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From the Attorney's Desk

TRANSFER ON DEATH DEED: CURE FOR PROBATE OR PANACEA?

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TRANSFER ON DEATH DEED:

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Our Team in the Community

Catherine B. Read, Certified Elder Law Attorney*, will serve as an attorney expert on the **DSFG** professional panel on September 23, 2026 at their Resource Fair at the Christina Hilton in Newark.

Calendar of Events

August 26th: **Caregiver Conference Bally's Hotel Resort Dover, DE**

September 7th: Office Closed for Labor Day

September 23rd: Catherine

CURE FOR PROBATE OR PANACEA?

Governor Meyer signed House Bill 147, the Uniform Real Property Transfer on Death Act on September 5, 2025. It can be found at 25 Delaware Code Chapter 2. **https://delcode.delaware.gov/title25/c002/index.html**. The Act, creates a Transfer on Death Deed ("TODD"). It is intended to create a mechanism to avoid probate. According to the official synopsis of House Bill 147, "a beneficiary who will *automatically* receive the real estate on the owner's death without a probate procedure." (Emphasis supplied). **https://legis.delaware.gov/BillDetail?LegislationId=142272**.

Is that true?

Probate is the process of transferring property out of the name of the dead into the name of the living. If property is solely in an individual's name at death and there is no contractual or statutory authorization to pass title to a beneficiary or heir, then there is a probate. It does not matter whether the property is a car, bank account or house. With most types of property, one can designate a beneficiary. A beneficiary is entitled to obtain the property upon the death of an owner. Bank accounts, mutual funds, cars, IRAs and of course life insurance all have or at least possibly have beneficiaries. Until September 5, 2025, real estate in Delaware did not. Most states do not have TODD. Some states that adopted a TODD statute before Delaware have dealt with some of the unintended consequences that Delaware's version of the Uniform Transfer on Death Deed Act addresses. Discussion of some unresolved issues will be addressed.

The main purpose of estate planning is family harmony. Transfer of property upon death that is quick, cheap and easy facilitates family harmony. There are other considerations other than being quick. Is the TODD really automatic? Is it quick, cheap or easy?

What is needed to create a TODD? Is it more complicated than a non-TODD deed? Is it easier than a Will? Is it easier and more effective than a trust? Does it facilitate family harmony?

HOW TO CREATE A TRANSFER ON DEATH DEED

In my experience, it is rare that a lay person prepares their own deed. Real estate law is complex. The likelihood of making an error with a deed is significant. The TODD statute aims to make a beneficiary designation easy. Therefore, a statutory form is provided to create a beneficiary designation for a TODD. A form to revoke the beneficiary designation if the one changes one's mind is also provided. The Recorder of Deeds and the Register of Wills are directed to create forms and update their systems to facilitate filing a TODD. The Office of Vital Statistics is also directed to make it easier for beneficiaries of TODD to obtain death certificates. The forms have instructions and frequently asked questions (called Common Questions). All the forms and instructions suggest that one consult with a lawyer.

Basic Definitions:

1. A "Beneficiary" is an individual. A "grantee."
2. A "Designated Beneficiary" is an individual designated to receive property in a TODD.
3. A "Person" is broadly defined: individual, corporation, estate, trust, etc.

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4. "Property" is an interest in real property in this State which is transferable on the death of the owner.
5. A "Transferor" means an individual who makes a transferor on death deed. A "grantor."

Some Basic Concepts:
1. The TODD statute in nonexclusive. It does not affect any other method of transferring property.
2. An individual may transfer property to one or more beneficiaries effective at the transferor's death by a TODD.
3. A TODD is always revocable, even if it or anything else says it is not.
4. The capacity of a Transferor is the same as what is required to make a will.

The statutory requirements? A transfer on death deed must:
1. Other than the below exceptions, the TODD must contain the essential elements and formalities of a properly recordable deed, including notarization of all signatures required under the statute.
2. The TODD must be witnessed by two individuals. One witness must not be a beneficiary.
3. The TODD must state the transfer to the designated beneficiary is to occur at the transferor's death.
4. Be recorded before the transferer's death in the recorder of deeds in the county where the property is located.

Unlike a regular deed, it need not be delivered or accepted by the beneficiary during the transferer's lifetime. The beneficiary need not be notified. No consideration need to be given. That is the potential transfer at death is a gift.

There is no effect on the transferer's current interests or the beneficiary's because of the TODD. Only upon death does the beneficiary have an interest in the property. Therefore, a beneficiary cannot lose public benefits or have a judgment collected until the transferer dies.

Is this easy?

This is approximately what one must do to create a will. The TODD has to be in writing. One has to maintain all formalities. This includes two witnesses. The witness requirements are stricter than a will. The TODD must be notarized. A requirement beyond a will is that the TODD must be filed with the Recorder of Deeds before the transferer dies.

The legal description must be incorporated or attached to the TODD. A legal description of property in Delaware identifies a property's boundaries and location. It is the metes and bounds description of lines, angles, and distances. It often refers to a recorded survey with the Recorder of Deeds.

This is more complicated than giving property to a beneficiary in a Will or Trust. In estate planning, we typically identify the property to be given by its address and tax parcel number. As many of you know, we set out the terms and conditions. For example, will debts against the property be paid at death or will the property remain subject to encumbrances? Will the property be kept in trust for asset protection? Is there a contingency, such as what to do if a beneficiary or contingent beneficiary is on public benefits or in debt or going through a divorce or a substance issue?

HOW TO REVOKE A TRANSFER ON DEATH DEED

A TODD can be revoked anytime the transferer wishes. There are three ways to revoke a TODD.

The most obvious way is to sell the property. The TODD ends with the transfer of property.

The second way is to file a written revocation with the Recorder of Deeds. The revocation must be in writing. It is not like revoking a will where the only thing one has to do is tear up the will.

The third way to revoke a TODD is to prepare and file a new TODD which designates a different beneficiary.

In each of the three ways, there is a required public recordation of a new deed with the applicable Recorder of Deeds.

DOES TODD PROPERTY PASS FREE AND CLEAR? DOES IT ALWAYS AVOID PROBATE?

The answer is no. The beneficiary takes the property subject to all the mortgages, liens, judgments and debts of the transferer/decedent. Wills and trusts may provide for payment of those obligations. Certain types of trusts are designed to pass property without the obligations of the transferer/decedent attaching. But TODD retains the obligations on the property.

While the purpose of the TODD is to avoid probate, the statute specifically provides for probate where the transferer/decedent has an obligation to a creditor or a spouse or a child. A claimant may open an estate at the Register of Wills, file a claim and enforce the liability against the property transferred by TODD. So that a beneficiary can be obligated to pay the debt of the transferer to the extent of the value of the TODD property. A beneficiary is not responsible for any excess.

A beneficiary may disclaim the TODD if the debt does not make retaining the TODD property worthwhile.

GENERAL OBSERVATIONS ON TODD

1. The TODD is public. Wills are private until death. Trusts are always private.
2. A joint owner can change the designation. The surviving spouse can change TODD and disinherit step-children. This is very common in ordinary estate planning. Trusts prevent this.
3. There is no tax planning with TODD.
4. TODD can complicate estate planning. TODD supersede wills and trusts.
5. While Delaware's TODD wisely provides for contingent beneficiaries, children of a TODD beneficiary can be disadvantaged.
6. It is not easy to change TODD if one is elderly or infirm.

COMMON PROBLEMS AND ISSUES EXPERIENCED IN OTHER STATES

Inquiring among other Certified Elder Law Attorneys who have TODD statutes see the following problems and issues.

1. Do it yourself TODD errors are extremely common.

2. Powers of attorney are not recognized in revoking TODD. As a result, title companies in Texas will not insure the sale of real estate subject to a TODD designation by a power of attorney. Court involvement is required.
3. A major issue in District of Columbia, Texas, Ohio and at one time Illinois is that title companies require probate when real estate is sold by a TODD beneficiary if it is sold within the claim period.

What does this last issue mean? All states have probate statutes. All states have a process where creditors of a decedent can file claims against estates to be paid from an estate. Any debt you owe when you die is owed by your estate. If your family, heirs or beneficiaries do not open an estate, and they may not because there is no property passing through probate, a creditor may open an estate, file a claim and pursue the claim against the decedent's property. Delaware's TODD statute recognizes this process and permits it against TODD property.

When real estate is to be sold within the probate claim period, title insurance companies require that the net proceeds be held in escrow. This is because they do not want to be stuck dealing with a claim in an estate opened after the settlement.

For example, George dies on April 1st and the TODD leaves his house to Mary. On June 1st, Mary sells the house to Ralph. On July 1st, Alice, who is owed money by George, opens George's estate and then files a claim against it. The house sold by Mary to Ralph is subject to that claim. Alice can sue the estate, get a judgment against it and then lien Ralph's house, which is subject to George's debts, just as if George was alive. The title company, which insured Ralph's title, is responsible for that lien. The title company not only has to pay the lien. It can only recover its loss by pursuing Mary.

Title insurance companies want zero risk in issuing its policies.

In a typical probate, either the settlement attorney/title agent retained by the buyer retains the net proceeds, or the probate attorney for the seller holds them in escrow. If the probate attorney holds the escrow, it must promise not to distribute the net proceeds to the seller (here Mary) until the claim period has lapsed and the estate is closed.

In theory, there is no reason why a seller's escrow agent (or the buyer's title agent) cannot simply hold the proceeds pending expiration of the claim period. Notwithstanding, title companies have required probate to be open. Perhaps because of the public notice required.

The chief inconvenience of probate is not probate *per se*, but that assets may be tied up in probate. TA TODD does not avoid ethe period during which creditors may file claims against TODD property.

SOME TYPE OF ASSET PROTECTION TRUSTS REQUIRE PROBATE

Elderly clients who are concerned about long term care and the cost frequently come to us for estate planning. A technique commonly used by elder and disability law attorneys is to transfer property into a spouse who will die soon and by will create a testamentary asset protection trust for the surviving spouse. Federal law requires that this type of asset protection trust be created only by will, not by an inter vivos or living trust. A probate is required as property must be in the name of the first to die spouse in order for there to be a testamentary trust. That is, a trust created by a will. TODD cannot be used in this context.

ADVANTAGES OF THE TODD STATUTE

The TODD is another tool for the estate planning attorney to use. It may be appropriate where there is one clear beneficiary who will want to live in the property for some time after the transferer's death.

TODD can be used to transfer property into trusts.

TODD is better than joint property. When one creates a deed which adds another person, particularly a child as a joint owner, one can be stuck. If a parent decides that the child should be taken off the deed, then the parent needs the child's consent. If the parent severs the joint deed by putting the property back into her name, then the child can claim half the property while the parent is still alive. *Korn v Korn*. With TODD, the owner of the property retains control.

CONCLUSION

TODD is another estate-planning technique to be used when appropriate.

A TODD is generally preferable to joint ownership when the objective is to transfer property at death without giving the beneficiary a present ownership interest. A TODD will avoid probate of the property, but it does not eliminate the creditors' claims period. That claims period may delay access to estate assets, particularly proceeds from the sale of real estate during the claims period.

A TODD, by itself, provides no tax, public-benefits, or asset-protection planning.

A TODD is public record, as are instruments changing or revoking a TODD.

Unlike a will, which can be revoked relatively easily, a TODD must be revoked in accordance with statutory requirements. (I would state the specific execution, witnessing, notarization, and recording requirements only after confirming the applicable statute).

The process is sufficiently technical, and the consequences of an error sufficiently significant, that an attorney should be used in preparing a TODD.

A TODD is not a comprehensive estate plan. It does not, by itself, provide incapacity planning or asset protection, although it can provide probate avoidance for the property it covers.

A TODD may also have limitations concerning contingent beneficiaries.

If a minor becomes the beneficiary, the minor generally cannot independently manage or transfer the property until reaching the age of majority. Court involvement, including the possible appointment of a guardian, may be necessary.
A TODD does not itself protect property received by the beneficiary form the beneficiary's creditors, including claims arising from bankruptcy, litigation, or divorce. A properly structured trust may provide protections that TODD does not.

Property transferred to the beneficiary may also remain subject to claims arising from the deceased owner's debts.

TODDs are subject to specific statutory requirements. Failure to comply with those requirements can render the transfer ineffective. Naming multiple beneficiaries can also create conflicts. Unlike a trust, a TODD does not provide a private mechanism for resolving disputes among beneficiaries. As a result, disputes may be more likely to require court intervention.

OUR TEAM IN THE COMMUNITY

Estate & Elder Law Services is proud to share that our own Catherine B. Read, Certified Elder Law Attorney*, will serve as an attorney expert on the **DSFG** professional panel on September 23, 2026 at their Resource Fair at the Christina Hilton in Newark. She will be presenting to more than 75 attendees on an important topic:

Planning for the future of individuals with special needs and their families. More details coming soon.

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Planning
for a *Lifetime*

A Resource Fair & Panel Discussion
for Families and Caregivers
Supporting Individuals with Disabilities

Empowering Families with the knowledge, tools and resources to plan for the furture *with confidence.*

What to Expect

- Panel Discussion
- Resource Fair with Local Organizations
- Financial Planning Guidance
- Estate Planning Information
- Legal Insights from an Estate Planning Attorney
- Community Resources & Support

WHO SHOULD ATTEND?

- Parents & Caregivers
- Individuals with Disabilities
- Family Members
- Guardians
- Educators & Service Providers
- Anyone interested in planning for the future

DATE:
September 23,2026
at 5:30 pm

LOCATION:
Christiana Hilton
100 Continental DR, Newark DE 19713

COST:
No cost to attend

FOOD &DRINK:
Light Food and drink provided

Register here

Or call 302-366-0366

Alex DelCollo CPFA®, CAP®, Financial Advisor
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This event is funded in part by: Securian Financial Group, Allianz Life Financial Services, LLC, and RBC Rochdale

Calendar of Events

- **Wednesday, August 26th:**
Caregiver Conference Bally's Hotel Resort Dover, DE
As part of DSRN we will sponsor the Annual Easter Seals Caregiver Conference - a conference at which Kylee has presented twice in the past to caregivers of individuals of many types of disabilities. It is an annual worthwhile tradition to connect with Easter Seals representatives, other families and many vendors serving the needs of this community.

- **Monday, September 7th:** Office Closed for Labor Day

- **Wednesday, September 23rd:** A Resource Fair & Professional Panel for Families and Caregivers Supporting Individuals with Disabilities *Featuring* Catherine B. ("Kylee") Read - Attorney Panelist 5:30p - 7:30p EST at the Christiana Hilton100 Continental Dr Newark, DE 19713

E&EL

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