



## Transfer on Death Deed

The law in New Mexico allows an owner of real property (land or house) to transfer that property to another person (grantee beneficiary) through the use of a **Transfer on Death Deed (TODD)**. This deed allows the owner to designate a person or persons who will become the owner of the property when the original owner dies without any need for that property to go through probate.

### **There is no transfer until the owner dies.**

The owner keeps control of the property until the owner dies. The owner does not have to have permission from the grantee beneficiary to sell the property, borrow money on it, or give it away. The owner can **revoke** (cancel) the deed at any time and can execute (sign), acknowledge (sign before a notary) and record a new TODD providing for a different person to get the property. The grantee beneficiary does not have to be notified of the recording of the TODD and does not have to be notified if the TODD is revoked. Since the grantee beneficiary has no claim on the property during the lifetime of the owner, the property can't be taken by the grantee beneficiary's creditors while the owner is still alive. A TODD also will not disqualify an owner from receiving Medicaid assistance for nursing home care, because the owner has not given the property away.

### **How does an owner make a TODD?**

It is very important that a TODD be properly drafted (written), executed and acknowledged. Therefore, it is advisable that the owner consult with an attorney to be certain that all of the requirements have been met. The TODD must then be recorded at the county clerk's office in the county in which the property is located.

### **A Joint Tenancy is not affected by a TODD.**

If joint tenants record a TODD, the property does not go to the grantee beneficiary when the first joint tenant dies. Instead, the surviving joint tenant becomes the sole owner of the property. The property goes to the



grantee beneficiary once the last joint tenant dies unless that joint tenant does a new TODD.

### **A TODD controls over a will.**

If the owner's will states that a certain person or persons will inherit real property and the owner recorded a TODD for that property, the grantee beneficiary inherits the property through the TODD. The owner's will has no effect on the TODD. **No matter what you say in your will, the TODD will control the distribution of your property.**

### **The grantee beneficiary gets the owner's interest in the property subject to any claims against the property when the owner was alive.**

If the owner had a mortgage, if there was a lien against the property, or if the owner had given away an interest in the property such as an easement, the grantee beneficiary's interest in the property is subject to those claims and obligations.

### **When the owner dies, the owner's creditors can make a claim against the property.**

The real property is transferred at the death of the owner. If the deceased owner owes money to creditors, the creditors can attempt to be repaid out of the real

property if there are no other assets available to pay them. To make that claim, the creditor would have to open a probate proceeding (if there wasn't one already

open). The transfer is also subject to allowances for the owner's surviving spouse and minor children if the owner didn't leave enough assets to provide those allowances.

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## *Frequently Asked Questions About TODDS:*

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**Q. How does the grantee beneficiary get title to the property after the owner's death?**

**A.** The grantee beneficiary takes a certified copy of the owner's death certificate to the county clerk's office to be recorded. This completes the transfer. Title is transferred without having to open a probate proceeding.

**Q. If I were to die after being in a nursing home, getting Medicaid, would my house go to my TODD beneficiary or would the house be sold so Medicaid could be paid back for money it paid for my nursing home care?**

**A.** There is no easy answer to this question. Under New Mexico law, Medicaid can recover from probate estates. The TODD property will not be in the probate estate. However, the TODD law also allows creditors to make claims against the TODD property. Currently, Medicaid is in the process of stepping up its estate recovery procedures and it is yet to be seen whether Medicaid will make claims against this type of transfer.

**Q. After my death, if my beneficiary wants to sell my house immediately, could my creditors create a problem with the sale?**

**A.** If there isn't enough money in your estate to pay your creditors, the TODD property would be subject to your creditors' claims. A creditor has one year from the date of the original owner's death to make a claim against the estate of the

deceased. Title insurers would likely be reluctant to issue title insurance before that one-year time period had passed.

**Q. Does my beneficiary get a stepped-up tax basis in my real property when I die?**

**A.** Yes, the property received at your death would get a stepped-up tax basis as property your beneficiary inherited from you. This means the beneficiary will not have to pay capital gains taxes on the amount the property increased in value while you owned it.

**Q. I have rental properties. Can I use a TODD to transfer those assets?**

**A.** Yes. The TODD is for any real estate located in New Mexico. Any existing leases would continue in effect after the owner's death. Before you execute a TODD for business or investment property, you should consult with an attorney as there may be tax consequences you need to consider.

**Q. What effect would a TODD have on taxation of my estate?**

**A.** The TODD itself would have no effect. Estate Taxes are calculated on one's taxable estate. A TODD removes your real estate from your probate estate, not your taxable estate. Your taxable estate is basically everything of value you own when you die. If you have concerns about estate taxation, you should consult with a tax professional.

## **Transfer on Death Deed (TODD)**

- **Allows NM real estate to be transferred to a beneficiary after your death**
- **Owners keep title and control while they are alive**
  - **Sign deed now and record it**
  - **Title transfers after your death**
  - **You can revoke the deed and execute a new one**
  - **You can sell the property or borrow money on it**

## **Transfer on Death Deed (TODD)**

- **Beneficiary can't take property or borrow money on it until after owner's death**
- **Property not part of probate estate**
- **Won't affect Medicaid eligibility because no transfer until after death**
- **TODD not advised for multiple beneficiaries because all have to agree on what's to be done with the property.**