

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 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 (the owner on title) who transfers property through the TOD Deed
2. **Beneficiary:** The individual who inherits property through the TOD Deed

Requirements of the revocable TOD and statutory form

- The form must be substantially similar to the form provided under California Probate Code Section 5642.
- 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 beneficiary or beneficiaries are identified in the deed by name. Although beneficiaries were limited to natural persons under the prior law, amendments effective January 1, 2022, allow a beneficiary to be one or more natural persons, trusts, or legal entities.
- The person executing the deed (grantor) or revoking the deed has capacity to contract (which requires a higher level of understanding of the nature and consequences of the person's action than testamentary capacity)

Signing and Recording:

For the TOD deed to be effective, the following must be satisfied:

- The grantor signs and dates the deed;
- The deed is also signed by two witnesses who were present at the same time and who witnessed either the signing of the deed or the transferor's acknowledgment that the transferor had signed the deed; and
- The deed is acknowledged before a notary public.

Note: For deeds executed prior to January 1, 2022, the TOD deed (or revocation) needed only be recorded on or before 60 days after the date of execution. For deeds executed after that date, it must be recorded 60 days after it was acknowledged by the notary. (Cal. Prob Code § 5626, 5632)

- 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 60 days after it is acknowledged by the notary.
- 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.

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

The Disadvantages:

The revocable 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.
- Title companies are not willing to issue title insurance to the beneficiary until three years after the Grantor’s death because of the risks of legal challenges. Thus, the sale of property may be held up for the inability to get title insurance.
- 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.
- Although the TOD was created 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.
- The property may still be subject to probate if the beneficiary predeceases the grantor and there is no alternate estate plan. And if the property becomes part of the estate, it may still be subject to Medi-Cal estate recovery.

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 by the Grantor at any time during the lifetime, as long as the Grantor has capacity (See above on revoking a TOD).
- A TOD Deed protects the property as long as the beneficiary does not predecease the grantor and as long as the deed is not voided by a drafting error in the part of the Grantor.
- The TOD permits the grantor to retain full ownership of the property during his or her lifetime, instead of adding the beneficiary as a joint tenant.
- The recording of the TOD deed is not a taxable event. (By contrast, if you add a joint tenant, this is considered a gift by the IRS and requires the filing of a gift tax return, and possibly higher taxes in the future. Consult with an experienced tax professional for tax advice.)