
REVOCABLE TRANSFER ON DEATH DEEDS

Effective January 1, 2016, California Probate Code Section 5600-5696 makes available a Revocable Transfer on Death Deed (“TOD Deed”) to transfer property to named beneficiaries. The following is a general summary of some of the key features, requirements, and limitations of a TOD Deed under this new statute. Keep in mind that as with any new legislation, courts may make additional distinctions as a result of future litigation.

KEY FEATURES:

Simplicity. In ideal situations, TOD Deeds transfer title to real property upon death with a minimal amount of pre-death planning and post-death administration. This simplicity can significantly reduce the time, money, and effort that might otherwise be required to accomplish the same property transfer. A property with a valid TOD Deed effectively avoids probate even if not held in a trust.

Control. During your life, you retain full control of the real property and your designated beneficiary has no control or rights. You can sell, encumber, or lease the property, and revoke or alter the TOD Deed without the consent of the designated beneficiary.

Not a Lifetime Gift. Because the transfer does not take place until your death, a TOD Deed is not considered to be a transfer for federal gift tax purposes.

Property Receives Adjusted Income Tax Basis. Property transferring via TOD Deed is includible in your gross estate for estate tax purposes. As a result, the beneficiary should receive the property with a step up in tax basis to the fair market value at the date of your death under Section 1014(e) of the Internal Revenue Code. An exception applies if property acquired by gift within the year preceding death passes from the decedent back to the original donor or donor’s spouse.

IMPORTANT REQUIREMENTS:

Statutory Form Required. The deed must substantially follow the format set forth in California Probate Code Section 5642. Significant deviations from the statutory form may invalidate the deed.

Limited Property Types. A TOD Deed is only allowable for improved residential real property with one to four units, a condominium unit, or agricultural property of 40 acres or less with a single-family residence. Vacant lots and commercial properties are not eligible.

Specific Beneficiary Requirements. The beneficiary or beneficiaries of a TOD Deed must be identified by name. A designation such as “to all my children” would be invalid unless the children’s names are also provided. The law also requires that multiple named beneficiaries must receive equal shares. Uneven or conditional distributions are not allowed.

Record within 60 Days. Unlike other deeds and estate planning documents, a TOD Deed must be recorded in the county where the property is located within 60 days after you sign it, or the deed has no effect.

Revocation by Recorded Instrument. Unlike wills and trusts, which may be revoked by a physical act on the document or by a subsequently executed unrecorded document, a TOD Deed may only be revoked by a recorded instrument (a subsequent TOD Deed or an instrument expressing revocation).

NOTABLE LIMITATIONS:

Joint Ownership. Property owned by “joint tenants” or as “community property with right of survivorship” automatically transfers to the remaining owner(s) when one owner dies. In that event, a TOD Deed would be ineffective. The only way a TOD Deed may be effective for these types of ownerships is at the death of the last remaining owner. For example, each joint owner may execute a separate TOD Deed for his or her ownership, with the understanding that only the survivor’s TOD Deed will be effective (if not revoked prior to the death). A partial interest owned by an individual who holds title as a “tenant in common” may effectively be transferred via TOD Deed. Property owned by an LLC, Corporation or other entity may not be transferred under a TOD Deed.

No Contingent Beneficiaries. The law does not allow the naming of contingent or alternate beneficiaries, and California’s “anti-lapse” law does not apply. This means a deceased beneficiary’s share will not pass to his or her children or any contingent beneficiary. If there are no surviving beneficiaries, the TOD Deed will be void and your property will be subject to probate.

Creditor and Estate Claims. This is a controversial and unsettled area of the new law. Please note that the beneficiary of property passing under a TOD Deed has significantly greater exposure to future creditor claims than under formal probate or trust administration laws. Secured and unsecured creditors of your estate have up to three years to make a claim against the property, and the beneficiary may be held personally liable even if the property has been sold. In addition, the personal representative of your estate may demand restitution of the property for up to three years. The law allows the claimant to demand that the beneficiary either turn over the property or its cash equivalent, plus any net income received, plus interest at the rate of 10 percent from the date of death. Even if your estate has no creditors and it is unlikely that there will be any demand for restitution, title companies may refuse to insure title to the property for up to three years. During this time, your beneficiary may not be able to sell or encumber the property.

Public Record. As a public record, the terms of a valid TOD Deed can be accessed by third parties, including the designated beneficiary, the designated beneficiary’s spouse, the designated beneficiary’s creditors, and the creditors (or potential creditors) of the transferor.

Sunset Provision. Currently, the law authorizing TOD Deeds will be in force until January 1, 2022. A mandatory review of the law’s effectiveness will be submitted to the state legislature by an independent agency who will make recommendations on whether to extend the law. If not extended, TOD Deeds recorded after January 1, 2022 will be invalid. However, valid TOD Deeds recorded before that date will remain valid.

The content herein is for general information only and should not be construed as legal advice or legal opinion. You are urged to consult with your own attorney on any specific legal questions you may have.

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