
Agnew Law Office, P.C.

An Estate Planning Law Firm

TRANSFER ON DEATH INSTRUMENT

A Transfer on Death Instrument ("TODI") is an estate planning device that allows a residential real estate owner to pass their property upon death to a beneficiary without having to go through the probate process.

Effective Only Upon Death

A TODI is not a deed. They do not transfer ownership to property while the owner is alive. TODIs are more similar to wills in that they only transfer legal title upon the death of the property owner. While alive, a property holder who executes a TODI (known as an "owner") is not bound in any way by the TODI. A TODI has no effect on the owner's right or ability to sell the property as they see fit. Additionally, a TODI does not affect the property interests of third parties such as leinholders, creditors, and mortgagees prior to the owner's death.

Revocation of a TODI

Once executed and recorded, a TODI can be revoked at any time by the owner. TODIs are "revocable" in that the owner is not bound by the instructions set forth in their TODI. In other words, the owner of a TODI is free to modify or rescind the instrument at will. The owner can accomplish this by executing and recording **(i)** a subsequent TODI or **(ii)** a written document that expressly revokes the prior TODI.

Property Restrictions

A TODI can only be used for **residential real estate**, which is defined in the Illinois TODI Act as:

- ✓ Real property improved with not less than 1 nor more than 4 residential dwelling units.
- ✓ Units in Residential Cooperatives.
- ✓ Condominiums.

- ✓ A single tract of agriculture real estate consisting of 40 acres or less which is improved with a single family residence.

Beneficiaries

The named beneficiaries of a TODI have no legal right in the owner's property while the owner is alive. Put simply, a TODI does not have any effect on the owner or the named beneficiaries while the owner is alive.

A TODI can name multiple beneficiaries. Unless stated otherwise in the TODI, the relationship of the beneficiaries to the owner affects who the interest of the beneficiary will transfer to should a named beneficiary predecease the owner. For example, if a beneficiary that predeceases the owner is a descendant of the owner (i.e. a child, grandchild, etc.), the beneficiary's interest will pass automatically "*per stirpes*" to the descendants of the beneficiary. "*Per stirpes*" is a Latin term meaning a named beneficiary's share will pass in equal portions to his or her descendants rather than to the other named beneficiaries. If a beneficiary that predeceases the owner is not a descendant of the owner, the beneficiary's interest passes to the other named beneficiaries in equal shares rather than to that beneficiary's descendants.

When a beneficiary receives residential property through a TODI, the beneficiary essentially "steps into the shoes" of the owner, meaning the beneficiary takes the property subject to all encumbrances, mortgages, liens, and other interests to which the property was subject prior to the owner's death. Additionally, the beneficiary takes the property without any covenants or warranties of title, even if the TODI itself states otherwise.

Incapacity

In the event of an owner's incapacity, a TODI can still be created for the owner's property, but **only if** the owner has executed a Power of Attorney that expressly authorizes the designated agent to execute a TODI on the owner's behalf. This type of authorization can be added to your Power of Attorney for Property at your request.

Joint Owners

TODIs can be created by joint owners (see the "Tenancy by the Entirety" summary for more information about joint owners). A TODI can be executed by either or both joint owners.

- ❑ If just one joint owner executes a TODI, that joint owner must survive the other joint owner in order for their TODI to be effective.

- ❑ If both joint owners execute a TODI, the TODI will be effective upon the death of the surviving joint owner, regardless of the order of death. A TODI executed by both joint owners can only be revoked by both joint owners. However, after the death of one joint owner, the surviving joint owner may revoke a TODI executed by both joint owners.

Attorney Preparation Required

The Illinois TODI Statute mandates that, as legal documents, all TODI instruments must be prepared by an Illinois licensed attorney.