

BY CHARLES G. BROWN &
NATHAN HINCH



The New & Improved Transfer on Death Instrument Act

A detailed guide to the significant changes in the TODI Act by the drafters.



▲ **CHARLES G. BROWN** of DeKalb is a past chair of the ISBA Trusts and Estates Section Council and is the principal drafter of the Illinois TODI Act.

✉ cbrown@brownlawdekalb.com



▲ **NATHAN B. HINCH** is an attorney with Meyer Capel in Bloomington. He is a member of several ISBA sections and has previously served on the Construction Law Section Council.

✉ nhinch@meyer-capel.com

AMONG ILLINOIS' NEW LAWS TAKING EFFECT JAN. 1, 2022, the Transfer on Death Instrument (TODI) Act¹ has been significantly amended to better provide another option for clients seeking cost-effective and straightforward ways to transfer real property at death. The authors had the privilege to be a part of an *ad hoc* ISBA committee that worked on this effort, in coordination with related ISBA practice-area committees, representatives of the National Association of Elder Law Attorneys (NAELA), and representatives of the Illinois Land Title Association. The goal was to update the Act to better serve clients, not just for residential real estate, but for all types of real property and to provide consistency with the recently enacted Illinois Trust Code as it relates to the claims of creditors and statutory claimants of nonprobate assets.

What is the TODI Act?

The TODI Act (“Act”) is Illinois’ version of the Uniform Real Property Transfer on Death Act (“Uniform Act”) promulgated by the National Conference of Commissioners on Uniform State Laws.²

1. The Real Property Transfer on Death Instrument Act, 755 ILCS 27/1 *et seq.* The amendments to the Act were enacted as Public Act 102-0068.

2. See Charles G. Brown, *The Transfer on Death Instrument Comes to Illinois*, 99 Ill. B.J. 618 (Dec. 2011), law.isba.org/3saURKh.

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- Leonard Berg, *Liens Against Decedent's Real Estate*, Trusts & Estates (Nov. 2021), law.isba.org/3F83jh4.
- Michael J. Fleck, *Public Act 102-68—Long Awaited Changes to the Illinois Residential Real Property Transfer on Death Instrument Act*, Trusts & Estates (Aug. 2021), law.isba.org/3E8aowJ.
- Susan Bart, *Who Are My Qualified Beneficiaries*, 109 Ill. B.J. 26 (May 2021), law.isba.org/3H8rq67.

The purpose of the law as originally enacted is to provide a mechanism for the transfer of ownership of residential real estate to named beneficiaries upon the death of the owner without the need for probate administration. To do so, an owner is required to execute and record prior to death a TODI with the recorder of deeds having jurisdiction of the subject real estate. The TODI, though recorded like a deed, has no legal effect on the owner's title so long as the owner remains living.³ Upon the death of the owner and subject to conditions identified in the Act, the named beneficiaries take title to the residential real estate (subject to any mortgages, liens, or other interests of record against the property).⁴ Thus, the Act provides a means for an owner of residential real estate to transfer the property to her family or other desired beneficiaries, outside of probate and without the necessity of retitling the property during life or using a revocable trust. This is similar to the manner in which owners of life insurance policies, retirement accounts, or other financial assets may designate a beneficiary or name a “payable on death”⁵ or “transfer on death”⁶ beneficiary to receive the asset upon the owner's death.

Not just for residential real estate anymore

Prior to Jan. 1, 2022, the Illinois version of the Uniform Act restricted the use of a TODI to “residential real estate” as defined by the Act. That restriction will no longer be applicable for owners dying after Jan. 1, 2022. Illinois has now joined other states that have adopted a version of the Uniform Act or similar law in allowing a real property owner to transfer, at death and by means of a recorded instrument,

any type of real property, whether residential or otherwise. Thus, for example, to cite a not-infrequent scenario in the authors' experience, the owner of a small tract of farmland or other type of vacant real property may now provide for the nonprobate transfer of the real property at death without the need to create a living or revocable trust if the owner does not wish to do so. The defined term “residential real estate” is preserved for the sole purpose of grandfathering TODIs that were executed prior to the effective date of the amendatory Act.⁷ A summary of other significant changes follows.

Trust as beneficiary

A new section, section 21, has been added to the Act to clarify that a TODI may name the trustee of a trust as the designated beneficiary, including a trust created under the owner's will, a trust created within the TODI itself, or under a will of another individual who has predeceased the owner.⁸ It also clarifies that the designated trust may be amended, modified, revoked, or terminated after the date the TODI is executed similar to trusts designated under a pour-over will. The trust designated does not need to be funded with a trust corpus. The failure of the trust to have a trust corpus prior to the death of the owner is immaterial. The revocation or termination of the trust before

3. 755 ILCS 27/60.

4. *Id.* § 27/65(b).

5. 205 ILCS 625/1 *et seq.*

6. 815 ILCS 10/0.01 *et seq.*

7. The Act as amended will apply to all TODIs for residential real estate made before, on, or after Jan. 1, 2012, by an owner dying on or after Jan. 1, 2012, and to all TODIs for real property made before, on or after the effective date of the amendatory Act by an owner dying on or after Jan. 1, 2022, the effective date of the amendatory Act. 755 ILCS 27/10(1), (2).

8. *Id.* at § 27/21.

TAKEAWAYS >>

- Prior to Jan. 1, 2022, the Illinois version of the Uniform Real Property Transfer on Death Act restricted the use of transfer on death instruments to “residential real estate” as defined by the Act. That restriction will no longer be applicable for owners dying after Jan. 1, 2022.
- New section 21 of the Act permits the naming of a trustee of a trust created within the TODI itself as the designated beneficiary.
- With limited exceptions, new section 66 of the Act permits a surviving spouse to renounce a TODI.
- The amendment to section 85 of the Act clarifies the rights of creditors and claimants against the beneficiary of a TODI and adopts by reference the same process and procedure as set forth in section 505 of the Illinois Trust Code for claims asserted against the beneficiary of a revocable trust.

IMPORTANTLY, THE FACT THAT A TRANSFEREE FOR VALUE WITHOUT CONSTRUCTIVE NOTICE TAKES FREE OF CLAIMS DOES NOT ABSOLVE THE BENEFICIARIES OF THE LIABILITY.

the owner's death will be treated as a lapse causing the real property to be transferred to the owner's estate unless the TODI provides otherwise.

Fiduciary limitations & differentiation from a will

Sections 5 and 35 of the Act have been amended to clarify that a fiduciary for the owner, such as a trustee or agent under a power of attorney, cannot execute a TODI on the owner's behalf, even if the underlying document (the power of attorney for property, for example), purports to grant such authority.⁹ Section 35 also specifies that the presence of a TODI in the record of title does not limit the power of attorney's authority to sell, transfer, or encumber the real property. Section 30, as amended, makes clear that even though a TODI meets the execution requirements for a will, a TODI cannot be admitted to probate as the owner's will or as a codicil.¹⁰

Attestation requirements

One of the often-cited issues raised by title insurance companies is the question of witnesses for purposes of satisfying the execution requirements of section 45 of the Act. Section 45 requires the execution of the TODI by the owner to be attested in writing by at least two "credible witness," the same as the requirements for the execution of a will.¹¹ Neither the Act nor the Probate Act defines the term "credible witness." A TODI is void if not attested in writing by at least two credible witnesses. Although the Probate Act does not define the term "credible witness," it does address what results if a beneficiary or a spouse of the beneficiary serves as one of the witnesses to the will.

Under section 4-6 of the Probate Act,¹² if a beneficial legacy or interest is given in a will to a person attesting its execution or to his spouse, the legacy or interest is void as to that beneficiary and all persons claiming under him, unless the will is otherwise duly attested by a sufficient number of witnesses as provided in the Act exclusive of that person, and he can be compelled to testify as if no legacy or interest was given to him. But the beneficiary is entitled to receive so much of the legacy or interest given to him by the will as does not exceed the value of the share of the testator's estate to which he would be entitled were the will not established. An amendment to section 45 now incorporates the same treatment if a beneficiary or his spouse is a witness to the execution of the TODI.¹³ The beneficiary can receive whatever he might have received if no TODI was established. This amendment also clarifies that a TODI witnessed by only one witness, even if notarized, is not a valid TODI.

Spousal renunciation

Another question often raised by practitioners is whether a TODI is subject to renunciation by the surviving spouse. Many practitioners believe that because the real property passes outside of the probate process it is not subject to renunciation by the surviving spouse. But the Illinois Supreme Court made it clear many years ago that the rights of the surviving spouse and creditors of the decedent are not dependent on whether the decedent's assets are subject to probate.¹⁴ The issue the court stated is whether the decedent retained ownership during his or her lifetime and only parted with ownership at the time of his or her death. If the decedent retained ownership during life and only parted with it at the time of his or her death by whatever means it is deemed to be a substantially testamentary transfer in character and will be subject to the surviving spouse's statutory share and the claims of creditors—the same as if it had passed by probate under the owner's will at the

time of his or her death. Section 1 of the Lifetime Transfer of Property Act, which permits revocable transfers to defeat a surviving spouse's right of renunciation, is inapplicable to TODIs because the recording of a TODI is not a lifetime transfer of property.¹⁵

New section 66 of the Act clarifies that unless waived by the surviving spouse, a TODI is subject to renunciation by the surviving spouse with one exception.¹⁶ The language excepts from the right of renunciation transfers of real property to trusts created under the owner's will or otherwise that are for the sole benefit of the surviving spouse. This exception is created, among other reasons, to comply with federal Medicaid regulations for transfers of the principal residence by the community spouse to a trust created under the community spouse's will for the sole benefit of the nursing home spouse. It also permits planning by an owner for the benefit of her surviving spouse without the necessity of creating and funding a trust during the lifetime of the owner to avoid the possibility of renunciation.

To exercise a renunciation of the TODI, the owner's surviving spouse must record in the office of the recorder of deeds having jurisdiction of the real property, a written instrument signed by the surviving spouse setting forth the description of the real property and declaring the renunciation. This written instrument must be recorded within seven months of the owner's date of death, or within such additional time as a court having jurisdiction of the real property might grant pursuant to section 5/2-8 of the Probate Act.¹⁷ Just as under the Probate Act, the exercise of a renunciation will entitle a surviving spouse to an undivided one-third share

9. *Id.* at §§ 27/5, 27/35.

10. *Id.* at § 27/30.

11. *Id.* at § 27/45(a).

12. *Id.* at § 5/4-6.

13. *Id.* at § 27/45(c).

14. *Montgomery v. Michaels*, 54 Ill. 2d 532 (1973); *Johnson v. La Grange State Bank*, 73 Ill. 2d. 342 (1978).

15. 755 ILCS 25/1 *et seq.*

16. *Id.* at § 27/66.

17. *Id.* at § 5/2-8.

of the real property if the owner leaves a descendant, and an undivided one-half share of the real property if the owner leaves no descendant. The recording of the renunciation operates as a complete bar to any claim of the surviving spouse under the TODI.

If the TODI is renounced, any future interest that is to take effect in possession or enjoyment at or after the termination of an estate or other interest given by the TODI to the surviving spouse will take effect as though the surviving spouse had predeceased the owner, unless the TODI expressly provided in the case of renunciation that any future interest shall not be accelerated.

An example will illustrate the application of the meaning of this provision. Assume the following facts: Adam and Betty are married, but it is the second marriage for both. Adam owns the marital residence in his name alone. Adam executes and records a TODI, which provides Betty with a life estate in the marital residence with remainder to his son Carl from his previous marriage. The TODI provides that if Carl predeceases Betty, then the home goes to Carl's children *per stirpes*, but subject to postponement of possession until the children attain age 21. Carl has three children all under the age of 21. Assume Carl dies before Adam, but Adam does not change the TODI. If Adam then dies and Betty renounces the TODI, Betty is treated as having predeceased Adam, which vests an undivided one-third share of the real property in Betty and an undivided two-thirds share of the real property in the three minor children subject to postponement of possession until the children attain age 21. Unless the TODI provides that the minor children's interest is transferred to someone for their benefit, such as a parent or a custodian under the Illinois Uniform Transfers to Minors Act¹⁸ until age 21, a guardianship will need to be created for the minor children. This illustration also emphasizes the importance in drafting the TODI to

anticipate possible issues and to address them in the TODI.

Rights of claimants

Section 85 of the Act has been substantially amended and replaces the language in the original enactment, which failed to specify the rights of creditors and statutory claimants with respect to real property passing at death by a TODI.¹⁹

The recent enactment of the Illinois Trust Code now sets forth a procedure and process for making claims against assets passing under a revocable trust; thus, a procedure now exists for creditors and statutory claimants to assert claims against assets passing under a revocable trust outside of probate. To provide consistency in the law regarding claims against real property passing by a TODI, section 85 adopts by reference the same procedure and process as set forth in section 505 of the Illinois Trust Code. Under section 505 of the Illinois Trust Code, a creditor or statutory claimant of the decedent may assert a claim against the decedent's nonprobate assets passing under a trust if the probate assets are insufficient to satisfy the claim.²⁰ A personal representative of the decedent's estate may recover such sums from the beneficiaries of the decedent's trust and administer those sums as part of the decedent's probate estate. Similarly, section 85 of the Act will permit the personal representative of the owner's estate to assert a claim against the real property passing by a TODI. The beneficiaries of the TODI will take subject to the claims of the owner's creditors and statutory claimants. If more than one property is being transferred by a TODI, the liability for the claim is to be apportioned among the real properties in proportion to the net values of the real properties at the time of the owner's death. Section 505(a)(5) of the Illinois Trust Code provides that a settlor of a trust has the right to direct the source from which liabilities will be paid. Similarly, an owner can direct within the TODI which properties will be the source of payment for any liability. Section 85

SECTION 95 OF THE ACT HAS BEEN AMENDED TO CLARIFY THAT A TODI MAY BE PREPARED BY ANY LICENSED ATTORNEY, AND THAT A TODI IS NOT RENDERED VOID SOLELY BY FAILING TO BE PREPARED BY A LICENSED ATTORNEY.

of the Act again highlights the need for thoughtful drafting of estate plans utilizing TODIs and other probate avoidance mechanisms.

Bona fide transfers & actions to set aside

Amended section 90 of the Act retains the statute of limitations for the filing of actions to set aside or contest the validity of a TODI and coordinates the provision for the protection of *bona fide* purchasers or mortgagees for value who take title to the real property from beneficiaries without notice or knowledge of a pending contest, claim, or renunciation.²¹ A *bona fide* purchaser or mortgagee for value is fully protected from claims if they acquire their interest in the real property prior to the recording of a *lis pendens* under section 2-1901 of the Code of Civil Procedure.²² Similarly, such parties are protected against the claim of a surviving spouse if the transfer occurs before a notice of renunciation is recorded in the office of the recorder of deeds as required under section 66 of the Act. Importantly, the fact that a transferee for value without constructive notice takes free of claims does not absolve the beneficiaries of the liability.

TODI preparation

Finally, section 95 of the Act has been amended to clarify that a TODI may be

18. 760 ILCS 20/1 *et seq.*

19. 755 ILCS 27/85.

20. 760 ILCS 3/505.

21. 755 ILCS 27/90.

22. 735 ILCS 5/2-1901.

prepared by any licensed attorney, and that a TODI is not rendered void solely by failing to be prepared by a licensed attorney.²³ An owner is permitted to prepare his or her own TODI, but section 95 does not permit the owner's agent under a power of attorney or guardian to execute a TODI on the owner's behalf.²⁴ Under Illinois law, the person who prepares an instrument affecting title to real property must disclose his or

her name and address on the face of the instrument.²⁵

Conclusion

The Act as amended will continue to give Illinoisans another tool to carry out probate avoidance transfers upon death. With this amendment, Illinois joins the other states that permit the use of a transfer on death deed or instrument for any real property, not

solely residential real estate. The amended Act also coordinates its provisions with the Probate Act as it relates to witnesses and renunciation and with the recently enacted Illinois Trust Code as it relates to creditors and statutory claimants. **EB**

23. 755 ILCS 27/95.

24. See *id.* at § 27/5 (providing definition of "owner"); see also *id.* at § 27/35 (capacity of owner and agent's authority).

25. 55 ILCS 5/3-5022.