

PRESENTED AT

2016 Stanley M. Johanson Estate Planning Workshop

December 2, 2016

Austin, Texas

**SAVE ME FROM PROBATE: TRANSFER ON
DEATH DEEDS AND LADY BIRD DEEDS**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	WHAT IS A TODD	1
A.	Requirements.	1
B.	Who Can TODD or Be TODDed To	2
C.	What Can Be TODDed	2
D.	Revocable or Not	3
E.	How to Revoke.....	3
F.	Effect on Mortgages or Liens.....	3
G.	Effect of Insolvent Probate Estate	4
H.	What a TODD Does Not Do	4
I.	Medicaid Qualification and Recovery.....	4
J.	How to TODD.....	5
III.	LADY BIRD DEED	5
IV.	OTHER NONTESTAMENTARY TRANSFER OPTIONS.....	5
A.	Joint Tenancy With Right of Survivorship.....	6
B.	Revocable Trusts.....	6
V.	WHAT ARE TITLE COMPANIES DOING	6
A.	For TODDs	6
1.	Underwriting Guidelines	6
2.	Continuation of Title Insurance Coverage	7
B.	For Lady Bird Deeds.....	8
1.	Underwriting Guidelines	8
2.	Continuation of Title Insurance Coverage	8
VI.	POTENTIAL LANDMINES: CONCERNS ABOUT USING TODDS, LADY BIRD DEEDS, AND OTHER ALTERNATIVES TO PROBATE	8
A.	Personal Representative Selling TODDed Property.....	8
B.	Unintended Consequences of Nontestamentary Transfers.....	8
C.	Discrepancies with a Will	9
VII.	WHEN TO USE TODD AND LADY BIRD DEEDS.....	9
VIII.	CONCLUSION	10
	APPENDIX A	11
	APPENDIX B.....	13
	APPENDIX C.....	31

SAVE ME FROM PROBATE: TRANSFER ON DEATH DEEDS AND LADY BIRD DEEDS

I. INTRODUCTION

If I had a dollar for every time a client has said they want to avoid probate, I would own my dream villa in Italy by now. I am sure all estate planners have to spend countless hours debunking the well-intentioned advice of financial advisors, bankers, insurance agents, accountants, in-laws, next door neighbors, etc. about payable on death accounts (“PODs”), transfer on death accounts (“TODs”), and joint tenants with right of survivorship agreements (“JTWRoS”). First, debunking the myth that the cost of probate will drain their estate to the last penny so that only the lawyers and court system benefit from their estate, and then, explaining that creating a well-coordinated estate plan means that most of their non-retirement assets will go through probate to ensure that when life gives them lemons, their estate plan still makes lemonade (for example, if their beneficiaries die or become disabled, their plan is still carried out). Unfortunately, some clients look at me like I am telling them this so that I (or my colleagues) can make more money in the long run. But the well-coordinated estate plan means they may spend less money in the long run, and they will not have to contact all the different entities that have their assets to try to change beneficiaries in a time when the last thing they are thinking about is changing beneficiaries. Chances are high that they will not remember they need to change beneficiaries anyway as many people hardly remember to contact their lawyer to change their Will when their situation changes, much less contact numerous banks, financial advisors, life insurance companies, former employers, etc. When the estate plan falls apart due to lack of coordination, true astronomical expenses occur.

But it is possible the latest save me from probate instrument is not the newest wrecking ball to the well-coordinated estate plan. In the last legislative session, Texas enacted its own version of the Uniform Real Property Transfer on Death Act, known as the Texas Real Property Transfer on Death Act (“TRPTODA”).¹ The necessity for TRPTODA was highlighted after Hurricane Ike and Hurricane Dolly hit the Texas coast. In trying to provide aid for people to rebuild their homes or relocate, the federal government and various legal aid groups discovered that the person living in the home was often not the owner or not the sole owner. Low-income families are less likely to have Wills and

less likely to have cleared title with formal intestate succession proceedings; further, improperly drafted Lady Bird Deeds, likely created without lawyers, helped exacerbate the problem. Clearing title required significant resources prior to rebuilding or relocating some of the lowest income Texans.²

According to the Texas Access for Justice Commission website, all Texans, but especially low-income homeowners, will benefit substantially from this law by avoiding probate.³ And in theory, TRPTODA does provide a simple process for the non-probate transfer of real estate.

This article is meant to better understand if all Texans really will benefit substantially from TRPTODA as advertised. It begins by giving an overview of what a transfer on death deed (“TODD”) is and then, more briefly, giving an overview of a Lady Bird Deed and other non-testamentary transfer options for real property. Then, this article attempts to summarize how title companies are viewing these instruments and raises concerns about the unintended consequences of these instruments. Finally, this article concludes by addressing when to use TODDs and Lady Bird Deeds.

II. WHAT IS A TODD

A TODD is a non-testamentary instrument to transfer an individual’s interest in real property to one or more beneficiaries effective at the transferor’s death.⁴ A Texas TODD can only be a deed executed and acknowledged on or after September 1, 2015, by a transferor who dies on or after September 1, 2015.⁵ Although many are referring to a TODD as a statutory Lady Bird Deed, the two instruments are not the same.

A. Requirements.

To be effective, a TODD must meet the following requirements: (1) contain the essential elements of a recordable deed except as provided in subdivision (2); (2) state that the transfer of an interest in real property to the designated beneficiary is to occur on the death of the owner; and (3) must be recorded in the deed records in the county clerk’s office in the county in which the real property is located prior to the transferor’s death.⁶

Although called a deed, a TODD is unlike any other Texas deed. Notably, the statute and

¹ See Texas Estates Code Chapter 114, added by Acts 2015, 84th Leg., Ch. 841 (S.B. 462), effective September 1, 2015.

² See Lucy Wood, *Transfer on Death Deeds in Texas: High Time for the TODD*, State Bar of Texas, Advanced Elder Law Course, 5.1 & 5.7 (2016) ; Jerry Frank Jones, *Transfer on Death Deeds*, State Bar of Texas Advanced Real Estate Drafting Course, 22.1 (2016).

³ <http://www.texasatj.org/transfer-death-deed>

⁴ Tex. Estates Code §§ 114.051 & 114.053.

⁵ Tex. Estates Code § 114.003.

⁶ Tex. Estates Code § 114.055.

promulgated forms never use the terms “Grantor” and “Grantee.” Instead, the typical grantor is referred to as the “Transferor” and the typical grantee is called a “Beneficiary,” “Designated Beneficiary,” or “Transferee.” In fact, one essential element for a deed is specifically not required for a TODD. Although a deed usually must be delivered and accepted by the grantee,⁷ a TODD is effective without notice or delivery to or acceptance by the designated beneficiary during the transferor’s life.⁸

B. Who Can TODD or Be TODDed To

One or more individuals, referred to herein as a transferor or transferors, may execute a TODD.⁹ However, as with any document, just because a TODD is executed, does not mean it is effective.

A transferor must have the capacity required to make a contract in order to make or revoke a TODD.¹⁰ An agent under a power of attorney may not create a TODD.¹¹ The statute does not mention whether an agent under a power of attorney may revoke a TODD or convey or encumber the property. An argument can be made that an agent who has the power to change beneficiaries, sell or mortgage real property, and make gifts should be able to revoke a TODD or convey or encumber the property.

If a transferor is a joint owner with right of survivorship, the TODD will be effective at the transferor’s death only if the transferor is the last surviving joint owner.¹² Otherwise, the interest of the transferor belongs to the surviving joint owner or owners at the transferor’s death.¹³

A beneficiary of a TODD can be a person, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.¹⁴

A designated beneficiary must survive the transferor by 120 hours or his interest will lapse and pass to the alternate beneficiary, if one is named.¹⁵ However, if two or more designated beneficiaries are identified to receive concurrent interests in real property, the share of a designated beneficiary who predeceases the transferor will be subject to and pass

under Subchapter D of Chapter 255 of the Texas Estates Code, the anti-lapse statute, as if the TODD were a devise made by a Will.¹⁶ Specifically, if a designated beneficiary predeceases the transferor but is a descendant of the transferor or the transferor’s parents, the descendants of the designated beneficiary who survive the transferor by 120 hours will take the designated beneficiary’s share of the real property.

Interestingly, no mention is made as to whether Subchapter D of Chapter 255 applies when there is only one designated beneficiary. So if a transferor names multiple designated beneficiaries who are his children and if one of those children predeceases the transferor, her share shall lapse and pass to her children as if the TODD were a devise made by a Will. However, if a transferor names only one designated beneficiary who is also his child and if she predeceases the transferor, her share shall lapse and shall not pass to her children as if the TODD were a devise made by a Will. Notably, in the form TODDs that will be discussed later, there is no mention of the effects of the anti-lapse statute on a gift to two or more designated beneficiaries or the lack of its application when there is only one beneficiary. As per stirpes distribution can be hard to set out in a deed, especially when drafted by a non-lawyer, and is likely what most transferors would want to have happen, at least in my practice, a TODD would satisfy more transferors if the anti-lapse statute applied in all situations and not just when there are multiple designated beneficiaries.

A designated beneficiary may disclaim all or part of the designated beneficiary’s interest as provided by Chapter 122 of the Texas Estates Code.¹⁷

C. What Can Be TODDed

Any real property interest located in the state of Texas can be transferred using a TODD.¹⁸ After filing a TODD, the transferor still retains all of his interest and rights while living.¹⁹ However, a TODD cannot transfer real property with any warranty of title even if the deed states that it does.²⁰ This means the designated beneficiary will have no right to assert a claim against the transferor and, through that claim, reach the transferor’s owner title policy if the transferor did not have good title. Similar to a Will, the designated beneficiary gets only the title the transferor had.

⁷ Tex. Prop. Code § 5.021.

⁸ Tex. Estates Code § 114.056.

⁹ Tex. Estates Code §§ 114.002(a)(7) & 114.0057(d).

¹⁰ Tex. Estates Code § 114.054. Notably, the Uniform Real Property Transfer on Death Act requires testamentary capacity rather than contractual capacity. See Uniform Real Property Transfer on Death Act § 8 (2009).

¹¹ *Id.*

¹² Tex. Estates Code § 114.103(b).

¹³ *Id.*

¹⁴ Tex. Estates Code §§ 114.051 & 114.002(a)(1) & (a)(5); Tex. Gov’t Code § 311.005(2).

¹⁵ Tex. Estates Code §§ 114.103 & 114.151.

¹⁶ Tex. Estates Code § 114.103(a)(4).

¹⁷ Tex. Estates Code § 114.105.

¹⁸ Tex. Estates Code § 114.051 & 114.002(a)(5).

¹⁹ Tex. Estates Code § 114.101(1).

²⁰ Tex. Estates Code § 114.103(d).

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Title search: Save Me from Probate: Transfer-on-Death Deeds and Lady Bird Deeds

First appeared as part of the conference materials for the
2016 Stanley M. Johanson Estate Planning Workshop session
"Transfer-on-Death and Lady Bird Deeds"