

TRANSFER ON DEATH INSTRUMENTS AND TITLE INSURANCE: TWO SIGNIFICANT PROBLEMS

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Public Act 97-555 (HB 1153), effective January 1, 2012, creates the Illinois Residential Real Property Transfer on Death Instrument Act, to be codified as 755 ILCS 27/1 et seq. The Act creates a new "probate-avoidance" tool known as a Transfer on Death Instrument (TODI). For a complete description of the Act and TODI requirements and procedures, see Charles G. Brown, *The Transfer on Death Instrument Comes to Illinois*, 99 Ill. BJ No. 12 at 618 (December 2011).

The Act is new, complex, and untested. It presents to title insurers numerous issues that may be difficult to resolve. The discussion that follows highlights two of these issues: (1) insuring subsequent purchasers when title is derived through a TODI and (2) insuring title when a recorded TODI is not timely or properly accepted by its beneficiaries. First, however, it is important to note some provisions of the Act that impact the title insurance process. For citations to specific sections of the Act, see the Brown article noted above.

THE ACT: IN BRIEF

Practitioners must be aware of, among other TODI provisions, the following features of the TODI Act:

- A TODI or revocation that fails to conform to the Act's technical requirements for execution, witnessing, and acknowledgement is void and ineffective
- A TODI is effective only if the property in question is residential, as defined in the Act
- TODI beneficiaries must accept title through the TODI within the time limit established by the Act; if timely accepted, the transfer through the TODI is effective as of the date of the owner's death
- The title of TODI beneficiaries is subject to claims against the estate of the deceased owner, federal estate taxes and state inheritance taxes against the estate of the deceased owner, and all liens and encumbrances affecting title at the time of the deceased owner's death
- The personal representative of a deceased owner may take possession of the property if the TODI beneficiaries fail to timely accept title; the personal representative may claim a lien on the property for the expenses of maintenance
- Heirs, devisees, and creditors of the deceased owner have a statutory right to challenge a title based on a TODI.

Insuring title through a TODI is similar to insuring the title of heirs taking from a testate decedent whose estate has not been probated. The insurability of title will be based on affidavits, waivers, and the traditional "bond in lieu of probate" procedure. These items are discussed below.

TITLE THROUGH A TODI: HOW TO CLEAR TITLE FOR SUBSEQUENT PURCHASERS

Section 90 of the Act states that “[a]n action to set aside or contest the validity of a transfer on death instrument shall be commenced within the earlier of 2 years after the date of the owner’s death or 6 months from the date that letters of office are issued.”

It appears, therefore, that title derived through a TODI is vulnerable to challenge during this statutory limitation period. The Act contains no provisions protecting subsequent purchasers for value. As a result, any title based on a TODI will be subject to the following title exception:

Right of any interested party to challenge or set aside title based on the Transfer on Death Instrument recorded as document _____.

Can this “right to challenge” exception be waived for a subsequent purchaser or mortgagee prior to the expiration of the Section 90 limitation period? Consider the following example.

Ben, a widower, is the owner of agricultural land in Illinois (locally known as “The Ponderosa”), consisting of just under 40 acres and containing a single family residence. Ben has 3 sons—Adam, “Hoss,” and Little Joe. Adam rode off somewhere and has not been seen for several seasons. Hoss and Little Joe, both adults, still live with their father but constantly quarrel with him and with each other. Ben has an old will naming Adam as the sole beneficiary. Ben properly executes and timely records a TODI that designates his long-time cook and housekeeper, Hop Sing, as the sole beneficiary. After Ben’s death, Hop Sing timely records a proper Notice of Death Affidavit and Acceptance. Hop Sing now wishes to sell The Ponderosa.

When asked to insure the contemplated transaction, a title insurer will first eliminate the possibilities of fraud, forgery, undue influence, and duress. Then, because of Section 90 of the Act, the title insurer will raise the “right to challenge” title exception noted above. In addition, the title insurer will anticipate risk because of the disclosed family disharmony and also because there will be different title outcomes in this case under testate succession, intestate succession, and the TODI,

What can Hop Sing’s attorney do to induce the title insurer to waive the “right to challenge” exception for the purchaser and purchaser’s lender?

The attorney should be prepared to provide the following:

- A copy of the death certificate for Ben
- An affidavit of heirship for Ben
- A copy of Ben’s last will and testament
- An affidavit establishing the type of improvements on the property and the use of the property
- Evidence that Hop Sing survived Ben and is under no legal disability
- “Bond in lieu of probate” affidavit and indemnity and an additional risk premium for waiver of an exception for claims against Ben’s estate

- Evidence that federal estate taxes and state inheritance taxes, if any, against Ben's estate are paid
- In the event a decedent's estate for Ben was opened, a waiver by the personal representative, if any, of any claim for reimbursement for maintaining the property
- Waivers in some form of the "right to challenge" from all of Ben's heirs and devisees—whether by specific written waivers, releases, disclaimers, quitclaim deeds, or otherwise.

The title insurer will waive exceptions for claims and taxes against Ben's estate in the traditional manner, sometimes requiring an additional risk premium. The title insurer will only waive the "right to challenge" exception, however, if it is satisfied that the risk of challenge has been eliminated—that is, if Adam, Hoss, and Little Joe have satisfactorily waived their right to challenge the TODI. In the above example, though, this requirement may be difficult to satisfy. For instance, what if Adam cannot be found or is unwilling to sign a waiver? Or, if Adam predeceased Ben, survived by minor children, additional difficulties will be encountered.

In the absence of a full set of satisfactory waivers, the title insurer may require an order from a court with jurisdiction over all the parties (Hop Sing, Adam, Hoss, Little Joe, and, if necessary, their respective heirs) declaring the rights of the parties. In the absence of waivers or court orders, the title insurer will only waive the "right to challenge" exception when the statutory limitation period has passed without challenge or contest.

TITLE DESPITE A TODI: WHAT IF BENEFICIARIES FAIL TO ACCEPT A TODI OR FAIL TO ACCEPT IT PROPERLY?

Section 75 of the Act provides that for a TODI to be effective as of the date of the owner's death, the beneficiary or beneficiaries (or authorized representatives) must record a Notice of Death Affidavit and Acceptance (Notice). The Act requires all of the beneficiaries to sign the Notice. If a properly executed Notice is not recorded within 2 years from the date of the owner's death, the TODI is void and ineffective. In that event, title passes to the owner's estate.

Thus, if a title insurer encounters a TODI on the chain of title but no recorded Notice, it may find title based on standard practices for testate or intestate succession. Because of Section 75, however, the title insurer will raise the following "right to record" title exception:

Rights of _____, beneficiary or beneficiaries under a Transfer on Death Instrument recorded as document _____ to record a Notice of Death Affidavit and Acceptance within the time permitted by law.

Where is title to the property between the date of owner's death and the date of recording of the Notice? What if no Notice is ever recorded? What if fewer than all beneficiaries sign a recorded Notice? Will the "right to record" exception ever be waived? Consider the following examples.

Ted, a widower, owns a residential condominium unit in Chicago's Gold Coast neighborhood. Ted has 3 estranged sons—James, John, and Alex. (These characters

are all Russian immigrants; their names have been Anglicized for convenience.) There is also an illegitimate son, Paul, who sometimes acts, reluctantly, as Ted's caregiver. Ted properly executes and timely records a TODI designating James, John, and Alex as the beneficiaries. Subsequently, Ted executes a will naming a woman nicknamed Grushenka—a woman Ted mistakenly believes to be his lover—as his sole devisee. (She is actually James' lover.) After Ted's death, Grushenka wishes to admit the will to probate, sell the condo, and keep all proceeds for herself.

Grushenka's attorney advises the title insurer of Ted's death and notes the lack of a recorded Notice. She then proceeds to have the will admitted to probate. Once again, the title insurer will first eliminate the risk of fraud, forgery, undue influence, and duress. After the will is admitted to probate, the title insurer is willing to find title in Grushenka but will also raise the "right to record" exception noted above. Once again, the title insurer anticipates risk because the title outcome differs under testate succession, intestate succession, and the TODI.

What can Grushenka's attorney do to induce the title insurer to waive the "right to record" exception for the purchaser and purchaser's lender?

The attorney should be prepared to provide the following:

- A copy of the death certificate for Ted
- An affidavit of heirship for Ted
- A copy of Ted's last will and testament
- A copy of the order admitting the will to probate and of the order appointing a personal representative, if any
- Affidavits, indemnity, and an additional risk premium for waiver of an exception for claims against Ted's estate
- Evidence that federal estate taxes and state inheritance taxes, if any, against Ted's estate are paid
- Waivers in some form of the "right to record" from James, John, and Alex—whether by specific written waivers, releases, disclaimers, quitclaim deeds, or otherwise.

The title insurer will waive exceptions for claims and taxes against Ted's estate in the traditional manner, sometimes requiring an additional risk premium. The title insurer will only waive the "right to record" exception, however, if it is satisfied that the risk of recording a Notice has been eliminated—that is, if James, John, and Alex have satisfactorily waived their right to record a Notice of Death Affidavit and Acceptance. In the absence of such waivers, the title insurer may require an order from a court with jurisdiction over all the parties (Grushenka, James, John, Alex, and Paul) declaring the rights of the parties. In the absence of waivers or court orders, the title insurer will only waive the "right to record" exception under this scenario when two years have passed since Ted's death without the recording of a Notice.

Consider the same scenario, except that an effort is made to record a Notice of Death Affidavit and Acceptance. Alex wishes to take title, along with James and John, through the TODI by recording a Notice, but he cannot obtain signatures from James (drunk in a River North bar every night) and John (engaged in deep philosophical

discussions in Hyde Park that no one seems to understand). Alex alone signs and records a Notice within 2 years of Ted's death.

Has Alex defeated Grushenka's title? Will the title insurer find title through the TODI rather than through Ted's will?

Section 75 of the Act requires each beneficiary (or his or her authorized representative) to sign the Notice. Thus, this Notice, signed by fewer than all beneficiaries, is ineffective under Section 75. Alex, self-sacrificing though he may be, is not an authorized representative of his brothers who are adults and not under legal disability. Therefore, the title insurer will find title through Ted's will, but the insurer will continue to show the title exception for the "right to record." After all, the beneficiaries might eventually get together and record a proper Notice.

One problem remains. In a speech at the Chicago Bar Association, Charles G. Brown, principal drafter of the Act, suggested that if fewer than all beneficiaries sign the Notice, the 2 year time period for recording a proper Notice is extended indefinitely. Although this conclusion is not specifically stated in the Act, title insurers will take it very seriously. Thus, the "right to record" exception will not be waived after 2 years from the owner's death if a Notice was signed and recorded by fewer than all beneficiaries. The title insurer will waive the "right to record" exception under these circumstances only upon production of appropriate waivers from all interested parties or a court order that declares the rights of and is binding upon all interested parties.