

## CONSIDERATIONS FOR A TRANSFER ON DEATH DEED

In 2008 the Minnesota legislature enacted a law allowing persons to sign deeds that only become effective on death. These deeds are known as Transfer on Death Deeds (TODD). TODDs may assist persons with simple estates to avoid probate. The Transfer on Death Deed is similar to a Payable on Death (POD) designation on a bank account or a Transfer on Death (TOD) designation for securities. The use of a TODD is quite inexpensive and flexible and may help persons with simple estates to avoid probate.

A TODD may be helpful for persons who do not have a trust and have elected not to currently transfer ownership of their homestead because of the potential need to apply for Medical Assistance in the future.

Factors to be considered in determining whether or not a TODD is advisable in your situation include the following:

1. Real Estate Taxes A TODD does not affect homestead taxes.
2. Gift Taxes A TODD does not require a gift tax return because it is not effective until the owner's death.
3. Estate Taxes The entire value of the homestead conveyed in a TODD will be included in the current owner's estate on death. This will not cause any Minnesota estate tax consequences, unless the taxable estate exceeds the current estate tax minimum of one million dollars.
4. Income Taxes Real estate transferred with a TODD will be included in the previous owner's estate at death and will receive a full stepped-up tax basis. The beneficiaries report no capital gains on the sale of the property if it is sold for the fair market value as of the date of death.
5. Recording A TODD or its revocation must be recorded prior to death to be legally effective.
6. Revocation 1) A TODD may be revoked at any time by the owner(s), 2) A TODD may be revoked by a revocation document or by a second TODD which is acknowledged on a later date, 3) A revocation must be recorded prior to death of the owner(s), 4) If owned by joint tenants and the revocation is not executed by all owners, the revocation is not effective unless executed by the last surviving owner, 5) A non-TODD conveyance to a third party after a TODD is recorded revokes the TODD as to the interest conveyed.
7. Mortgages A TODD allows the current owner to mortgage the homestead without the signature or consent of the grantees. The grantees take the property at the death of the grantor subject to all mortgages or other encumbrances of the real estate.
8. Medical Assistance A TODD has no effect on an individual's ability to apply for Medical Assistance because it is not effective until death. A TODD will not prevent the owner from selling the property during the owner's lifetime if a sale is needed to meet Medical Assistance eligibility requirements or for any other purpose. A TODD will not protect property from Medical Assistance claims or liens. The grantees of the property will take the property subject to Medical Assistance claims or liens.

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9. Probate A TODD may assist the estate in avoiding a probate proceeding. A determination of whether a probate proceeding is necessary in your particular situation should be made with the consultation of your estate planning attorney. If a Minnesota resident dies with \$50,000.00 or more worth of properties, a probate proceeding is required to transfer the solely owned properties.
10. Green Acres Classification Recording of a TODD may trigger reconsideration of green acre classification of your real estate.
11. Subdivision Each parcel of land described in a TODD should be a parcel of land that is a separate tax parcel or is approved for subdivision such that if the same parcel or parcels were described in any other deed, the deed would be accepted for recording as being in compliance with all subdivision requirements of the government entities (city, township and/or county) exercising subdivision regulations.
12. Spouses Do not consider a TODD unless the spouses of all the owners join in executing the TODD. If you become married after recording a TODD, you should seek legal counsel regarding spousal interest in the property subject to the TODD.
13. Claims and encumbrances Real property described in a TODD pass subject to all effective conveyances, assignments, contracts, and “other encumbrances.” The TODD statute does not provide for payment of the unsecured claims of the deceased owner’s general creditors. Unsecured claims could still be pursued in probate against probate assets, if any.
14. Grantees group, class, or minors Naming a class of grantees is not recommended. It can result in unintended consequences such as the following:
  - a. If title vests in a minor grandchild, a court appointed conservator and Probate Court approval will be required to convey the minor’s interest in the real estate.
  - b. A probate proceeding will likely be needed to specifically identify “descendants” or “issue” or “grandchildren” surviving the grantor(s).
15. Control Transfer of the real estate directly to multiple grantees fails to provide control to a specified individual, such as a Personal Representative or Trustee, to pay expenses, maintain property, prepare and conduct a sale, etc.
16. Anti-lapse Statute Failing to include proper survivorship language, may result in the unintended consequence of having descendants of a named grantee who does not survive the grantor receive the interests of a predeceased grantee.
17. After Acquired Title The grantee does not receive any property acquired by the grantor subsequent to the TODD or otherwise not specifically designated on the TODD. If the grantor sells all or part of the property subject to the TODD prior to death, the grantee does not receive any portion of the property not owned by the grantor at time of grantor’s death, but the grantee may have rights to unpaid proceeds of sale, condemnation, or insurance.