

TRANSFER ON DEATH DEEDS IN TEXAS: HIGH TIME FOR THE TODD

by Lucy Wood*

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I. INTRODUCTION

Last session, the 84th Texas Legislature passed the Texas Real Property Transfer on Death Act.¹ This “Transfer on Death Deed” (TODD) statute, based largely on the Uniform Real Property Transfer On Death Act, allows an owner of real property to designate, via deed, a beneficiary to receive the property upon the owner’s death without going through probate.²

The TODD is the latest swell in the nonprobate tsunami, but the nonprobate “revolution” has been in full swing since the 1980s.³ Every few years lawmakers come up with yet another way to avoid probate. But is adding another tool to the already-disorganized toolkit just going to create more confusion? Is the TODD really necessary?

This article will explain why those in favor of increased access to justice will support the TODD. First, it will offer a bit of background about the problems in Texas that led to its becoming the latest state to jump on the TODD train, before summarizing the basics of the new law.⁴ Next, this article will discuss how Texans—particularly those with little to no money—stand to benefit.⁵ Lastly, it will address some challenges associated with the TODD and begin a conversation about how to TODD responsibly.⁶

1. See TEX. EST. CODE ANN. § 114 (West 2015).

2. Compare TEX. EST. CODE ANN. §§ 114.001–.152 (West 2015), with UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 1–21, (UNIF. LAW COMM’N 2009), http://www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf [<https://perma.cc/W8QS-EW85>] (last visited Nov. 16, 2016).

3. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (explaining the development of non-probating laws).

4. See *infra* Parts II and III

5. See *infra* Part IV.

6. See *infra* Part V.

II. WHY TODD?

A. *Lack of Access to Probate*

Texans with low incomes are frequently unable to pass title to their real property because of the costs associated with writing and probating a will. Legal aid organizations in Texas help with this problem, but the need is overwhelming. In one study conducted in eight border and interior Texas counties, over 90% of the more than 1,300 low-income families interviewed did not have a will.⁷ Sixty-five percent of the respondents were over the age of sixty.⁸

B. *Big Families and Messy Intestate Succession*

It gets worse. Many families without wills report that they have made informal, and therefore unenforceable, arrangements that the rules of intestate succession will ultimately trump.⁹ Further, the number of children in this low-income population dramatically exceeds both national and state averages.¹⁰ To sum up, Texas can expect an imminent and exponential rise in the fractionalization of ownership among poor, big families lacking access to lawyers along the Texas-Mexico border and in other low-income areas across the state.¹¹

C. *Natural and Legal Disaster*

This extensive problem has produced clouded titles and caused unintended, confusing co-ownership structures that pose difficulties for owners, title companies, local governmental entities, and other real estate stakeholders.¹² When properties are persistently tied up due to these issues, low-income families may abandon their real property, creating dilapidated

7. See Peter Ward, Heather Way, & Lucy Wood, *The Contract for Deed Prevalence Project*, 1, 94 (2012), U. TEX. https://www.lahn.utexas.org/Final%20Report_August31/Final%20Report_The%20Contract%20for%20Deed%20Prevalence%20Project/Chapters/Full%20Report.pdf [<https://perma.cc/XU3Y-RDG7>] [hereinafter Ward, Way & Wood, *Prevalence Project*]; See also Peter Ward, Heather Way, & Lucy Wood, *Protecting Homebuyers in Low-Income Communities: Evaluating the Success of Texas Legislative Reforms in the Informal Homeownership Market*, 41 L. & SOC. INQUIRY 152, 154 (2016) [hereinafter Ward, Way & Wood, *Protecting Homebuyers*]; Heather Way & Lucy Wood, *Contracts for Deed: Charting Risks and New Paths for Advocacy*, 47 CLEARINGHOUSE REV. 286 (2013) [hereinafter Way & Wood, *Contracts for Deed*].

8. See Ward, Way, & Wood, *Prevalence Project*, *supra* note 7; See also Ward, Way, & Wood, *Protecting Homebuyers*, *supra* note 7; Way & Wood, *Contracts for Deed*, *supra* note 7.

9. Ward, Way & Wood, *Protecting Homebuyers*, *supra* note 7, at 5.

10. *Id.*

11. *Id.*

12. See Lucy Wood & France Leos-Martinez, *A Home But No Will: Problems Faced by Low-Income Homeowners Lacking Access to Probate Systems in Texas*, U. TEX. (Apr. 28, 2014), http://law.utexas.edu/publicinterest/docs/no_will_homeownrs.pdf [<http://perma.cc/k9QH-MHK4>].

communities.¹³ Unfortunately, in the past several years a series of hurricanes hit Texas, leaving the Texas Department of Housing and Community Affairs, the General Land Office, and many local governmental agencies up to their ears in the title problems that intestate succession had created.¹⁴ Texas agencies have devoted significant resources to title cleanup in order for these property owners to rebuild or relocate.¹⁵

The 84th Texas Legislature passed the TODD statute in part to address these issues. In doing so, Texas joined twenty-four other states in authorizing this specific form of nonprobate transfer.¹⁶ These other states include: Alaska, Arizona, Arkansas, Colorado, Hawaii, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.¹⁷ The District of Columbia has also enacted a version of the law.¹⁸

III. TODD BASICS

So what *is* a TODD? An owner of real property uses a TODD to transfer an interest in real property upon death without going through probate. Similar will substitutes exist for the nonprobate transfer of personal property including life insurance policies, pension plans, securities registered in transfer on death forms, and funds held in Payable on Death (POD) accounts. A TODD is like a POD account for real property. The Texas law only applies “to a transfer on death deed executed and acknowledged on or after September 1, 2015.”¹⁹

A. Requirements

The transferor must sign the TODD and *properly record* it during the transferor’s lifetime in the deeds records office for the county in which the property is located.²⁰ The TODD must contain “the essential elements and formalities of a recordable deed.”²¹ It must contain the owner’s signature, a notarization, and a statement that the transfer of the owner’s interest to the

13. *Id.* at 2.

14. *See id.* at 1.

15. *Id.*

16. See Mary Randolph, *States That Allow Transfer-On-Death Deeds for Real Estate*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/avoid-probate-book/chapter5-1.html> [https://perma.cc/YPW4-7KMR] (last visited Sep. 18, 2016).

17. *Id.*

18. *Id.*

19. TEX. EST. CODE ANN. § 114.003 (West 2015).

20. *Id.* § 114.055(3).

21. *Id.* § 114.055(1).

beneficiary will not occur until the owner dies.²² No consideration is required.²³ A transfer on death deed is a non-testamentary instrument.²⁴

B. Who Can TODD?

The TODD statute incorporates the definition of “person” in the Texas Government Code § 311.005 in establishing who may receive property via TODD.²⁵ Any person, including a trustee, may be a beneficiary.²⁶ The transferor of property must be an individual, but multiple owners can effectuate a TODD together.²⁷ The capacity required to make or revoke a TODD is the same as the capacity required to make a contract.²⁸ The property owner cannot use a power of attorney to make a TODD.²⁹

C. What Interest May Be TODDED?

A person can TODD any interest in Texas real property.³⁰ The statutory form is permissive.³¹ A person may designate more than one primary beneficiary and more than one alternate beneficiary.³²

D. Who Owns the Property After a TODD Is Filed?

After filing a TODD, the transferor *retains all ownership rights* in the property while alive.³³ The transferor can sell, obtain a mortgage on, or refinance the property.³⁴ The TODD does not create any *legal or equitable interest* in the designated beneficiary.³⁵ A TODD does not affect the designated beneficiary’s eligibility for public assistance, and it does not subject the property to the designated beneficiary’s creditors.³⁶

22. *Id.* § 114.055(2).

23. *Id.* § 114.056(2).

24. *Id.* § 114.053.

25. *Id.* § 114.002(a)(4).

26. *See id.* § 311.005.

27. *Id.* § 114.057(d).

28. *Id.* § 114.054(a).

29. *Id.* § 114.054(b).

30. *Id.* § 114.051.

31. *See id.* § 114.151.

32. *Id.* §§ 114.051, 114.151.

33. *Id.* § 114.101(1).

34. *Id.*

35. *Id.* § 114.101(2).

36. *Id.* § 114.101(7)–(8).

E. Is a TODD Revocable?

A TODD must be revocable “regardless of whether the deed or another instrument contains a contrary provision.”³⁷ Revocation occurs when the transferor revokes the TODD or records a subsequent TODD that expressly or implicitly revokes it.³⁸ It will become void if the transferor transfers the property during his lifetime through a recorded conveyance.³⁹ A TODD is also void if a transferor divorcing the spouse to whom he has TODDED property files a final court judgment dissolving the marriage in the deed records where the TODD had been recorded.⁴⁰ A will may not unwind or otherwise trump a TODD.⁴¹

F. How Does Revocation Work with More Than One Transferor?

If more than one transferor makes a TODD, and one of the transferors later revokes, the revocation is ineffective as to the other transferors.⁴² Similarly, if joint owners with rights of survivorship (JTWROS) make a TODD, revocation is only effective if all living owners revoke.⁴³ That is, if joint owners with rights of survivorship make a TODD, it will only “kick in” upon the death of the last surviving joint owner if he has not revoked.⁴⁴ These provisions will not come into play frequently since JTWROS is relatively uncommon in Texas.

G. Does the Beneficiary Have to Do Anything?

The beneficiary must survive the transferor by 120 hours.⁴⁵ Although not required, filing a certified copy of the transferor’s death certificate and accompanying affidavit will help to keep title clear and to improve access to title insurance.⁴⁶ A TODD does not require a probate action to transfer ownership of the property. The statute does not require notice, delivery, or acceptance by the beneficiary during the transferor’s life.⁴⁷ Additionally, the

37. *Id.* § 114.052.

38. *Id.* §§ 114.057(a)(1)(A)–(B), 114.152.

39. *Id.* § 114.102.

40. *Id.* § 114.057(c).

41. *Id.* § 114.057(b).

42. *Id.* § 114.057(d).

43. *Id.* § 114.057(e).

44. *Id.* § 114.103(c).

45. *Id.* § 114.103(a)(1).

46. *Transfer on Death Deed Kit*, TEXAS LAW HELP TEX. L. HELP 1, 15 (2015), <http://texaslawhelp.org/files/685E99A9-A3EB-6584-CA74-137E0474AE2C/attachments/B9C15152-DA34-4BE5-A606-4E1D87EEF5AE/0-entire-transfer-on-death-deed-kit-final-updated-1-16.pdf> [https://perma.cc/T9KN-D8XK] (last visited Oct. 13, 2016).

47. EST. § 114.056(1).

beneficiary may disclaim all or part of the transferred interest in the same manner as state law permits for any other testamentary devise.⁴⁸

H. What About Liens and Mortgages?

The beneficiary takes the property subject to all encumbrances, mortgages, and liens on the property at the time of death.⁴⁹ Creditors' rights are similar to their rights in the administration process. That is, when a will is probated, if the transferor's estate is not sufficient to pay all debts, the personal representative of the estate can enforce liability against the property as if it were part of the estate. A secured creditor can elect to accelerate payments on its note or simply allow the new beneficiary to continue payments.⁵⁰ These same options are available to a secured creditor under the TODD framework. The creditor may elect to have the claim treated as a matured secured claim or as a preferred debt and lien claim. If the creditor elects to treat the claim as a preferred debt and lien claim, the TODD is treated like a devise in a will would be, and the creditor may not pursue any other remedies against the estate.⁵¹ If the creditor elects to treat the claim as a matured secured claim, Texas Estates Code § 355.153 applies. A TODD transfers real property *without* covenant of warranty of title even if the deed contains a contrary provision.⁵²

I. What About Other Claims?

A TODD does not “affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed.”⁵³ If the estate is insufficient to satisfy a claim against the estate, expenses of administration, or any estate tax or allowance owed, the personal representative may use the property to satisfy those claims as if the property was part of the probate estate.⁵⁴ If there are multiple TODDED properties or other nonprobate assets, liability may be apportioned consistent with the net values of the assets at the time of death.⁵⁵ Under the TODD statute, title to the property could be unsettled for two years until the claims period has expired, although title insurance may, as a practical matter, be issued prior to the passing of the statute of limitations.⁵⁶

48. *Id.* § 114.105.

49. *Id.* § 114.104(a).

50. *See id.* § 355.151.

51. *Id.* §§ 114.104, 355.154–155.

52. *Id.* § 114.103(d).

53. *Id.* § 114.101(3).

54. *See id.* § 114.106(a). Note that, unless the transferor makes other provision, state or generation skipping taxes attributable to TODD property will continue to be borne by the beneficiary.

55. *Id.* § 114.106(d).

56. *Id.* § 114.106(e).

A creditor must file suit within two years of the death, but the two-year limitation does not apply when a secured creditor elects to have the claim treated as a matured secured claim.⁵⁷

IV. TODD BENEFITS

One obvious benefit of the TODD is the ability for those unable to afford a will to avoid the rules of intestate succession. However, even for those able to afford estate planning, it is useful to compare the TODD to other probate and nonprobate means of transfer. The TODD statute does not remove the availability of those alternatives.⁵⁸

A. *TODD v. Will*

Many consider the TODD to be a cheaper and simpler substitute for a will, but this is not always the case. For some people it may make sense to have both a will and a TODD. For others, having only a will or a TODD may make the most sense. Some factors to consider in deciding whether to do a TODD, a will, or both include:

1. *The Cost of Legal Services.*

It is less expensive to make a TODD than it is to execute a will. Part of the reason for the lowered cost is that those who make use of online forms to create a will are more likely to consult an attorney than those deeding property. Even individuals who consult an attorney when making a TODD, as the statutory form recommends, are likely to pay their lawyers less to prepare a TODD than they would to prepare a will.

2. *Avoiding Probate.*

Parties do not have to probate a TODD, thus they can avoid probate costs altogether. Additionally, parties may desire to avoid the emotional or privacy implications of probate.

3. *Personal Property and Later-Acquired Real Property.*

A will allows for the disposition of both real and personal property, whereas a TODD only deals with real property that the owner accurately describes. A “belt and suspenders” approach—using both a will and a TODD—should be considered when a client expects to acquire more real property, is unsure of how to execute and record a TODD in the future, lacks funds to revisit an attorney,

57. *Id.*

58. *Id.* § 114.004.

or is unlikely to visit an attorney in a timely fashion. If the client dies owning only the property that the TODD covers, the beneficiaries will not have to probate the will. If the party who made the TODD dies owning additional real property, the family will need to probate the will as to the later-acquired property. Critically, the property that the TODD covers will still pass as a nonprobate asset unless the TODD is effectively revoked.

Tip (1): For the out-of-state client with a will who has acquired a second home in Texas, the TODD might be a good way to avoid probate in Texas.

Tip (2): To prevent confusion, misunderstanding, and litigation, a property owner with both a will and a TODD must understand how to revoke each of them and maintain their consistency.

Tip (3): Young and healthy clients, and clients who suggest that they will likely sell their homes soon, might wait to TODD until after they have purchased the home they will most likely hold at death. Obviously, this will depend on the client's ability to pay repeated recording fees and the client's willingness to incur the risk of having to go through probate if the property has not yet been TODDED before their death. For some clients, paying forty dollars to record a TODD for a home they will likely sell will not make economic sense when compared with the future benefit of avoiding probate, especially where the chance of going through probate unexpectedly is slight.

Tip (4): The client who changes her mind frequently about her beneficiaries might consider making only a TODD. It may be less expensive to make a change in the disposition of her property by recording a new TODD than it would be to pay for a lawyer to repeatedly revise her will. Clients with many children who expect to designate one or more grandchildren to take real property—and whose vision of who is responsible may change—may also fall into this category. Having both a will and a TODD in these circumstances creates the strong possibility that the two documents may become inconsistent when the client has a change of heart.

Tip (5): If a client wants to sell a home, and is therefore reluctant to transfer it to a trust, consider a TODD to the trustee. If the client dies before being able to sell, the property will wind up in the trust as intended.

B. A Note About Trusts

One of the most common ways to dispose of real property outside of probate is through a trust. A full discussion of trusts falls outside the scope of this article. A condensed discussion of some key differences between TODDs and trusts follows.

1. *Revocable vs. Irrevocable.*

An irrevocable trust is not truly comparable to a TODD because one cannot revoke it, so it is not exactly a will substitute. Individuals might use a revocable trust instead of a TODD, as both may be undone before death.

2. *Flexibility.*

A trust may allow for conditions that many lawyers may, and should, be reluctant to try to incorporate through a TODD.⁵⁹

3. *Legal Services.*

Even if the transferor could adapt the TODD to incorporate certain conditions and to accomplish some of the purposes that trusts have traditionally achieved, this is not something we want people to tackle without legal assistance. This means that low-income families who opt for a trust over a TODD will lose the TODD benefit of spending little-to-no money for legal services.

4. *Other Costs.*

A trust of any kind is likely to involve costs that may dramatically exceed what families most attracted to the TODD can afford, and a trust may not be advisable for low-income families seeking to dispose of a low-value homestead.⁶⁰

59. See UNIF. REAL PROP. TRANSFER ON DEATH ACT, §13 (UNIF. LAW COMM'N 2009), http://www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf [<https://perma.cc/W8QS-EW85>] (last visited Sept. 8, 2016).

60. See Susan Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROPERTY, PROBATE AND TRUST JOURNAL 529, 539 (2006). See also David Major, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California's Trusts and Estates Attorneys Heading for the Hills*, 49 SANTA CLARA L. REV. 285, 307 (2009) (explaining that the benefit of the TODD is affordability).

5. *Medicaid.*

Attorneys attracted to the tax and Medicaid planning benefits of the TODD should consider trusts as well for those clients who can afford them.⁶¹

C. *TODD v. Joint Tenancy with Right of Survivorship*

In many states, transferors have used JTWROS as an “easy” nonprobate fix to ensure that their property passes outside of probate, often to a child added to a deed.⁶² Texans use JTWROS very rarely, although it is not unheard of.⁶³ Fortunately, parties can use a TODD to accomplish this same purpose. Although many attorneys in Texas do not frequently use JTWROS, comparing JTWROS to TODD may be helpful to those who do:

1. *Alternates.*

A TODD allows for the naming of alternative beneficiaries in the event of both spouses’ untimely deaths, without having to add more names to the deed.

2. *Unmarried Partners.*

Same-sex couples and heterosexual couples that do not wish to marry have reportedly used JTWROS.⁶⁴ Pre-TODD, this made sense as a tool for partners to pass their real property interests outside of probate.⁶⁵ However, an owner who promises to pass property at death as an expression of commitment to a non-spouse can now use a TODD without encountering the costs of naming a new beneficiary if the couple splits up. Those who want joint ownership as a kind of “glue” in a non-marital relationship may prefer JTWROS to a TODD.

3. *Children.*

Parents adding children to their deeds in an effort to ensure a nonprobate transfer at death have also used JTWROS.⁶⁶ Unfortunately, this may unnecessarily subject the property to the children’s creditors during the lifetimes of the transferors.⁶⁷ Grantors who use a TODD can keep their property out of the reach

61. See Gary, *supra* note 60, at 556.

62. See generally TEX. EST. CODE ANN. § 112 (West 2012).

63. See STANLEY JOHANSON, TEXAS ESTATES CODE ANNOTATED 79 (Thomas Reuters, 2015 ed.).

64. See Michael A. Kirtland & Catherine Anne Seal, *Beneficiary Deeds and Estate Planning*, 66 ALA. LAW. 118, 123 (2005).

65. See *id.*

66. See Gary, *supra* note 60, at 565.

67. See *id.* at 555.

of any potential legal judgments a child or other beneficiary may face through divorce, tort action, or bankruptcy.⁶⁸

4. *Elderly.*

A TODD also offers the transferor full control over the property during his lifetime.⁶⁹ TODDing may also help to prevent elder abuse by allowing an elderly transferor a way to avoid being forced to move into institutionalized care under threat of sale by a child added to a deed as a JTWROS.⁷⁰

5. *Creditors.*

It is worth noting in the JTWROS-TODD comparison that the unsecured creditors of a deceased joint tenant may have no recourse against the property or against the other joint tenant.⁷¹ Instead, the property passes automatically to the survivor free of the decedent's debts.⁷² Property conveyed through a TODD is liable to the transferor's probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

6. *Estate Planning.*

JTWROS assets are generally unavailable to fund the estate plans found in dispositive instruments.⁷³

Tip (6): A parent seeking to circumvent the costs of probate should consider using a TODD to transfer property to a child, rather than add the child to the deed as a JTWROS, to avoid a child's creditors.

Tip (7): Advise clients to use a TODD with their life partner to express commitment while avoiding the risks of having to buy out that partner if they split up after adding them as a JTWROS. The ability to revise a TODD makes a better will substitute.

68. See Kirtland & Seal, *supra* note 64, at 119.

69. See Gary, *supra* note 60, at 542.

70. See *id.* at 543.

71. See *id.* at 535.

72. See *id.*

73. Richard J. Shapiro, *Counseling-Based Estate Planning: A Modern Approach*, 2012 WL 6636367 (Nov. 2012).

D. The Lady Bird Deed

The “Lady Bird Deed” is an enhanced life estate deed used to convey property to heirs outside of probate.⁷⁴ The deed may get its name from a story involving President Johnson’s use of the deed to convey property to Lady Bird Johnson.⁷⁵ The Lady Bird Deed allows the grantor to transfer property while retaining a life estate in the property.⁷⁶ Grantors also retain the power to sell the property and keep the proceeds from the sale, convey the property, or mortgage the property without the beneficiaries’ consent.⁷⁷

Many use “Lady Bird” and “transfer on death” to refer to the same thing.⁷⁸ However, one critical difference is that the TODD is statutory, and Lady Bird is not. Moreover, even when case law refers to Lady Bird Deeds or to enhanced life estates, there remains the unfortunate need to unpack what they are and what they are really doing.⁷⁹ In at least one reported case, the use of an enhanced life estate led to protracted litigation concerning how to characterize the interest transferred to the remainderman.⁸⁰ In another, the judge hinted to Michigan’s legislature that it ought to address rogue Lady Bird Deeds.⁸¹

With the TODD statute in place, we can answer questions about this deed type clearly and with relative ease. As one critic of Lady Bird puts it, although it may bring about TODD-like results, “[t]he main issue regarding the revocable deed with a reserved life estate is that neither the boundaries nor the structure of the device has been fully developed.”⁸²

74. See Abshire, Farrell, Sitchler & Wright, *Texas Elder Law*, Texas Practice Series, Vol. 51, § 9:32, (2015–2016 ed.); see also John C. Newman & Ron R. Morgan, *Tax and Medicaid Planning Aspects of the Standard Vermont Estate Plan—2007 Update*, 33 Vt. B. J. 28 (Winter 2007/2008) (explaining the purpose of the Lady Bird Deed).

75. Interview by Professor Gerry Beyer of Florida lawyer credited with using a Johnson family example to instruct lawyers on how to draft the namesake deed (1980s).

76. See Abshire, Farrell, Sitchler & Wright, *Texas Elder Law*, *supra* note 74.

77. *Id.*

78. See generally, *In the Matter of the Estate of Dolores Ann Davis*, 18 QUINNIPIAC PROB. L.J. 247, 249 (2005) (discussing that “[t]his type of deed is apparently referred to as a ‘Lady Bird’ deed, an ‘enhanced life estate’ deed, or a ‘transfer-on-death’ deed”).

79. See *Cook v. Coburn*, 2014 VT 45, 196 Vt. 410, 415, 97 A.3d 892, 895 (2014) (discussing the resolution of whether or not an enhanced life estate or Lady Bird Deed allows the transferor to mortgage the property after execution); see also *McLane v. Silver Bros., Inc.*, 31 A.2d 305, 307, 92 N.H. 361 (1943); *In re Stannert’s Estate*, 339 Pa. 439, 15 A.2d 360, 363 (1940) (recognizing the general principle that a life tenant’s reservation of the power to convey the property includes the power to mortgage). *But see, e.g., Kipp v. Estate of Chips*, 169 Vt. 102, 107, 732 A.2d 127 (1999) (finding this power was not retained via the enhanced life estate where the life tenant’s contrary intent appeared either in the deed or in the circumstances surrounding the making of the deed, where admissible).

80. *Coburn*, 2014 VT 45, 196 Vt. 410, 97 A.3d 892 at 895.

81. See QUINNIPIAC PROB. L. J., *supra* note 78 (stating that “‘Lady Bird’ deeds only convey a future interest. They are designed to avoid probate, as well as creditors. Until the legislature decides that these instruments may not be used in that fashion, an action to set aside such conveyances under [the Uniform Fraudulent Transfer Act] is not available.”).

82. See Major, *supra* note 60, at 131–32.

The following are some basic points to consider when comparing the Lady Bird Deed to TODD:

1. *Nonprobate.*

Transferring property via TODD allows the transferor to affect a nonprobate transfer, as does a Lady Bird Deed. Similarly, both Lady Bird and TODD give transferors the ability to hold on to their property, sell it, change their mind, or revoke.

2. *Transfer.*

Ill-informed or non-lawyer third parties could view a Lady Bird Deed, unlike a TODD, as an inter vivos transfer.⁸³ This can, at least potentially, jeopardize beneficiaries' eligibility for various means-tested programs.

3. *Revocability.*

Some people mistakenly use the term "Lady Bird" to describe any deed through which the transferor retains a life estate.⁸⁴ If the deed retaining the life estate is irrevocable, however, people should not call it a Lady Bird Deed.⁸⁵ In comparing the TODD with a deed reserving a life estate that is in fact irrevocable, the obvious benefit of the TODD is the ability for a transferor to change his mind due to changing family circumstances or for other reasons.

4. *Cleaning Up Title.*

The use of Lady Bird—most likely without lawyers—recently caused some confusion during the disaster recovery effort in Texas.⁸⁶ Hurricane-impacted families seeking relief had to "unwind" Lady Bird Deeds and consolidate ownership in a single family member in order to qualify for assistance in some cases.⁸⁷ Although lawmakers have taken some steps to address the barriers to recovery that families with non-resident co-owners in impacted properties have experienced, the messiness has lived on, particularly when it comes to government-sponsored relocation efforts.⁸⁸

83. *See id.* at 307.

84. *See* Rania Combs, *What is a Lady Bird Deed?*, TEX. WILLS & TR. ONLINE (Mar. 17, 2014), <http://www.texaswillsandtrustslaw.com/2014/03/17/what-is-a-lady-bird-deed> [https://perma.cc/Y26A-FVUD].

85. *See Texas Lady Bird Deed*, DEEDCLAIM, <http://www.deedclaim.com/texas/lady-bird-deed/> [https://perma.cc/9UJ4-QFRX] (last visited Sept. 8, 2016).

86. *See generally* Wood & Leos-Martinez, *supra* note 12 (discussing the use of Lady Bird Deeds among Texas hurricane victims).

87. *Id.*

88. *Id.* Non-resident owners are no longer required to transfer their interests to hurricane-impacted owners prior to rebuild, provided the hurricane-impacted owner signs and has notarized an affidavit stating

5. *Permitting.*

Permitting applications have reportedly presented similar hurdles in at least one state where signatures from both the transferor and remainderman on the Lady Bird Deed have been required.⁸⁹

6. *Credit Issues.*

Lady Bird transferors may also experience problems obtaining credit.⁹⁰

7. *Title Insurance.*

Another problem with Lady Bird Deeds is that title insurers may refuse to insure in situations that appear likely to generate future litigation.⁹¹ Because of the lack of clear statutory or case law guidance on the use of Lady Bird and its validity, a TODD may be the better option in such situations. At the same time, unlike a TODD, a Lady Bird Deed can warrant title.

E. Taxes

1. Stepped-Up Basis

The homeowner's basis in property received through devise or inheritance is generally the fair market value at the time of death, and a Lady Bird Deed may also be used to achieve this "step-up" in basis.⁹² The TODD offers the same benefit because the real property is only transferred to the beneficiary on the death of the transferor. This stepped-up basis may result in significant income tax savings when the property is later sold.

In this respect, transferring property to a child via a TODD, instead of adding them as a JTWRROS, may make the most sense in situations in which the property will likely appreciate. The child named in the deed as a JTWRROS will have a basis in the property that is imparted at the time the transferor adds the child to the deed. This will be a disadvantage when a home appreciates but is sold before the death of the parent.⁹³ (Upon the death

that, to his knowledge, the other co-owners do not oppose the rebuild. *Id.* However, clear and consolidated sole ownership continues to be a requirement for relocation. *Id.*

89. See John C. Newman, *Estate Planning for Out-of-State Owners of Vacation Homes*, 37 VER. B. J. & L. DIG. 42, 45 (2011).

90. *Id.* "The impact of tax and creditor liens on the remaindermen is a concern that [apparently] has arisen when the life tenant wishes to refinance," *id.* It remains unclear, at least to some, as to whether a judgment lien against a remainderman following an enhanced life estate attaches to the property immediately. See Florida Real Prop. Sales Transactions § 11.14 (7th ed. 2013). As discussed above, during the life of the transferor, the TODDed property cannot be impacted by any liens against the beneficiary, who has no interest in that property before the death of the transferor.

91. Florida Real Prop. Sales Transactions § 11.14 (7th ed. 2013).

92. I.R.C. §§ 1014(b)(9), 2033, 2036 (West 2015).

93. See generally Newman, *supra* note 89.

of the parent, the estate will include property that the parent contributed to the estate and that property will get the step-up in basis.⁹⁴) For spouses who hold community property, the entire property will get the step-up in basis, placing this strategy on par with the TODD.⁹⁵

2. Estate Tax

Obviously, the property owner must compare any benefit to be gained through holding onto a property until death to take advantage of the step-up in basis with the potential for a rise in estate tax. For many low-income families who do not expect to have taxable estates at death, this question is easily answered in favor of a TODD. For others, inter vivos gifting may allow for greater tax advantages. Other things being equal, it will often make sense to hold onto property with significant appreciation until the time of death and to make lifetime gifts of property that has not yet appreciated significantly.

These are questions familiar to those conversant in trusts. The TODD is likely to further the wide-spread use of deeding as a means to accomplish the step-up in basis that was once the province of Lady Bird.

F. Medicaid Qualification and Recovery

1. Qualification

Generally speaking, Medicaid does not count the principal residence in determining eligibility.⁹⁶ Transferring it for less than market value, however, can cause problems for someone on Medicaid or wanting to qualify in the future.⁹⁷ Because the Texas TODD, by definition, does not “affect an interest or right of the transferor” while the transferor is alive, there should not be any risk that TODDing an asset amounts to a transfer.⁹⁸ Even so, there remains some concern about whether the execution of a TODD might be considered a transfer, perhaps because of the treatment of the TODD in other

94. I.R.C. §§ 1014(a), (b)(6), 2040(b).

95. *Id.* § 1014(b)(6).

96. 1 TEX. ADMIN. CODE § 358.348 (West 2015).

97. See *Medicaid for the Elderly and People with Disabilities Handbook*, TEX. HEALTH & HUMAN SERVS. COMM’N, <http://www.dads.state.tx.us/handbooks/mepd/> [<http://perma.cc/T4WF-JARV>] (last visited Sep. 8, 2016).

98. TEX. EST. CODE ANN. § 114.101(1) (West 2015).

states.⁹⁹ The Uniform Law Commission has expressly disavowed this approach.¹⁰⁰

Relatedly, adding another owner to a deed as a JTWROS to qualify for Medicaid is a common mistake in some states. It appears that this practice stems from some aging residents' perception that adding a child to a deed will keep the property safe from Medicaid's recovery arm. Although the Medicaid qualification rules allow for the transfer of property to certain family members under certain conditions, TODDing is the safest choice for avoiding a transfer for less than fair market value.¹⁰¹

The Health and Human Services Commission (HHSC) does not consider a Lady Bird Deed a transfer. However, the HHSC requires Lady Bird Deeds to be submitted to HHSC regional attorneys for review and determination.¹⁰² TODDing does not appear to trigger this reporting requirement.¹⁰³

2. MERP

Texas has participated in the Medicaid Estate Recovery Program (MERP), somewhat reluctantly, for more than ten years.¹⁰⁴ TODDing furthers the common estate planning goal of avoiding MERP. The program will not seek to recover against TODDED property because the transfer happens outside of probate.¹⁰⁵ This policy applies to Lady Bird Deeds as well.¹⁰⁶ Notably, federal law allows for a state to go beyond the probate estate

99. COLO. REV. STAT. § 15-15-403 (West 2015). Curiously, Colorado has enacted a statute declaring a TODDing grantor ineligible for Medicaid assistance, transforming a TODDED property into a countable resource, *see id.* But to lessen the transfer-on-death deed's effect on an unknowing grantor, the law apparently allows the grantor to "unwind" or revoke the deed without the imposition of a disqualification period, *see id.*

100. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT §3 (UNIF. LAW COMM'N 2009), http://www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf [<http://perma.cc/W8QS-EW85>] (last visited Sep. 8, 2016).

101. *See* TEX. HEALTH & HUMAN SERVS. COMM'N, *supra* note 97.

102. *See id.*; John D. Hale, *Medicaid Asset Protection: Lady Bird Deeds in Texas*, THE HALE LAW FIRM 1, 9, <http://www.thehalelawfirm.com/wp-content/uploads/2013/10/Medicaid-Asset-Protection-LadyBirdDeedsinTexas.pdf> [<http://perma.cc/XA3H-HG2H>] (last updated Aug. 2013).

103. *See* 1 TEX. ADMIN. CODE § 358.604(b) (West 2009) (referring to the requirements of 20 CFR § 416, Subpart G). TODDing does not constitute a change in income or resources or create any other event requiring a report under 20 CFR § 416.708, *see id.* During the time period in which this article was written, three attorneys reported to the author that HHSC review of a TODD should be pursued nonetheless. *Id.*

104. *See Medicaid Estate Recovery Program FAQs*, TEX. DEP'T OF AGING & DISABILITY SERVS., http://www.dads.state.tx.us/services/estate_recovery/faqs.html [<https://perma.cc/CCL7-7PVM>] (last updated June 3, 2016).

105. ADMIN. § 373.105(6). Texas MERP regulations define "estate" as "[t]he real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in § 3(l), Definitions and Use of Terms, Texas Probate Code," *id.*

106. *Id.*

and to pursue “other assets in which the individual had any legal title or interest at the time of death,” including assets the individual conveyed “through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.”¹⁰⁷ However, Texas has not adopted this extended estate recovery provision. Astute practitioners have already noted that revisions to Medicaid policy can render a once-protective practice obsolete.¹⁰⁸ Critically, although there is no sign that HHSC will change its policy on this issue to broaden the scope of MERP, the Texas Estates Code codifies the TODD’s current insulation from MERP.¹⁰⁹

G. Homestead Issues

While the transferor is still alive, a TODD does not affect the transferor’s homestead rights in the property or eligibility for ad valorem tax exemptions, including exemptions for a residence homestead, persons sixty-five years of age or older, persons with disabilities, and veterans.¹¹⁰

Although some seniors have used Lady Bird Deeds to hold onto the last of their homestead exemptions, Lady Bird is non-statutory, and it has not generated any case law on which we can hang our hats down here in Texas. And while some folks have used JTWROS to add another person to a piece of property while attempting to hang on to their exemptions, the strategy is quite risky. The addition of a non-resident child, for example, may in some places cause the appraisal district to reduce the exemption by the share of ownership conferred upon the non-resident.

Finally, the TODD will be a big help to those families for whom the rules of intestate succession have operated as a barrier to the full benefits of tax exemption. For example, in a recent study conducted by UT Law students of clients impacted by Hurricanes Ike and Dolly, about one quarter of those eligible for homestead exemptions were found not to have had exemptions in place for their long-time homesteads prior to receiving clinic assistance.¹¹¹ Many co-owned property with siblings, and some with unknown heirs, due to their parents’ and grandparents’ inability to afford wills. Although some counties have created forms to assist such homesteaders in applying for and receiving fractional homestead exemptions proportional to their interests, the students’ experiences strongly suggest that these forms are often not accessed. Also, many of the homesteaders lacking sole ownership status

107. 42 U.S.C. § 1396p(b)(4)(B) (West 2013).

108. See Hale, *supra* note 102, at 10 (noting that Section F-3210 was revised to allow for the consideration of a home placed in revocable trust as a countable resource).

109. EST. § 114.106(b) (explaining that when a transfer on death deed transfers real property upon the transferor’s death, the real property is not considered property of the probate estate for any purpose, including for purposes of section 531.077 of the Texas Government Code).

110. EST. § 114.101(1)(B)–(C).

111. Please contact the author for a copy of this study, which was funded by the Texas General Land Office.

nonetheless reported paying all of the taxes and upkeep on their properties. TODDing will halt the further fractionalization of these family assets, ensuring that later generations of homesteaders can access their full exemptions under the law.

H. Due on Sale and Transfer Restrictions

A TODD does not constitute a transfer triggering a "due on sale" or similar clause.¹¹² There have been reports of those having transferred property via Lady Bird Deeds having to argue the absence of true transfer.¹¹³ Affordable housing programs may also include default provisions that bar transfer of property; the language of such provisions may not make clear that Lady Bird Deeds would not trigger these provisions. The TODD should take care of these problems.

V. TODD CONCERNS

A. A Word About Litigation

One of the biggest concerns among practitioners is the fear that the TODD will result in frequent litigation.¹¹⁴ The idea appears to be that TODDing will, naturally, lead to more disputes than would exist otherwise. However, the rise in TODD-related conflicts, if we see many, must be viewed in the context of the number of cases in which we would otherwise have seen the continued fractionalization of ownership—a problem with very negative consequences disproportionately burdening poor families. This fractionalization (and its reduction through TODDing) may not be very visible to the bar or to the judiciary. Also, some of the TODD-related conflicts that we may see will be problems that likely would have arisen, without TODD, in the form of will contests or as applications to determine heirs. Finally, because the TODD has been fully integrated into our statutory framework, it answers through carefully-crafted default rules a set of questions that otherwise might have resulted in litigation.¹¹⁵

The good news is that other states' experiences with TODD appear positive and rather non-litigious.¹¹⁶ "Overall, the perception that TOD deeds

112. EST. § 114.101(5).

113. See Combs, *supra* note 84.

114. See Mathew B. Talbot, *California Bill Cuts Probate Costs But May Increase Estate Litigation*, LAW OFFICES OF MATHEW B. TALBOT BLOG (Sept. 28, 2015), www.mathewbtalbot.com/blog/2015/9/23/california-bill-will-cut-probate-costs-but-may-increase-estate-litigation [https://perma.cc/7QBF-XQZP].

115. See, e.g., *infra* Section V.C. (discussing the provisions concerning liens, expenses, allowances, etc. The law also provides clear guidance concerning the applicability of anti-lapse).

116. Jennifer W. Jiang, *Transfer on Death Deeds: Benefit or Burden? A Proposal for Transfer on Death Deed Legislation in North Carolina*, 90 N.C.L. REV. ADDENDUM 106, 113–16 (2012).

increase litigation is unfounded.”¹¹⁷ A review of TODD-related litigation in other states may help us to avoid some common pitfalls.

B. User Error

Critics of the TODD point first to the fact that the statutory form is available online, increasing the potential for user error among people without lawyers. It is useful to remember, however, that wills are available online and may afford equal, if not greater, opportunities for user mistakes. Lady Bird Deeds are also available online, and many users do not understand their legal consequences.

About fifty decisions reported as of the writing of this article mention a transfer on death deed; of those reported, only two clearly refer to TODD user error.¹¹⁸ In one, title was transferred immediately, instead of upon death, due to *attorney* error in preparing the form.¹¹⁹ In a second, the court found that the language in the deed purporting to transfer upon death was ineffectual in light of language transferring a fee simple interest within the same instrument.¹²⁰ The use of the statutory form will, hopefully, reduce this sort of error. It bears noting that the form, which is permissive, has been further developed by at least one organization to minimize the likelihood of user error.¹²¹

C. Multiple Beneficiaries and Anti-Lapse

Some states that have adopted TODD without incorporating an anti-lapse statute have experienced problems when transferors fail to name alternate beneficiaries, leading to lapsed gifts and unintended results. Fortunately in Texas, the incorporation of our anti-lapse provisions will operate to prevent many of these issues.¹²² However, the TODD statute does

117. *Id.*

118. *Helbling v. Thomas (In re Thomas)*, 2013 Bankr. LEXIS 5644 (Bankr. N.D. Ohio Nov. 12 2013); *Brannan v. Easter*, 2012-Ohio-2045, 2012 Ohio App. LEXIS 1796, 2012 WL 1654945 (Ohio Ct. App., Scioto County Apr. 30, 2012).

119. *Helbling v. Thomas (In re Thomas)*, 2013 Bankr. LEXIS 5644 (Bankr. N.D. Ohio Nov. 12 2013); *Brannan v. Easter*, 2012-Ohio-2065, 2012 Ohio App. LEXIS 1796, 2012 WL 1654945 (Ohio Ct. App., Scioto County Apr. 30, 2012).

120. *Brannan v. Easter*, 2012-Ohio-2045, 2012 Ohio App. LEXIS 1796, 2012 WL 1654945 (Ohio Ct. App., Scioto County Apr. 30, 2012).

121. *See Transfer on Death Deed Kit*, *supra* note 46. The increased costs involved in filing these lengthier TODDs has led several pro bono clinics to adopt a streamlined version.

122. EST. § 114.103(a)(3)–(4) (West 2015). Concurrent interests are transferred to beneficiaries in equal and undivided shares without a right of survivorship, *see id.* If the transferor designates two or more beneficiaries to receive concurrent interests in the real property, the share of the one who predeceases lapses and is subject to and passes in accordance with Subchapter D of Chapter 255, *id.* For example, if A transfers property via a TODD to friends B and C, and B predeceases, then C takes the property. *Id.* §§ 114.103(a)(4), 255.152(b).

not incorporate anti-lapse for gifts that are not concurrent.¹²³ For example, if A TODDs only to daughter D, and D predeceases, the gift will lapse and *not* go to the children of D unless they are named as alternates.¹²⁴

Tip (8): Make sure clients name alternative beneficiaries, and make sure they understand how Chapter 255 will or will not apply to their TODDs.

D. Lack of Capacity and Undue Influence

1. Lack of Capacity to TODD

To TODD one must have the capacity to enter into a contract.¹²⁵ This is a deviation from the Uniform Real Property Transfer on Death Act (URPTODA), which requires the capacity to enter into a will.¹²⁶ The bottom line is that transferors need to understand what they are doing. As is the case with wills executed by those with questionable capacity, there are bound to be contests. It is hoped that the fact that the TODD must be filed before death to be effective will operate to produce fewer, rather than more, contests regarding capacity; there will at least be some opportunity for cure. At least one reported case mentions the unwinding of a TODD for lack of capacity.¹²⁷

2. Undue Influence

Some fear that family members will use TODDs to pressure others into TODDING property to them, even after the execution of a will.¹²⁸ Recall that a valid TODD will trump a will.¹²⁹ However, it bears noting that a family member who wants to push another into a change of heart can do so with a boilerplate will printed from the family's home computer. Critically, the requirement that a property owner file the TODD before death, which gives other family members at least the opportunity for notice, may make such instances less likely than those involving wills not produced until after death.

123. *Id.* § 114.103(a).

124. *See id.* At the time of the writing of this article, a bill was being drafted that would apply anti-lapse to non-concurrent gifts.

125. *Id.* § 114.054(a).

126. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 8 (UNIF. LAW COMM'N 2009), http://www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf [<http://perma.cc/W8QS-EW85>] (last visited Sep. 8, 2016).

127. *Severing v. Severing*, 54 N.E.3d 724, 2015-Ohio-5236, 2015 Ohio App. LEXIS 5058 (Ohio Ct. App., Franklin County Dec. 15, 2015).

128. *Hamblin v. Daugherty*, 2007-Ohio-5893, 2007 Ohio App. LEXIS 5180 (Ohio Ct. App., Medina County Nov. 5, 2007).

129. EST. § 114.057(b).

In one TODD case, three sisters were to inherit equally under a will.¹³⁰ Upon the death of their father, most of his property transferred via TODD to only one of the sisters.¹³¹ The disinherited sisters brought allegations that the court found largely conclusory and without merit in light of the TODD's validity.¹³² It may be that we are likely to see similar litigation when TODDs function to the disadvantage of family members included in prior wills.

On the plus side, the Texas TODD statute prohibits the use of a Power of Attorney (POA) to TODD.¹³³ (Note that an agent named in a durable POA that gives the agent the authority to transfer real property by gift can sign a Lady Bird Deed.¹³⁴) At least one reported case of TODD trouble resulted from the use of a POA in a state that did not clearly disallow that practice.¹³⁵ Also on the plus side, it appears that there has been only one reported case in which a party complained of undue influence as evidenced by the failure to follow the required procedures for acknowledgment; in that case, too, the TODD was upheld as valid.¹³⁶

3. *Lack of Capacity to Revoke*

The Texas statute does not disallow the use of a POA to revoke a TODD, although it does disallow the use of the POA to TODD in the first instance.¹³⁷ Those familiar with TODDs have noted the importance of providing narrowly-drawn POAs, allowing for one trusted person to revoke a single TODD, in the event that it becomes prudent to revoke following the transferor's incapacity.¹³⁸ Without this use of a durable POA, the TODD will essentially become fixed, whether or not changed circumstances counsel in favor of a change to the estate plan.¹³⁹

130. *Hamblin*, 2007-Ohio-5893, 2007 Ohio App. LEXIS 5180.

131. *Id.*

132. *Id.*

133. EST. § 114.054(b).

134. See Abshire, Farrell, Sitchler & Wright, *supra* note 74.

135. *Miller v. Shreve (In re Miller)*, 2014-Ohio-4612, 21 N.E.3d 666, 2014 Ohio App. LEXIS 4510 (Ohio Ct. App., Guernsey County 2014).

136. *In re Estate of Frie*, 315 P.3d 278, 2014 WL 37685 (Kan. Ct. App. 2014).

137. EST. § 114.054.

138. See Kirtland & Seal, *supra* note 64; Abshire, Farrell, Sitchler & Wright, *supra* note 74.

139. See Gary, *supra* note 60, at 547-48 (discussing that for transferors lacking capacity to revoke a TODD they may need to rely upon judicially-appointed conservator).

Tip (9): Drafting a narrow POA solely for the revocation of a specific TODD may be a potentially helpful step. Attorneys should caution clients that the validity of POAs for this purpose is still open to question, but having this “in hand” may be useful should the TODD need to be revoked for some unforeseen reason.

E. Failure to Record

One of the most common issues with TODDs in the states that have allowed them is the failure of TODD transferors to properly record before death. Thus far, courts have held fast to the requirement that a TODD is only effective if it is recorded before death, even when the transferor clearly intended to transfer property via a TODD but did not actually record a TODD.¹⁴⁰

Failure to record revocations or subsequent conveyances will create similar problems. In one case, the court held a TODD remained valid because the party failed to record a deed intended to invalidate the TODD.¹⁴¹ Under the Texas TODD statute, the transferor must record a subsequent conveyance to void an otherwise effective TODD.¹⁴²

Tip (10): Tell clients to record TODDs and any subsequent conveyance or revocations! Clients are used to the idea that they can hold onto a will. They may also think that recording a deed is not necessary for it to be valid, but recording a post-TODD transfer by deed is necessary to void the TODD!

F. Being Careful to Revise a Will and the TODD

There is at least one reported instance of the estate planner’s worst nightmare.¹⁴³ After a falling out, a client instructed his lawyer to change his estate plan, which originally left property to one set of beneficiaries, to favor a different set of beneficiaries; the attorney revised the will but failed to prepare a new TODD.¹⁴⁴ The court wrote that, “[e]ven construing the evidence of intent to replace the TOD instrument strongly in favor of the Plaintiffs, reasonable minds can only conclude that [the transferor’s] unfulfilled intent does not affect the TOD instrument and its effective transfer of the real estate to the beneficiaries—in this case, the Defendants.”¹⁴⁵ Yikes!

140. *In re Estate of Scott*, 842 N.E.2d 1071, 1072 (Ohio Ct. App., Miami County 2005); *Mattia v. Hall*, 2008-Ohio-180, 2008 Ohio App. LEXIS 152, *2 (Ct. App. Jan. 23, 2008).

141. *Sheils v. Wright*, 357 P.3d 294 (Kan. Ct. App. 2015).

142. TEX. EST. CODE ANN. § 114.102(2) (West 2015).

143. *Blausey v. Vanness*, No. 10 CV 279, 2015 Ohio Misc. LEXIS 4365 (Ct. Com. Pl. July 8, 2015).

144. *Id.*

145. *Id.*

Obviously, the point is that one must always read a TODD and will—along with any other estate planning documents—together. One interesting TODD case involved a testator whose will clearly directed the executor to pay the mortgage on TODDED property.¹⁴⁶ The court held that the executor should have followed the directions even though the TODD statute specifically provided for the transfer of mortgages to TODD beneficiaries.¹⁴⁷ The example shows how a will can alter the outcome even where the TODD statute establishes a general default rule.¹⁴⁸

Tip (11): Check the deed records for a client who wants to revise a will, at least for those who cannot recall creating a TODD but mention having pulled down “forms” or meeting with an attorney previously.

G. Effective Date

In a few reported cases, the transferor attempted to use a TODD before the transferor’s home state enacted a statute.¹⁴⁹ Texas lawmakers carefully wrote the statute to apply only to those deeds authored after the Act’s passage.¹⁵⁰ Lawyers who drafted TODDs or Lady Bird Deeds for clients before September of 2015 should consider reconnecting with their clients to prepare new TODDs.

H. Imperfect Ownership

1. Fractionalized Interests

There is some concern that creating a TODD for property with fractionalized ownership could create additional problems. However, it is critical to understand that passing the property via intestate succession will further fractionalize the interests involved, which will compound the problems. Titles may be confusing after a generation or two of intestate succession, but TODDing will at least prevent another layer of confusion. Also, recall that the TODD cannot include a warranty of title. Lawyers should advise clients holding fractionalized interests in real property about the benefits of consolidating ownership via gift deeds. Additionally, affidavits of heirship should be considered to assist clients with consolidation of ownership where appropriate.

146. See *Carson v. Cornish (In re Estate of Carlson)*, 367 P.3d 486 (Okla. 2016).

147. *Id.*

148. See *id.*

149. *Hammond v. Hammond (In re Estate of Hammond)*, 268 P.3d 691, 2011 (Or. Ct. App. 2011); *Rickels v. Goyings*, 2008-Ohio-2119, 2008 Ohio App. LEXIS 1833, (Ct. App. May 5, 2008).

150. TEX. EST. CODE ANN. § 114.003 (West 2015).

2. Contract for Deed

It is not uncommon to see recorded, or even unrecorded, contracts for deed (CFDs) in Texas, particularly in informal settlements.¹⁵¹ For those having bought via CFD—or for those who, for some other reason, have not yet acquired title—the TODD will operate to pass any interest that they have at death; if title is acquired before death via consolidation or conversion, the TODD will operate to pass full ownership.¹⁵² However, clients presenting with CFDs should certainly be informed about the process for conversion to warranty deed and how best to obtain clear title prior to death.¹⁵³

VI. FORWARDING ACCESS TO JUSTICE THROUGH TODD

Texans who can afford little-to-no legal services will experience significantly improved access to probate if the TODD is used carefully.¹⁵⁴ For example, students from the University of Texas School of Law recently traveled to the Rio Grande Valley and assisted in the supervised completion of more than 120 TODDs for low-income families in a partnership with Texas Rio Grande Legal Aid.¹⁵⁵ These clinics are emerging in Austin and Houston as well, and they will likely supplement our pro bono bar’s strong commitment to “will-a-thons” and other similar pro bono endeavors.*

151. See generally, Heather Way & Lucy Wood, *Homeownership Without a Net*, SHELTERFORCE (Spring 2013), http://www.shelterforce.org/article/3472/homeownership_without_a_net/ [<https://perma.cc/94K5-F526>] [hereinafter Way & Wood, *Homeownership*]; Way & Wood, *Contracts for Deeds, supra* note 7 (discussing how low income households outside the traditional mortgage market are at risk).

152. UNIF. REAL PROP. TRANSFER ON DEATH ACT 12–13, §12(UNIF. LAW COMM’N 2009) (noting the continued application of the doctrine of after-acquired title), http://www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf [<https://perma.cc/W8QS-EW85>] (last visited Sept. 8, 2016).

153. See generally TEX. PROP. CODE ANN. § 5.081, (West 2016) (discussing executory contracts).

154. See *Transfer on Death Deed*, TEXASATJ.ORG, www.texasatj.org/transfer-death-deed [<https://perma.cc/QUJ7-EWZC>] (last visited Sept. 12, 2016).

155. *Texas Law-Experimental Learning: Pro Bono Program*, TEX. LAW, <http://www.law.utexas.edu/probono> [<https://perma.cc/D522-WSSR>] (last visited Sept. 12, 2016).

* Please contact the author if you would like to supervise students for an evening or two in TODDing for low-income families in your area. Please also feel free to contact the author with any benefits you experience in your practice through the use of the TODD, or any concerns you may have about the TODD not discussed in this article.