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Transfer on Death Deeds in Montana

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A Transfer on Death Deed allows owners of real property in Montana to transfer it at death to one or more designated beneficiaries without probate.

THE 2019 MONTANA LEGISLATURE REPLACED BENEFICIARY deeds with transfer on death deeds (TODDs). As under prior law, TODDs allow owners at death to transfer their real property located in Montana to one or more beneficiaries without probate. **Real property** is land, including whatever is built, growing on, or affixed to it. Examples of real property include homes, garages, or other out-buildings, fences, water systems (unless removable), minerals and standing uncut timber.

A TODD has no effect while you are alive. A TODD does not limit your right to sell, transfer, or mortgage the real property prior to your death. You can change your mind and revoke a TODD prior to your death.

This MontGuide answers questions about the law that became effective for TODDs recorded on or after October 1, 2019. The statutory forms for TODD can be downloaded at: <https://www.montana.edu/estateplanning/eppublications.html>. Scroll to Transfer on Death Deeds in Montana, underneath the MontGuide are the forms. If you recorded a **beneficiary deed** before October 1, 2019, your document is still effective upon your death.

Transfer on Death Deeds

WHAT IS A TRANSFER ON DEATH DEED?

A TODD is a legal document an owner (**transferor**) can use to transfer an interest in Montana real property to one or more **designated beneficiaries**. The transfer is effective upon the owner's death. In other words, the real property transfers from a deceased person to the person(s) listed on the TODD. The TODD must specifically state it is effective upon the death of the owner.

An owner records a TODD with the Clerk and Recorder in the Montana county where the real property is located. In Montana, a TODD is a method of avoiding probate of real property, including mineral interests.

WHAT ARE THE LEGAL REQUIREMENTS FOR A TRANSFER ON DEATH DEED?

Montana statutes provide an optional form for a TODD. A TODD must contain a complete legal description of the Montana real property the owner wants to transfer at death. The legal description from a previously recorded deed is generally the correct one to use. The description appearing on the property tax bill sent annually by the county treasurer does not have the complete legal description. Montana's cadastral property ownership website does not list an accurate legal description. A legal description is available from the office of the Clerk and Recorder in the county where the real property is located.

The owner(s) (**transferor**) initiating the TODD must be identified on the document. List the name(s) exactly as it appears in the recorded deed when the real property was conveyed to the current owner(s). Next, list the current address of the owner. Owners must sign the TODD and have their signatures acknowledged before a notary public.

The owner may designate one or more beneficiaries in a TODD. The address of the designated beneficiary should be included. If the address of the beneficiary is not available, the address of the owner(s) is listed. The TODD must be recorded before the death of the owner or it will not be effective.

WHAT IS A DESIGNATED BENEFICIARY?

A designated beneficiary is a person or an entity who receives an interest in the Montana real property described in a TODD upon the owner's death. A designated beneficiary can be an individual or any legal entity, such as a corporation, trust, partnership, or limited liability company.

An owner is not required to have the signature, consent, or agreement of the designated beneficiary for a TODD. The designated beneficiary has absolutely no ownership rights in the Montana real property described on the TODD until the owner dies.

The owner does not have to give a designated beneficiary notice about the recording of a TODD. However, by letting the designated beneficiary know about the TODD, they can initiate the necessary steps to transfer title. After an affidavit certifying the death of the owner is submitted to and recorded by the Clerk and Recorder in the county where the property is located, the transfer of title to the designated beneficiary is completed.

MAY I DESIGNATE MORE THAN ONE BENEFICIARY?

Yes. An owner may designate two or more primary beneficiaries who will become co-owners of the real property upon the owner's death. When the owner designates more than one primary beneficiary, the beneficiaries acquire ownership as **tenants in common**. With this method of ownership, two or more persons hold undivided interests in the same property with no right of survivorship for the surviving tenant in common.

An owner may specifically state in the TODD the beneficiaries acquire ownership as **joint tenants with rights of survivorship**. An attorney can provide advice about the appropriate form of co-ownership that will best achieve the owner's estate planning goals. MSU Extension also has a property ownership fact sheet (https://store.msuetension.org/Products/Property-Ownership-Estate-Planning-MT198907HR__MT198907HR.aspx) that further describes the differences between joint tenancy with rights of survivorship and tenants in common.

MAY I NAME AN ALTERNATE BENEFICIARY ON MY TRANSFER ON DEATH DEED?

Yes. An owner of Montana real property can designate one or more **alternate designated beneficiaries** in case the primary designated beneficiary dies before the owner.

Example 1: Mark owns real property in Gallatin County. Mark completed and recorded a TODD to be effective upon his death. He named his son, Evan, as his primary designated beneficiary. Mark also designated his grandson, Luke, as the alternate designated beneficiary. If Evan survives Mark, he will acquire the real property as the primary designated beneficiary. If Evan does not survive Mark, Luke will acquire the real property because he is the alternate designated beneficiary.

WHAT HAPPENS IF MY DESIGNATED BENEFICIARY DIES BEFORE I DO?

Unless otherwise specified in the TODD, a designated beneficiary must survive the owner to acquire an interest in the property. If a designated beneficiary does not survive the owner and there is no language stating the interest does not lapse, the interest ends.

Example 2: John owns real property in Carter County. John recorded a TODD to be effective upon his death. John named his three children, Amy, Bob, and Carl, as his primary designated beneficiaries. Assume Amy dies before John leaving two children. Because there is no language providing otherwise in the TODD, Amy's interest ends (lapses) upon John's death. Bob and Carl, as the surviving designated beneficiaries, complete an affidavit certifying the death of John. They sign it in the presence of a notary public and record it with the county Clerk and Recorder where the real property is located.

Bob and Carl each acquire an undivided one-half interest in the property as tenants in common. Amy's two children acquire no interests. Bob and Carl each may dispose of their one-half interest in the real property under their respective wills. Or, they may each record a TODD to convey their undivided interest to a designated beneficiary. If they don't write a will or record a TODD, the real property is distributed according to the intestacy statutes of Montana (https://store.msuetension.org/Products/Dying-Without-a-Will-in-Montana-Who-Receives-Your-Property__MT198908HR.aspx).

Example 3: Same situation as in example 2. However, John specifically states in the TODD that if any primary designated beneficiary does not survive him, then their interest does not lapse. John further indicates the deceased designated beneficiary's interest shall be distributed to their descendants by **right of representation**.

Assume Amy dies before John. Because there is specific language in the TODD, Amy's interest does not lapse. After John dies, Bob and Carl record an affidavit of death. Bob and Carl each acquire an undivided one-third interest in the real property as tenants in common. Because Amy died before John, her one-third interest passes to her two children by right of representation. Amy's two children each acquire an undivided one-sixth interest in the property as tenants in common with Bob and Carl.

WHAT CO-OWNERSHIP CHOICES ARE AVAILABLE IF THE OWNER DESIGNATES MORE THAN ONE BENEFICIARY?

Owners can choose to title the real property in two or more designated beneficiaries as tenants in common or as joint tenants with rights of survivorship.

Tenant in Common: As a general rule, if an owner has recorded a TODD and names more than one primary beneficiary, after the owner's death the primary beneficiaries become co-owners as **tenants in common**. As a tenant in common, each co-owner can transfer their interest in the property to heirs under a will (or under the Montana intestacy statutes in the absence of a will). If two or more persons own real property as tenants in common, each owner may record a TODD to transfer their interest in the real property upon death. A TODD does not affect the interest held by the other co-owner(s).

Example 4: Carol and Amy inherited mineral interests in Richland County from their parents as tenants in common. Carol recorded a TODD for her one-half interest in the minerals, naming her daughter, Susan, as a primary designated beneficiary. Amy, Carol's sister, did not record a TODD for her one-half interest in the minerals. After Carol's death, Susan, her surviving daughter and primary designated beneficiary, now owns a one-half interest in the minerals as a tenant in common with her aunt Amy who owns the other one-half interest.

Upon Amy's death her one-half interest in the property is distributed according to her will or, in the absence of a will, under the Montana intestacy statutes. Amy could sign and record a TODD for her one-half ownership in the mineral interests. She could name a designated beneficiary in a TODD at any time before her death.

Joint tenancy with rights of survivorship: An owner may name more than one designated primary beneficiary and specify they are to become owners as **joint tenants with rights of survivorship (JTWROS)**. That means if one of the joint tenants dies, the surviving joint tenant(s) becomes the sole owner(s) of the real property.

Example 5: Patricia recorded a TODD for her farm land in Teton County to be effective upon her death. She named her two daughters, Fay and Ellen, as primary designated beneficiaries. Patricia indicated in the TODD the title is to be acquired by "Fay and Ellen as joint tenants with rights of survivorship." Fay and Ellen completed an affidavit certifying the death of Patricia. They signed

it in the presence of a notary public and recorded it with the Clerk and Recorder in the county where the property is located. Fay and Ellen each acquire an interest in the farm as joint tenants with rights of survivorship.

Assume a few years later Fay dies. Ellen, as the surviving joint tenant, acquires sole ownership of the farm upon the death of Fay. Fay's interest ends at her death. Because Fay and Ellen held the farm as joint tenants with rights of survivorship, Fay could not distribute her interest to her family with a will.

You may want to consult an attorney about the form of ownership between co-owner beneficiaries that best accomplishes your estate planning goals.

I OWN MY REAL PROPERTY IN JOINT TENANCY WITH RIGHTS OF SURVIVORSHIP. MAY I TRANSFER MY JOINT INTEREST WITH A TRANSFER ON DEATH DEED?

It depends. Assume two or more persons own property as joint tenants with rights of survivorship. However, only one owner signs and records a TODD. The TODD is effective only if the owner completing the TODD is the last surviving joint owner. If the owner who signed the TODD dies before the other joint owner(s), the TODD has no effect. The surviving joint owner(s) continue to own the property because the joint tenancy with rights of survivorship form of ownership has priority over the TODD.

Assume two or more persons own property in joint tenancy with rights of survivorship. Further assume all owners sign and record a TODD designating the same person(s) as the primary beneficiary. The TODD is effective upon the death of the last joint tenant to die. The person(s) designated as the primary beneficiary in the TODD acquires ownership at that time if they survive the last joint owner's death. Keep in mind, however, the last surviving joint tenant has the right to revoke the TODD before death or record a new TODD naming another person.

Example 6: Doug and his wife, Laura, own real property in Cascade County as joint tenants with rights of survivorship (JTWROS). Doug signed and recorded a TODD naming his two daughters from a previous marriage as designated primary beneficiaries to be effective upon his death.

If Doug dies before his wife Laura, the TODD completed by Doug is ineffective. His daughters will not inherit the real property at Doug's death under the TODD. The existing joint tenancy with right of

survivorship with his wife takes priority. Laura acquires sole ownership of the property upon Doug's death.

However, if Laura dies before Doug, the TODD signed by Doug naming his two daughters as designated primary beneficiaries is effective. If both daughters survive Doug, they will acquire the real property upon his death. If only one daughter survives Doug, she will acquire sole ownership of the real property as the surviving designated beneficiary unless the TODD states that the interest of the predeceased daughter does not lapse.

Example 7: Phyllis and Bob own real property in Broadwater County as joint tenants with rights of survivorship. They recorded a TODD to be effective upon their deaths. They named their son, Greg, as the designated primary beneficiary and their daughter Wendy, as their alternate beneficiary.

Assume Phyllis dies first. Bob continues as sole owner during his lifetime. Bob does not revoke the TODD. Upon Bob's death, Greg becomes the owner of the real property. If Greg does not survive Bob, then Wendy, as the alternate designated beneficiary, acquires ownership of the real property assuming she survives both parents.

HOW DO I RECORD A TRANSFER ON DEATH DEED?

Complete the TODD form and have your signature acknowledged before a notary public. Take the original TODD to the office of the Clerk and Recorder of the county where the real property is located. If the real property is in more than one county, a TODD must be recorded in each one.

The recording fee is \$8 per page for a TODD that meets the **standard format requirements**. If a document does not meet the standard format requirements, there is an additional charge of \$10 per document. Details about the standard format are available at any Montana County Clerk and Recorder's office. Requirements about margins, color of ink, and size of paper are provided. A TODD must be recorded before the owner dies. TODDs signed, but not recorded before the death of the owner, are invalid.

DO I HAVE TO RECORD A REVOCATION IF I WANT TO SELL PROPERTY ON WHICH I HAVE RECORDED A TRANSFER ON DEATH DEED?

No. A TODD does not limit your right to sell, transfer, or mortgage the real property prior to your death. However, you should include in the new deed a statement that expressly revokes the previously recorded TODD.

HOW DO I INCLUDE WATER RIGHTS IN A TRANSFER ON DEATH DEED?

Because a TODD is revocable and does not become effective until the owner's death, there is no transfer of water rights during the owner's lifetime. Upon the owner's death the designated beneficiary must complete a water right ownership update form (DNRC Form 608: <http://dnrc.mt.gov/divisions/water/water-rights/water-right-forms>). An owner files the form with the local Water Resources Regional Office of the Montana Department of Natural Resources & Conservation.

CAN I CHANGE MY MIND BEFORE I RECORD THE TRANSFER ON DEATH DEED?

Yes. If you have not yet recorded a TODD and want to change your mind, simply tear up or otherwise destroy the TODD.

HOW DO I REVOKE A TRANSFER ON DEATH DEED AFTER I HAVE RECORDED IT?

An owner of real property in Montana can revoke a TODD at any time prior to death. No one, including beneficiaries, can prevent an owner from revoking a TODD. Keep in mind, however, a written will cannot revoke a TODD. An owner simply cannot tear up or destroy a TODD previously recorded with the Clerk and Recorder and think that action revokes a TODD.

A revocation of a previously recorded TODD by one co-owner does not affect the interest of another co-owner who signed the TODD. All living owners of a real property owned as joint tenants with rights of survivorship who signed and recorded a TODD must sign a revocation.

There are three ways to revoke a recorded TODD:

1. *Complete a revocation form that revokes the TODD.* An owner should sign the revocation form in the presence of a notary public. The owner then records the revocation form with the Clerk and Recorder in the county where the real property is located. If there is more than one owner of real property held in joint tenancy with rights of survivorship (JTWROS), all owners who signed the TODD should also sign the document revoking the TODD.
2. *Transfer the property to someone else during lifetime by completing and recording a deed.* A statement expressly revoking the previously recorded TODD should be included in the new deed. If more than one owner of real property held in joint tenancy with rights of survivorship wants to transfer, each owner should sign the new deed.

3. *Complete a new TODD for the same property.* An owner can sign a new TODD in the presence of a notary public and record it with the office of the Clerk and Recorder in the county where the real property is located. The recording of a new TODD revokes a previously recorded TODD for the same property to the extent it is inconsistent with the terms of the prior TODD.

You may want to include a statement in the new TODD specifically revoking the previously recorded TODD. If there is more than one owner of real property held in joint tenancy with rights of survivorship, all owners who signed the previously recorded TODD should sign the new TODD.

HOW DO MY DESIGNATED BENEFICIARIES RETITLE TODD PROPERTY AFTER MY DEATH INTO THEIR NAMES?

Proof of the owner's death is necessary to transfer title to the real property into the name(s) of the designated beneficiary(ies). Montana property transferred by a TODD does not go through the probate process. A designated beneficiary or any other person can complete an **affidavit** certifying the death of the owner. The person must sign the form in the presence of a notary public. The beneficiary then records the affidavit in the office of the Clerk and Recorder of the county in which the property is located. Recording of the affidavit transfers title in the real property to the designated beneficiaries in the TODD.

The new owner(s) must also complete a Montana Realty Transfer Certificate. A Montana Realty Transfer Certificate (Form 488) is available at any Montana County Clerk and Recorder's office or online at <https://mtrevenue.gov>, search "Realty Transfer Certificate."

If an owner transfers water rights with the property, the new owner should complete a water rights ownership update form (DNRC Form 608). The new owner then files the form with the local Water Resources Regional Office of the Montana Department of Natural Resources & Conservation.

WHAT HAPPENS IF THE REAL PROPERTY I LISTED ON THE TRANSFER ON DEATH DEED HAS A MORTGAGE OR OTHER TYPE OF ENCUMBRANCE AGAINST IT?

Montana real property conveyed in a TODD to a designated beneficiary is subject to any encumbrances against the property at the owner's death. **Encumbrances** against real property may include mortgages, deeds of trust, liens for unpaid taxes, construction liens, contracts, assignments, judgments (including dissolution decrees and child support orders) and any other legal conveyance document recognized by the State of Montana.

If an owner was a recipient of Medicaid, the Montana Medicaid program may assert a claim against the deceased owner's real property, including TODD property. Federal law requires the Montana Medicaid Estate Recovery program to recoup the costs of nursing facility care and other medical services from the estates of recipients who pass away. The claim typically is for the dollar amount of Medicaid payments provided to the owner before death, up to the value of the TODD property.

Example 8: Bob recorded a TODD for his home in Sanders County with his daughter, Sara, as the designated beneficiary. At the time of Bob's passing, Medicaid had paid \$340,000 during his five-year stay in the nursing home. The Montana Medicaid Estate Recovery program filed a \$340,000 creditor's claim against Bob's estate and recorded a lien against the home. Medicaid may seek to foreclose on Bob's home to pay the \$340,000 expense for nursing home care. Any proceeds from the sale of the home in excess of the Medicaid claim and other liens belong to his daughter Sara.

For further information about Medicaid, read MSU Extension MontGuide, *Medicaid and Long-Term Care Costs* (MT199511HR, https://store.msuextension.org/Products/Medicaid-and-Long-Term-Care-Costs__MT199511HR.aspx). Request a copy from your local MSU Extension office. The Montana Department of Public Health and Human Services also has a brochure explaining the Medicaid Lien Estate Recovery Program (https://dphhs.mt.gov/assets/sltc/Ombudsman/medicaidlienrecoveryestaterecoveryprogram_final.pdf).

The personal representative of the owner's estate may also seek payment from the designated beneficiary up to the value of the Montana real property conveyed by a TODD if the owner's estate has insufficient assets to pay creditors' claims and statutory allowances such as the homestead allowance, exempt property allowance and family allowance. A designated beneficiary may be liable for such claims and allowances (https://store.msuextension.org/Products/Probate-in-Montana-MT199006HR__MT199006HR.aspx) up to (but not exceeding) the value of any real property acquired under a TODD.

For this reason, some title companies are wary of potential creditors' claims against TODD property. Some Montana title companies will not insure a deceased owner's real property against creditors' claims for a period of one year after the owner's date of death. A year is the maximum time allowed

for creditors to submit claims against a decedent's estate. When considering a TODD, seek the advice of an attorney to ensure this potential issue with a title insurance company does not cause any unintended consequences for your designated beneficiaries who may need to sell the real property soon after your death to pay debts or to provide liquidity.

WHAT IS THE EFFECT OF MY WILL ON A TRANSFER ON DEATH DEED?

An owner cannot revoke a recorded TODD with a will. The owner may revoke a TODD only by completing and recording one of the three forms of revocation documents discussed previously.

Example 9: Gary signed and recorded a TODD to be effective upon his death naming his daughter as the designated beneficiary of land he owns in Fergus County. Gary later wrote a will leaving the same land to his son.

Upon Gary's death, the provision in his will leaving the real property to his son is invalid. The property passes to Gary's daughter because he recorded a TODD naming her as the designated beneficiary. Gary can only revoke a recorded TODD under one of the three methods discussed previously on page 4. Then he could write a will leaving the land to his son.

WHAT HAPPENS IF I RECORD MORE THAN ONE TRANSFER ON DEATH DEED ON THE SAME PROPERTY?

An owner can sign and record a new TODD at any time. The latest recorded TODD is the controlling document. In other words, at any time owners can change their minds about whom they want to receive their real property. The owner(s) can replace a recorded TODD with a later one naming different designated beneficiaries. The recording of a new TODD on the same property revokes the TODD dated earlier.

To avoid confusion, an owner should include a statement on a TODD that it revokes the previously recorded TODD. As indicated in the previous discussion about revocation, all owners who signed the previously recorded TODD should sign the new one.

WHAT SHOULD I DO IF SOMEONE IS PRESSURING ME TO COMPLETE A TRANSFER ON DEATH DEED?

Do not record a TODD under pressure from anyone. Seek help from a trusted family member, friend, or attorney.

DO I NEED TO TELL MY BENEFICIARIES ABOUT MY TRANSFER ON DEATH DEED?

No. However, secrecy can cause later complications and could make it easier for others to commit fraud. For that reason, letting a designated beneficiary know about the TODD is a good idea. Keep in mind a recorded TODD is a matter of public record. Anyone could go to the Clerk and Recorder's office and view a TODD.

Transfer on Death Deed Forms

The following Transfer on Death Deed forms are available to download at <https://www.montana.edu/estateplanning/eppublications.html> and scroll to Transfer on Death Deeds in Montana:

1. Transfer on Death Deed Form – One Primary Beneficiary
2. Transfer on Death Deed Form – 2 to 4 Beneficiaries
3. Affidavit of Death Form for Transfer on Death Deed
4. Revocation Form for a Transfer on Death Deed

Summary

A person can transfer Montana real property at death to one or more designated beneficiaries by signing and recording a TODD. The TODD must contain the name of the owner(s) who is making the TODD and a complete legal description of the Montana real property. All TODDs must designate one or more beneficiaries and contain a statement that the TODD is effective upon the death of the owner(s). The owner must sign and acknowledge a TODD before a notary public.

If there is more than one owner of the real property, all owners must sign the TODD to transfer the entire property. An owner must record a TODD in the county where the property is located before their death or it has no effect. After an owner has recorded a TODD, they should store the document in a safe place. A safe deposit box or a secure place in the owner's home is an alternative.

References

Montana Uniform Real Property Transfer on Death Deed Act, Mont. Code Ann. §§ 72-6-401 through 418. 2019

Acknowledgement

Representatives from the following professional organizations have reviewed this MontGuide. They recommend its reading by all Montanans who want to learn more about Transfer on Death Act, a law passed by the 2019 Montana Legislature.

- Business, Estates, Trusts, Tax and Real Property Section
– State Bar of Montana
- Montana Clerk and Recorders Association

The authors also express appreciation to Montana residents who reviewed this MontGuide in the early draft stages and made suggestions to improve readability.

