



ILLINOIS STATE BAR ASSOCIATION

GENERAL PRACTICE, SOLO & SMALL FIRM

The newsletter of the Illinois State Bar Association's General Practice, Solo & Small Firm Section

Estate planning update: The Illinois Transfer on Death Instrument

By Katherine A. Chamberlain

Editor's Note:

It is not often we devote an entire issue to a single topic. This article by Katherine Chamberlain on the Illinois Transfer on Death Instrument for residential real estate, provides us that opportunity. The changes in the Illinois Residential Real Property Transfer Act took place effective January 1, 2012. Katherine's article provides a checklist for lawyers and clients coupled with the applicable forms for attorneys. We thank Katherine for her work and hope the article helps our members serve their clients.

—John T. Phipps

I. Introduction

The Illinois Residential Real Property Transfer Act (the "Act"; 755 ILCS 27/1 *et seq.*; Ill. Public Act 097-0555) became a new tool to transfer residential real estate outside of probate for decedents dying after January 1, 2012.

The Act allows an owner, including joint owners, to transfer Illinois residential real estate to one or more beneficiaries using a The Transfer on Death Instrument ("TODI"). The TODI is prepared before the owners' death and becomes effective at the death of the last owner to die. Because the TODI sets up a non-testamentary transfer, the residential real estate passes to the chosen beneficiary or beneficiaries free of probate.

Below are a checklist and forms to guide the general practitioner in the use of a TODI.

II. Checklist

A. Introduction

755 ILCS 27/1 *et seq.*; Ill. Public Act 097-0555 became effective Jan. 1, 2012.

1. Owner, including joint owners, may transfer

Illinois residential real estate to one or more beneficiaries by a TODI, effective at owner's death.

2. Non-testamentary transfer (not in will), so avoids probate.
3. Owners may prepare their own TODI and any revocation thereof. Otherwise, a licensed Illinois attorney must prepare these documents.

B. Requirements for Validity

1. Must comply with requirements for a deed.
2. Must state that the transfer occurs on the owner's death.
3. Must be recorded in the county or counties where the property is physically located before the owner's death.
4. Must be executed with the same formalities and requirements as a will:
 - a. Owner must have the legal capacity required to execute a will (18 years old, of sound mind and memory).
 - b. Owner must sign the instrument before two credible witnesses and a notary public who attest to the owner's capacity and the voluntariness of the owner's actions.

Does *not* require notice to beneficiaries, delivery, and consideration.

C. Revocation

1. All TODIs are revocable, even if the instrument contains contrary language.
2. Revocation can occur through a subsequent TODI that revokes the prior beneficiary designation, or a revocation instrument. Both must be executed with the same formalities as a TODI and must be recorded prior to the owner's death to be effective.
3. All owners must revoke for revocation to be effective.
4. The last acknowledged and recorded TODI

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controls the disposition of the residential real estate at the owner's death.

D. Special Rules for Joint Tenants or Tenants by the Entirety

1. A TODI can be signed by some, but not necessarily all, of the joint owners.
2. The execution of a TODI does not sever a joint tenancy. The TODI is only effective after the death of the last joint owner to die, and then only if that joint owner executed the TODI. If the last joint tenant to die did not execute a TODI, the designation of a prior deceased joint owner is ineffective.

E. Other Special Rules

1. The rules that govern predeceased beneficiaries under a will or trust also apply to predeceased beneficiaries under a TODI.
2. If the owner sells the residential real estate on contract during her lifetime and the contract remains executory at the time of her death, the beneficiary is entitled the remaining sale proceeds.

F. Beneficiaries of a TODI

a. Interest in Property

1. During the owner's lifetime, the designated beneficiary has no legal rights or interest in the property.
2. The owner (or owner's agent acting under a power of attorney) may sell, mortgage, lease, or deed the property during her lifetime without the consent, knowledge, or involvement of the beneficiary.

Under the ademption law, if property that is the subject of a specific bequest has been transferred during the owner's lifetime, and is not owned by the decedent at her death, the bequest will fail (*i.e.*, is adeemed). An *inter vivos* deed properly executed, delivered, and accepted during the owner's lifetime could result in ademption even if the deed was not recorded prior to the owner's death.

b. No Exoneration of Liens

1. Beneficiaries take title to the residential real estate subject to all conveyances, encumbrances, assignments, contracts, options, mortgages, liens, and other interests to which the property is subject at the owner's death.

c. Creditors' Rights to Recover

Just like the beneficiaries of other non-testamentary transfers (*e.g.*, life insurance), TODI beneficiaries are not subject to certain claims, including those of probate creditors; statutory claims of an owner's surviving

spouse or dependent child; or the surviving spouse's right of renunciation.

1. Residential real estate is subject to the Homestead Exemption Law and the Illinois Frauds Act.

G. Effect of Death of Owner

a. Notice of Death Affidavit and Acceptance

1. To finalize the transfer at the owner's death, the TODI designated beneficiary must record a Notice of Death Affidavit and Acceptance in the office of the County Recorder in the county or counties in which the residential real estate is physically located.
2. Once the Affidavit is recorded, the transfer is effective as of the date of the owner's death.

b. Statute of Limitations

1. Failure of at least one beneficiary's authorized representative (*e.g.*, an attorney) to record the Notice of Death Affidavit *within two (2) years of the owner's death* will render the TODI void and ineffective.
2. If no beneficiary steps forward to accept the residential real estate *within thirty (30) days of the owner's death*, the personal representative of the owner's estate (if any) may take possession of the property to protect and preserve it until a beneficiary accepts the TODI.

c. Disclaimer.

A beneficiary may disclaim her interest in the property. The property then passes as if the beneficiary predeceased the owner.

d. Basis Step-up.

The beneficiary receives a full step-up in the basis of the real estate to the owner's date-of-death value.

e. Predeceased Beneficiaries.

The real estate will pass to the owner's estate if the beneficiary is not a descendant of the owner. If the beneficiary is a descendant of the owner, the real estate will pass to the deceased beneficiary's descendants *per stirpes*.

f. No Warranty of Title.

The real estate passes to the beneficiary without convent or warranty of title, even if the TODI contains provisions to the contrary.

H. TODI Challenges

a. Statute of Limitations. An action to challenge the validity of a TODI must commence *within two (2) years of the owner's death* or

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within six (6) months of the date that Letters of Office are issued for the decedent's estate, whichever is sooner. (This is the same statute of limitations with respect to the time to challenge or contest a revocable trust created by a decedent during her lifetime).

III. Sample TODI For

TRANSFER ON DEATH INSTRUMENT

OWNER'S NAME AND ADDRESS AND TAXES TO:

Name
Address
Address

BENEFICIARY'S NAME AND ADDRESS:

Name
Address
Address

RECORDER'S STAMP

THIS TRANSFER ON DEATH INSTRUMENT made this _____ day of _____, 20____, by _____ [name of owner/s], of the City of _____, County of _____, State of Illinois (herein "Owner/Owners"), being the sole Owner(s) of the following legally-described residential real estate located in _____ County, Illinois:

[legal description]

Property Identification Number:
Property Address:

The Owner(s), being of competent mind and capacity, and waiving and releasing all rights under the homestead exemption laws of the State of Illinois, hereby convey(s) and transfer(s), effective on the death of the Owner last to die, the above-described real estate to:

[beneficiary designation]

IN WITNESS WHEREOF, the said Owner(s) has/have hereunto set his/her/their hand(s) and seal(s) the day and year first above written.

NAME, Owner

NAME, Owner

AFFIX TRANSFER TAX STAMP

OR

Exempt under provisions of 33 ILCS 200/31-45, Paragraph ____, Illinois Real Estate Transfer Tax Law.

Date

Buyer, Seller, or Representative

We, the undersigned witnesses, hereby certify that the above Transfer on Death Instrument was on the date thereof signed and declared by the Owner(s) as his/her/their Transfer on Death Instrument in our presence and that we, at his/her/their request and in his/her/their presence and in the presence of each other, have signed our names as witnesses thereto, believing to the best of our knowledge that the Owner(s) was/were at the time of signing of sound mind and memory, and under no undue influence.

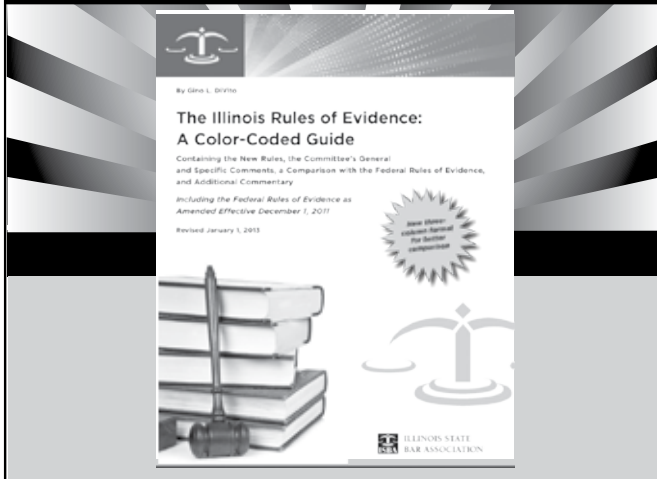
_____, residing at
Witness

Address

_____, residing at
Witness

Address

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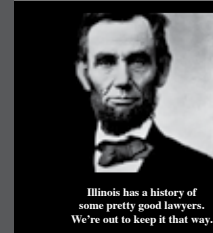
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STATE OF ILLINOIS)
) SS
 COUNTY OF _____)

I, the undersigned, a notary public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Owner(s) and witnesses personally known to me to be the same persons whose names are subscribed on the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of _____, 20____.

 Notary Public

PREPARED BY AND RETURN TO:

Name
 Address
 Address

NOTICE OF DEATH AFFIDAVIT
 AND ACCEPTANCE OF
 TRANSFER ON DEATH INSTRUMENT

PREPARED BY AND RETURN TO:

Name
 Address
 Address

SEND SUBSEQUENT TAX BILL TO:

Name
 Address
 Address

RECORDER'S STAMP

The undersigned beneficiary or beneficiaries, being duly sworn on oath, state as follows:

1. That _____ [name of owner] died on _____, 20____ [date], a resident of _____ County, Illinois, owning residential real estate legally described below:
 [legal description or attach exhibit]
2. That the street address of the residential real estate is _____ [address] and the property identification number is _____ [PIN].
3. That the Transfer on Death Instrument is dated _____ and recorded as Document No. _____ in the Office of the Recorder for _____ County, Illinois.
4. That the undersigned, whose names and addresses appear below, are all beneficiaries entitled to receive under the Transfer on Death Instrument:

<u>Name</u>	<u>Address</u>	<u>Share</u>
_____	_____	_____
_____	_____	_____



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IV. Conclusion

In summary, the transfer on death instrument can be a useful tool for the right client who is getting a will updated or drafted for the first time. Because the instrument remains new, future implications and issues are still unknown, and the instrument may not be the best option for all estate plans.

Those attorneys in favor of trusts and life estates should still consider their utility when meeting with clients, but not discount the relative simplicity of the TODI (not to mention the one-time county recorder fee instead of annual trustee fees) for clients with less complicated estate planning needs. ■

About the Author: Katherine A. Chamberlain is currently the managing attorney of a solo law practice in Princeton, IL. Her practice focuses on estate planning, estate administration, guardianships, and real estate transactions. She graduated from the University of Illinois at Urbana-Champaign with a JD in 2009 and a master's degree in library and information science in 2010. She received her bachelor of arts *summa cum laude* in English in 2006 from the University of Alabama.

A member of the Bureau County Bar Association and Illinois State Bar Association, Attorney Chamberlain has published law journal articles on constitutional law and copyright law. She is also on the board of the Princeton Plan Commission & Board of Zoning Appeals and a member of Rotary International.

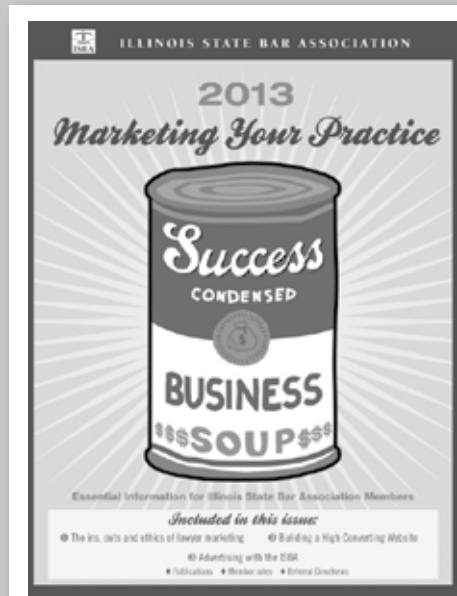


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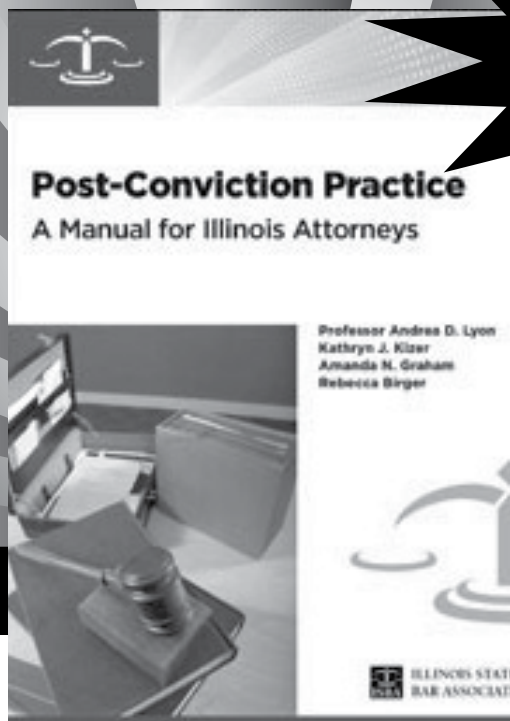


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Tuesday, 3/5/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Tuesday, 3/5/13 – Teleseminar—Estate Planning Issues in Pre- and Post-Nuptial Agreements. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/7/13 - Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Thursday, 3/7 — Friday, 3/8/13 - Chicago, Kent College of Law—ISBA 12th Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. Thurs: 9-4:45 with reception from 4:45-6; Friday, 8:45-1:15.

Friday, 3/8/13 - Quincy, Quincy Country Club—General Practice Update 2013: Quincy Regional Event. Presented by the ISBA General Practice Section. 8:15-5:00.

Tuesday, 3/12/13 – Teleseminar—2013 Age Discrimination in Employment Law and Hiring Update. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/14/13 - Chicago, ISBA Regional Office—Litigating, Defending, and Preventing Employment Discrimination Cases: Practice Updates and Tips for the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4.

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Thursday, 3/14/13 – Teleseminar—Drafting Confidentiality and Non-disclosure Agreements. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 3/19/13 – Teleseminar—Understanding the Role of Insurance and Indemnity in Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/20/13 - Chicago, ISBA Chicago Regional Office—America Invents Act- Part 2: Protecting Innovation in a First to File System. Presented by the ISBA Intellectual Property Section. AM Program.

Wednesday, 3/20/13 - Live WEBCAST—America Invents Act- Part 2: Protecting Innovation in a First to File System. Presented by the ISBA Intellectual Property Section.

Wednesday, 3/20/13 Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Thursday, 3/21/13 – Teleseminar—Ethics and Tribunals: Attorney Duties When Communicating With the Courts and Governmental Agencies. Presented by the Illinois State Bar Association. 12-1.

Friday, 3/22/13 – Teleseminar—LIVE REPLAY: Post-Mortem Estate Planning. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 3/26/13 – Teleseminar—Formula and Defined Value Clauses in Estate Planning: An Update. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/28/13 - Teleseminar—Techniques and Traps for Merging Unincorporated Entities. Presented by the Illinois State Bar Association. 12-1.

April

Tuesday, 4/2/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Tuesday, 4/2/13 – Teleseminar—Overtime, Exempt and Non-Exempt: 2013 Wage and Hour Update, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 4/3/13 – Teleseminar—Overtime, Exempt and Non-Exempt: 2013 Wage and Hour Update, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 4/4/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Thursday, 4/4/13 — Friday, 4/5/13 - New Orleans, Hyatt French Quarter—Family Law Update 2013: A French Quarter Festival. Presented by the ISBA Family Law Section. 12:50-6:30; 9:30-5.

Friday, 4/5/13 - Chicago, ISBA Regional Office—Privacy & Security: Online Marketing and Other Hot Topics. Presented by the ISBA Antitrust & Unfair Competition Section. Half day AM.

Tuesday, 4/9/13 – Teleseminar—Estate Planning for Farmers and Ranchers. Presented by the Illinois State Bar Association. 12-1.

Friday, 4/12/13 - Chicago, ISBA Regional Office—Corporate Legal Ethics. Presented by the ISBA Corporate Law Section. 8:30 am – 12:45 pm.

Friday, 4/12/13 – Rockford, NIU—Practicing in Juvenile Court: What to Expect, What to Do, and How to Help Your Clients. Presented by the Child Law Section. 8:45 – 5:00.

Monday, 4/15/13 – Live Studio Webcast (Tape in CLASSROOM C)—Managing E-Discovery When Resources Are Limited. Presented by the Federal Civil Practice Section and Co-sponsored by the 7th Circuit E-Discovery Pilot Program. 11:00 am – 12:30 pm. (Rehearsal prior at 9:00 – requesting classroom for studio set-up with regular studio cameras due to big panels – not just studio space).

Tuesday, 4/16/13 – Teleseminar—Structuring Preferred Stock and Preferred Returns in Business and Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1. ■



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