



Real Estate News

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Transfer on Death Deeds

A Revocable *Transfer on Death Deed* is a real estate deed that allows you to designate a beneficiary to whom your real estate will pass when you die. Generally speaking a Revocable Transfer on Death Deed has many advantages over a regular life estate deed or simply adding a name to your deed as another joint owner.

Historically many items of **personal property** have routinely transferred to a designated beneficiary outside of probate upon the death of the owner; for example, vehicles, bank funds held in pay-on-death bank accounts and the proceeds of life insurance policies, retirement accounts, and pension plans. However, until recently a Will was the only mechanism for transferring **real property** at the owner's death. Many states now recognize *Transfer on Death Deeds*. These are also known as *Enhanced Life Estate Deeds* or *Revocable Beneficiary Deeds*. They have also been referred to as *Lady Bird Johnson Deeds* because President Johnson was once said to have used this type of deed to convey some land to Lady Bird.

In Vermont they are usually called *Enhanced Life Estate Deeds*. These deeds transfer real property to others, usually the owners' children, but reserve to the owners all present ownership rights including the right to sell, lease, mortgage or convey the

property during their lifetimes. This keeps control of the property with the original owners during their lives, but passes the property outside probate on their deaths. It gives the recipients a *step-up in the tax basis* of the property to date of death value, avoiding Capital Gains Tax under current tax law. It also is not considered a *penalized transfer* for Medicaid purposes, but does avoid Medicaid recovery by avoiding probate.

Once the deed is recorded, the owner continues to use the property with no restrictions. He can sell or mortgage it, or even record another Transfer on Death Deed changing the recipients. If the owner sells the property the Transfer on Death Deed is voided. Likewise, if a subsequent Transfer on Death Deed is recorded the first one is voided.

Because the Transfer-on-Death Beneficiary Deed can be revoked it avoids the problems that exist when a homeowner adds a child or grandchild to his or her deed. The home ends up in the son's divorce, or the grandson's bankruptcy, or with liens from a her daughter's creditors.

There are situations where a Transfer on death Deed may not be recommended. For example, if you are a single parent with several children named as your TOD beneficiaries and one child dies before you do. If you have not changed your TOD Deed, the result may not be what you intend. The property will go to the three living

children, but the children of your deceased child will get no share of the property if you did not name them as contingent beneficiaries. Of course, you can name all of your grandchildren as contingent beneficiaries, but you would have to do a new deed each time a grandchild is born.

In a regular life estate deed, the owner keeps the "life estate" and conveys a "remainder interest" to someone who will inherit the property. The current owner continues to occupy and use the property and is entitled to all money that may come from the property. However, the owner cannot sell the property without agreement of and participation by the holder of the remainder interest. Further, the IRS puts a value on the creation of the remainder interest, and if it is large enough there may be gift tax consequences.

Adding the name of another joint tenant to a deed has consequences for capital gains taxation. When an individual makes a gift to another person during the grantor's lifetime, the capital gains tax basis of that property in the hands of the new owner remains unchanged. Should the individual choose to sell the property, the capital gains tax will be determined based on the grantor's tax basis in the property.

In addition to tax consequences, other unintended liabilities can occur as a result of adding the name of an adult child as a joint tenant. Because the addition constitutes a completed gift, the ownership interest of the

child vests at that time. Should the child become involved in a lawsuit, most typically a divorce, a tort action, or a bankruptcy proceeding, the real property on which that child's name has been added is subject to those legal proceedings

For tax purposes, property transferred with the new deed should be treated in the same way as real property passing through probate. Generally, for estates of less than one million dollars, there should be no federal or state estate tax. Additionally, the heirs should get the "stepped up basis" (date of death value) in the real property and will likely owe no tax on their inheritance.

Because of these various issues and the strong desire to avoid probate, the concept of a transfer-on-death deed has been growing number of states.