companies are not willing to issue title insurance to the beneficiary until three years after the Grantor’s death
- Although the TOD law was written to minimize the use of attorneys, because of the specificity of the form, a consumer may unwittingly void the transfer because of an error in the completion of the form.
- Because the TOD Deed offers no protection from creditors, the beneficiary may end up with nothing if the debts of the Grantor are larger than the worth of the property.
- Can only be used to transfer one to four residential dwelling units or condominium units, or a single-family residence with less than 40 acres of agricultural land.
- 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 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.
- Notaries, who must acknowledge the TOD Deed, are not mandated reporters for elder abuse.

The Advantages:

- The new TOD Deed may be simple to use, will be less expensive than creating 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 in the part of the Grantor.
- 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.
- The deed does not need to be delivered to the beneficiary.
- The deed must be recorded 60 days or less from the time it is signed. To be safe and until this issue is clarified, be sure to record every page of the form, including the “common questions” or “frequently asked questions” pages.
- 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 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.

Where to Find the Form:

The new law requires use of a specific form with specific provisions, and includes a “frequently asked questions” provision. The form and FAQ is available for online download at a number of county sites (see for example Sacramento County’s form):

<https://sacalaw.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: AB 139 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, 2020. Unless the Legislature acts otherwise, the law will sunset on January 1, 2021, but that would not invalidate any revocable TOD Deed executed before that date.