

The Transfer on Death Instrument:

A New Estate Planning Tool for Illinois Attorneys

On January 1, 2012, the Illinois Residential Real Property Transfer on Death Instrument Act (the “Act”), 755 ILCS 27/1 et seq., became effective. The Act enables an owner of residential real estate to direct the transfer of that property upon his or her death through a recorded instrument and without a will or probate proceedings. Prior to the Transfer on Death Instrument (“TODI”), homeowners seeking to transfer their homes upon their deaths without going through probate had to create a revocable trust, put the home in a land trust, or, in some cases, pass on to heirs or legatees the expense of a bond covering the title company insuring subsequent transfers. The TODI will serve those homeowners who do not have estates large or complex enough to justify the cost of a revocable trust and who wish to avoid the \$100 to \$200 in annual fees required by most land trustees. This article provides an overview of the Act and discusses some of the issues a lawyer may encounter in drafting or attempting to implement a TODI.

As indicated above, the TODI is effective only in transferring residential real estate.¹ Although the Act contains a lengthy definition of that term, it does not specify whether the residential classification is relevant only at the time the instrument is executed and recorded or whether property must remain residential until after the owner’s death. In counseling an owner of residential property that may become non-residential in character, you may wish to suggest alternatives to the TODI to avoid this issue. In order to create or revoke a TODI, an owner must be at least eighteen years of age and of sound mind and memory, the same capacity requirements

¹ 755 ILCS 27/10.

for a will.² Like a will, a TODI must be signed by two witnesses who must attest that they saw the owner sign the TODI as his or her free and voluntary act and that they believed the owner to be of sound mind and memory. A notary public must acknowledge the signature of the owners and the witnesses.³ In addition to these requirements, the instrument must state that the transfer is to occur at the owner's death, contain the essential elements and formalities of an inter vivos deed and be recorded with the recorder's office in the county in which the property is situated before the owner's death.⁴ Failure to comply with any of these requirements renders the TODI void and ineffective to transfer title to the property.⁵ The Act specifies that an agent acting under a power of attorney does not have the authority to create a TODI on behalf of the principal unless the power of attorney expressly authorizes that action.⁶ Attorneys representing clients in TODI matters should pay careful attention to these specific requirements because a failure to observe any one of them will render an intended TODI void.

A TODI does not automatically transfer property upon the owner's death. The Act expressly provides that the TODI is a non-testamentary instrument.⁷ In order to make the TODI effective as of the owner's death, the beneficiary or beneficiaries must file a notice of death affidavit and acceptance containing certain information in the office of the recorder in the county where the TODI was filed.⁸ The Act contains a form notice and acceptance.⁹ When a beneficiary of a TODI fails to survive the property owner, the property passes to the owner's

² 755 ILCS 2735, 755 ILCS 5/4-1.

³ 755 ILCS 27/45.

⁴ 755 ILCS 27/40.

⁵ 755 ILCS 27/40.

⁶ 755 ILCS 27/35.

⁷ 755 ILCS 27/30.

⁸ 755 ILCS 27/75.

⁹ 755 ILCS 27/100.

estate except when the beneficiary is a descendant of the owner. In that case, the beneficiary's descendants take the property per stirpes.¹⁰

The acceptance provisions of the Act create a serious ambiguity where at least one beneficiary files a proper notice and acceptance but other beneficiaries fail to take any action. Section 75 specifies that a TODI becomes effective upon the filing of a notice and acceptance. It further specifies that the "notice of death affidavit and acceptance shall be signed by each beneficiary or by the beneficiary's authorized representative." If such a notice and acceptance has not been filed by at least one beneficiary within 30 days after the owner's death, the personal representative of the owner's estate may take possession of the property. If such a notice and acceptance has not been filed by at least one beneficiary within two years of the owner's death, the TODI is void and ineffective and the property passes to the owner's estate.¹¹ A beneficiary may disclaim his or her interest in a TODI by delivering or filing a written disclaimer complying with Section 2-7 of the Probate Act of 1975, 755 ILCS 5/1-1 et seq.¹² Section 75 is unclear as to the status of title to property subject to a TODI where one of several beneficiaries properly files a notice of death affidavit and acceptance upon the death of the owner but other beneficiaries refuse to file notices and acceptances or disclaimers. The TODI becomes effective only upon each beneficiary's filing of an executed notice and acceptance. However, it never becomes void if at least one beneficiary has filed a proper notice and acceptance. The Act appears to place property in such circumstances in limbo indefinitely.

Section 75 is missing a provision addressing who takes title to the property when one of several beneficiaries properly files a notice and acceptance upon the death of the owner but other

¹⁰ 755 ILCS 27/65(a)(2)

¹¹ 755 ILCS 27/75.

¹² 755 ILCS 27/80, 760 ILCS 25/1, 755 ILCS 5/2-7.

beneficiaries refuse to file notices and acceptances or disclaimers. Does the property go solely to the beneficiary who filed a proper notice and disclaimer? Does it go to all beneficiaries? If the beneficiary or beneficiaries who fail to file a notice and acceptance or disclaimer are descendants of the property owner and do not take title, do the descendants of those beneficiaries have an interest in the property? The answers to these questions are unclear.

Attorneys have some flexibility in addressing this issue. The Act permits a property owner to transfer property through a TODI to “one or more beneficiaries as owners, concurrently or successively, and upon any contingency, effective at the owner’s death”.¹³ Attorneys can utilize this section to render a TODI effective as to certain beneficiaries only upon the occurrence of certain contingencies. For instance, to avoid the above scenario where only some of a TODI’s beneficiaries accept or disclaim the property, a beneficiary’s right to inherit the property could be made contingent upon his or her filing of a proper notice and acceptance within a certain time period.

A TODI is revocable even if it contains a contrary provision.¹⁴ Unlike a will, a TODI cannot be revoked by a revocatory act on the instrument, an unrecorded instrument or by a provision in a will.¹⁵ An owner can revoke a TODI only through either another TODI that revokes the instrument expressly or by inconsistency or an instrument of revocation. Both types of revocation must meet the execution, witness and acknowledgement requirements of a TODI, must post-date the TODI and must be recorded prior to the owner’s death.¹⁶ When an owner

¹³ 755 ILCS 27/20

¹⁴ 755 ILCS 27/25.

¹⁵ 755 ILCS 27/55(b).

¹⁶ 755 ILCS 27/55(a).

transfers property subject to a TODI, the transferee takes the property free of any interest of the TODI's beneficiary or beneficiaries, which is another way of extinguishing a TODI.¹⁷

The Act provides Illinois attorneys with an effective estate planning tool for certain clients. When representing clients in TODI matters, make sure you thoroughly consider the long-term possibilities an instrument may present for your clients and always stay mindful of the Act's specific requirements.

¹⁷ 755 ILCS 27/60.