Avoiding Probate with a TOD Deed and TOD Account

If you want to leave your home to your children or other heirs and keep the property out of the costly and time-consuming probate process, you could place your home in a living trust. Trusts offer numerous advantages, but they incur up-front costs, often have ongoing administrative fees, and involve a complex web of tax rules and regulations.

More than half of U.S. states offer a simpler and less expensive way to avoid probate through a transfer-on-death (TOD) deed (also called a beneficiary deed). As the name suggests, this is a legal document that directly transfers ownership of the property from you to your designated beneficiary or beneficiaries upon your death. You retain full ownership and control while you are alive, and your beneficiary has no rights to the property until after your death. (Beneficiaries also inherit any associated financial obligations, such as a mortgage or lien.)

The TOD deed must be filed with the appropriate land records office. The deed supersedes your will, so be sure the provisions of your will match the deed. If you change your mind, the deed can be revoked and/or replaced through a new filing. As with all beneficiary documents, it would be wise to designate contingent beneficiaries in the event that a designated beneficiary predeceases you.

In some states, a married couple who own a house together through joint tenancy or as community property with right of survivorship would each have to complete a TOD deed. The deed for the first spouse who dies would be void, and the deed for the second spouse would transfer ownership to the designated beneficiary(ies).

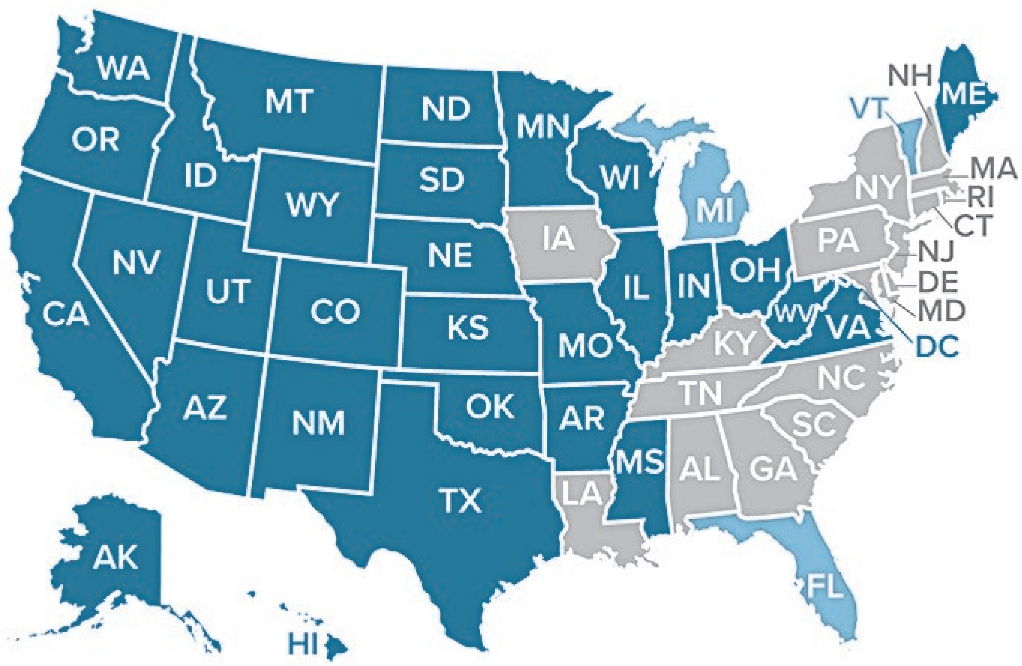
TOD accounts

In most states, you can apply a transfer-on-death provision to individual non-retirement brokerage accounts. This typically involves filing a form with the financial institution to designate a beneficiary or beneficiaries (including contingent beneficiaries) and register the account as TOD. Ownership of the TOD account would transfer directly to the designated beneficiary(ies) upon your death without going through probate. Like TOD deeds, a TOD account designation supersedes your will.

For a joint account, the effect of a TOD designation would depend on the type of account.* Retirement accounts generally go directly to the beneficiary(ies) without probate and do not require being retitled as TOD.

Bank accounts offer a similar designation called Payable on Death (POD). One key difference is that POD accounts typically do not allow contingent beneficiaries.

States in dark blue allow a TOD deed



Florida, Michigan, and Vermont (light blue) allow a similar document called an enhanced life estate deed or Lady Bird deed. Texas and West Virginia allow TOD and Lady Bird deeds. Source: Nolo, October 8, 2024

Estate and capital gains taxes

A TOD deed or account designation does not remove the property or account assets from your taxable estate. However, with high federal estate tax exclusion amounts, few estates would likely be subject to federal estate taxes.**

If your heirs sell your home or account assets, they could be subject to capital gains taxes regardless of whether they receive the property/account through a living trust or a TOD deed. However, the *step-up in basis* provision of U.S. tax law automatically sets the basis as the fair market value of the home or account at the time of your death, effectively eliminating all capital gains up to that time. Your heirs could shelter $250,000 of gains ($500,000 for a married couple) if they live in the home for two out of five years before selling. (There is no shelter provision for financial accounts.)

Although you do not need an attorney to execute a TOD deed in most states, you may want to consult an attorney familiar with the laws of your state. You should consider the counsel of experienced estate planning, legal, and tax professionals before implementing trust strategies.

*A TOD designation on a *joint ownership/tenancy* or *tenants by/in the entirety* account would only become effective if both owners die simultaneously. A TOD on a *tenants in common* account would be similar to an individual account.

**For estates of those who die in 2025, the exclusion is $13.99 million, with a combined $27.98 million exclusion for a married couple.

IMPORTANT DISCLOSURES