

**Real Property Issues in the Transfer on Death  
(TOD) Property Act  
&  
Devolution Affidavits**

**BY**

**JAMES W. MARTIN  
8585 BROADWAY, SUITE 660  
MERRILLVILLE, INDIANA 46410  
(219) 769-3760; [jwm@netnitco.net](mailto:jwm@netnitco.net)**

# UNIFORMITY WITH PROBATE CODE AND TRUST CODE

- 1. Anti-Lapse**
- 2. Omitted Child**
- 3. Divorce**
- 4. Slayer Rule**

# Transferring Entity

- **Includes** a governmental agency, business entity, or transfer agent that **issues** certificates of ownership or title to property and a person acting as a custodial agent for an owner's property. (BMV)
- **Does not include** *a governmental office charged with endorsing, entering, or recording the transfer of real property in the public records.* (Auditor/Recorder)

# Form (Deeds)

## **Substantially similar to:**

- "(insert owner's name) conveys and warrants (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's name)" [IC 32-17-14-11(f)]

**NOTE:** Words indicating that the person is a primary beneficiary are not required [IC 32-17-14-26(b)(4)]

See Exhibits A and B

# Recording

- To be effective, a TOD deed must be recorded **before the death of the owner** IC 32-17-14-11(a)(2)
- **Void** if not recorded before the death of the owner IC 32-17-14-11(b)

# Rules (Deeds 1)

- TOD deeds not recorded before the death of the owner are **void**
- Amendments/revocations not recorded before the death of the owner are **void**
- No consideration is necessary
- POD/Pay on Death does not mean the real property must be liquidated
- Auditor's endorsement is unnecessary for TOD deeds which do not include a transfer

## Rules (Deeds 2)

- Trusts may be beneficiaries
- If ownership is tenants by entirety, the conveyance is void unless both spouses sign
- If ownership is JTWRORS, a conveyance by one joint owner severs the joint tenancy and creates tenants in common
- If ownership is JTWRORS, a conveyance by one joint owner has no effect on the non-severing owner

# Rules (Deeds 3)

- If ownership is tenants by entirety or JTWRORS, the transfer does not occur until the death of the last owner
- If ownership is as a tenant in common, the owner's interest transfers at the owner's death
- TOD transfer of a life estate is inoperable and void

# Revocation (Real Property 1)

- **Beware**: Deed statute changes in IC 32-17-1-2(c), IC 32-21-1-13(b) and IC 32-21-1-15(b) (Effective July 1, 2019) (See Exhibits C, D & E)
- Negates *Robinson v. Robinson*, 125 N.E.3d 1 (Ind. App. 2019) Decided May 13, 2019
- Cannot be revoked by will or trust
- A physical act of deed destruction has no effect

# Revocation (Real Property 2)

- An instrument amending or revoking a TOD beneficiary on real property must be recorded **during the life of the owner** (See Exhibit F)
- Could also be a subsequent TOD Deed
- Transfer of the real property during the life of the owner terminates the beneficiary designation, but only if the deed is recorded **during the life of the owner**
- Revocation of tenants by entirety property must be signed by both spouses

# TOD Affidavit

- Must contain [IC 32-17-14-26(b)(20)]:
  - Legal description
  - Date of owner's death
  - Name and address of each beneficiary who survived the owner
  - Name and address of each beneficiary who did not survive the owner
  - Cross reference to the recorded TOD deed

See Exhibit G

# Direct Transfers (1 Deed vs. 2 Deeds)

- IC 32-17-14-13 authorizes direct transfers
  - A husband, in one (1) deed, can transfer to husband and wife **AND** add TOD beneficiaries
  - A trustee, in one (1) deed, can transfer to himself or herself **AND** add TOD beneficiaries
  - See Exhibit H

# Email Sent to PTRP List Serv 5/13/21

- I have to strongly disagree with requiring two (2) deeds for this situation.
- The purpose and intention of 32-17-14-13 is to allow an owner (transferor) to transfer ownership to a different owner or owners (transferee) AND include beneficiary designations, in one (1) document. If this capability is ignored, there is no reason for Section 13 to exist. It becomes meaningless.
- Those that ignore the purpose and intention of Section 13 have said that the current owner (transferor) cannot apply beneficiary designations to the new owner (transferee). They have said that only the new owner (transferee) can establish TOD beneficiary designations. That is the reason they claim that two (2) deeds are necessary to complete the transaction. In my opinion, those people are reading something into the Act that does not exist.

# Email to PTRP (Cont'd) 1

- 32-17-14-13(a) states: "A transferor of property, with or without consideration, may execute a written instrument **directly** transferring the property to a transferee **to hold as owner in beneficiary form.**" (Emphasis added). The statute specifically says that the transferee (new owner) will hold the property as owner in beneficiary form. See 32-17-14-3(8) for the definition of "ownership in beneficiary form."
- In addition, 32-17-14-13 (b) states that the transferee (new owner) is considered the **owner** for all purposes, including the right to revoke or change the beneficiary designation.
- Per 32-17-14-13(c), the direct transfer is effective when the deed is recorded.

# Email to PTRP (Cont'd) 2

- Clearly, Section 13 allows the direct transfer of property to a new/different owner to hold in beneficiary form. That new/different owner then has the right to revoke or change the beneficiary. A person may assume that a transferee must first be an owner to add a beneficiary designation, but that assumption is incorrect. Section 13 specifically allows the existing owner (transferor) to apply a beneficiary designation to the new/different owner (transferee), who is then free to change it.
- If Section 13 did not exist, I would agree with those that support using two (2) deeds for this situation. But it does exist and was included in the Act specifically to allow a single instrument to be used.
- For those that are still unconvinced, the subcommittee of the PRC will be submitting revisionary language to make the Act even clearer.

# Devolution Affidavits

- IC 29-1-7-23 was amended in 2019 and 2020 to confirm that devolution affidavits can be used to pass real property **of any value**  
(See Exhibit I)
- Except for rare situations, so-called “small estate affidavits” created under IC 29-1-8-3 are no longer acceptable
- For a form with both testate and intestate passage of ownership, see Exhibit J

# Actions of Legal Representatives

- An attorney in fact, guardian, conservator, or other agent acting on the behalf of the owner of property may make, revoke, or change a beneficiary designation
- Legal representatives may withdraw, sell or transfer TOD property extinguishing the beneficiaries' right to receive it
- After death of owner, beneficiaries may elect to receive from the owner's estate the amount determined under IC 29-3-8-6.5

# Anti-Lapse (LDPS)

- IC 32-17-14-22
- Default rule if a beneficiary is a descendant
- May be applied to any beneficiary
- An owner may opt out (“No LDPS”)
- Substitute beneficiaries take by representation
- If no substitute beneficiaries, the other primary beneficiaries take the share of the deceased beneficiary

# Slayer Rule

- A beneficiary designation is subject to the Slayer Rule under IC 29-1-2-12.1

# Divorce

- Any beneficiary designation in favor of the owner's former spouse is **revoked** on the date the marriage is dissolved or annulled
- Revocation is effective even if the beneficiary designation does not refer to the owner's marital status
- Treated as if the former spouse did not survive the owner
- Revived by the owner's remarriage to the former spouse **or** by a nullification of the dissolution or annulment of the marriage

# Divorce(Cont'd)

- Rule **does not apply** to a beneficiary designation that:
  - has been made irrevocable, or revocable only with the spouse's consent
  - is made after the marriage is dissolved or annulled; or
  - expressly states that the dissolution or annulment of the marriage does not affect the designation of a spouse
- Rule **does not apply** to any ERISA plans