

Transfer on Death Deed

For more information call the LREP toll-free Legal Helpline at 1-800-876-6657 or 505-797-6005 (Albuquerque area) or visit us online at www.nmbar.org.

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 (TOD Deed)**. 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.

This means that 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 TOD Deed providing for a different person to get the property. The grantee beneficiary does not have to be notified of the recording of the deed and does not have to be notified if the deed 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 TOD Deed also will not disqualify an owner from receiving Medicaid assistance for nursing home care, since the owner has not given the property away.

How does an owner make a TOD Deed?

It is very important that a deed 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 deed 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 TOD Deed.

If joint tenants record a TOD Deed, the property does not go to the grantee beneficiary when the first joint tenant dies. 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 TOD Deed.

A TOD Deed 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 TOD Deed, the grantee beneficiary inherits the property through the TOD Deed. The will has no effect on the TOD Deed. No matter what you say in your will, the TOD Deed 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.

Frequently Asked Questions About TOD Deeds

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 TOD Deed beneficiary or would the house be sold so Medicaid could be paid back for money it paid for my nursing home care?

A. New Mexico has the least burdensome form of Medicaid Estate Recovery law. Under New Mexico law, Medicaid can recover from **probate** estates. The TOD Deed property will not be in the **probate** estate. Although the TOD Deed law allows creditors to make claims against the TOD Deed property, Medicaid has not yet tried to make those claims.

Q. If I were to become incapacitated, would the person who has my power of attorney (POA) be able to make out a new TOD Deed and, thus, give my property to someone other than the person I wanted to have it?

A. A POA does not give an attorney-in-fact (your agent under the POA) the ability to change beneficiary designations on your assets, **unless you specifically grant that power.**

Q. Would a person who has my POA be able to sell my home for me?

A. An attorney-in-fact acting under a valid POA can sell your real estate for you. There may be a question as to whether the title would be insurable.

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 TOD Deed 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 have a problem with issuing 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. Although we refer to this deed as being a "transfer", the property received at your death would get a stepped-up tax basis as property your beneficiary inherited from you. This means the beneficiary won't 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 TOD Deed to transfer those assets?

A. Yes. The TOD Deed 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 TOD Deed 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 TOD Deed have on taxation of my estate?

A. The TOD Deed itself would have no effect. Federal (and New Mexico) Estate Taxes are calculated on one's **taxable** estate. A TOD Deed 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.