

Transfer on Death Accounts

Take-Away: Ladybird deeds are highly effective to avoid probate of real estate on the owner's death, but they can also expose the beneficiary to losses due to the lapse of insurance coverage.

Background: As was previously reported, Michigan has not adopted the Uniform Transfer on Death Deed Act, unlike 32 other states and the District of Columbia. Instead, the Michigan 'tool' used to avoid probate of real estate on the owner's death is a 'ladybird deed,' where the owner transfers title to the beneficiary, while reserving in the body of the transfer deed a life estate coupled with a general power of appointment; on the life estate holder's death, title then transfers automatically to the beneficiary, followed with the recording of the life estate holder's death certificate- all the while avoiding the delays, publicity, and expense of probate. One overlooked risk to the use of either a ladybird deed (Michigan) or a Transfer on Death Deed (32 other states) is the lapse of insurance coverage after the owner/life estate holder's death.

Michigan TOD & POD Statutes: Michigan's transfer-on-death (TOD) statute regarding securities is found at MCL 700.6301-700.6310. Its payable-on-death (POD) statute for savings and money market accounts and CDs is found at MCL 487.703. As noted, Michigan currently uses the 'nonprobate' 'ladybird' deed in lieu of the TODD to transfer real estate on the owner's death, but as what follows, that can lead to other problems.

Examples: Some common examples where confusion or a 'gap' in insurance coverage using either a TODD or a 'ladybird' deed follow:

Beneficiary Unaware: Bill names a former 'friend' Monica as the beneficiary of a ladybird deed to his Michigan cottage. Like some individuals, Bill does not want to share his testamentary intent to his prospective beneficiaries (or to anyone else for that matter.) Does Monica even know that she has been named as either a TODD beneficiary or the 'remainder' beneficiary of Bill's ladybird deed? Once Bill dies, how long will it take for Monica to learn that she is the new owner of Bill's Michigan cottage? Bill's estate fiduciary has no authority to obtain insurance over this 'nonprobate' asset. In fact, Bill's estate

fiduciary probably does not even know about Bill's ladybird deed to his Michigan cottage which he left to a nonfamily member 'friend.'

Insurance Claims: Joe owns a house that is damaged in a storm. Joe files an insurance claim. The homeowner insurer approves Joe's claim and sends Joe a check so the house can be repaired. Joe deposits that amount in his checking account. However, Joe dies before the home repairs can be completed. Joe's son, Hunter, is the remainder beneficiary of a ladybird deed to the home. Joe's wife from a second marriage, Jill, is the POD beneficiary of Joe's checking account. Immediately on Joe's death Hunter is the owner of the house damaged by the storm, but Hunter is without the benefit of the insurance proceeds to repair the damage. Jill is unlikely to share 'her' POD proceeds with Hunter who is not her son.

Insurance Proceeds: Don's vacation home was damaged in a hurricane. Don filed a claim with his homeowner insurance company to repair the storm damage. That claim was still pending on Don's death, as the insurer was concerned about Don's tendency to overstate the amount of the damage that his home sustained. After Don's death the insurer finally pays the claim to Don's estate. Don's son Baron is the TODD beneficiary to Don's vacation home. Don had a pour-over Will to his revocable trust. The proceeds are paid to Don's trust. The beneficiaries of Don's trust are his four children from three marriages, including Baron. Baron must now share the insurance proceeds with his step-siblings (all of whom are multimillionaires.)

From these examples it is probable that the property owner's testamentary intent was frustrated due to these timing issues, the remainder beneficiary might receive a less valuable, or even worthless asset, and/or other beneficiaries of the decedent's estate might receive a windfall using the insurance proceeds. These, among others, are the risks created with a TODD or a ladybird deed.

A fairly recent example of the potential lapse of the insurance coverage risk after the owner's death follows.

Strope-Robinson v. State Farm, 844 Federal Appeals Court 929 (2021)

Facts: David recorded a TODD for his home. David named his niece Dawn as the TODD beneficiary. David's former wife set fire to David's home six days *after* his death. [I guess their divorce did not go all that well for her.] The home and contents were damaged as a result of the fire. Dawn filed a claim with State Farm for: (i) damage to the home; (ii) loss of the use of the home; and (iii) damage to the home contents. State Farm paid the loss of home contents claim but it denied Dawn's other two claims.

Trial Court: Dawn filed a declaratory judgment in federal court on the two rejected claims by State Farm. The claims were filed both individually and in Dawn's capacity as the fiduciary of David's estate. The trial court granted summary judgment in favor of State Farm on the two rejected claims.

Court of Appeals: The federal appellate court affirmed the trial court's grant of summary judgment to State Farm.

No Insurable Interest: Title to David's home did not vest in Dawn until *after* David's death. Nor was Dawn named an additional insured in David's homeowner policy. David's estate did not have an insurable interest in the home six days *after* his death when the fire occurred.

David's Estate: Like many states, Minnesota (David's domicile) has a statute where the insurance policy includes an expanded definition of 'insured' to include the owner's 'estate fiduciary.' Apparently, this is why State Farm agreed to pay Dawn's claim for the loss of home contents, since David's estate was treated by statute as an 'additional insured' under his homeowner's policy, and the contents of David's home passed on his death to his estate, thus entitling the estate to replacement coverage of the contents.

Homeowner Insurance Coverage: It may be possible that some insurers will permit another individual, e.g., a TODD beneficiary or a remainder beneficiary under a ladybird deed, to be added as an additional insured to the owner's existing homeowner insurance policy. While the beneficiary will have an insurable interest after the owner's death, the same is not true during the owner's life. If there is a claim while the owner is still alive, the

homeowner policy may require that any check be issued to all insureds and additional insureds, which can create practical problems for the owner. Even more of a challenge is if there is a contingent TODD beneficiary/contingent remainder beneficiary under a ladybird deed since most insurers will not treat a contingent beneficiary as an additional insured.

State TODD Statutes: A few state TODD statutes have required extended insurance coverage to the TODD beneficiary. While not all statutes are alike, they typically provide extended insurance coverage to the beneficiary for a period of time after the owner's death, e.g., 30 to 60 days, or until the beneficiary obtains his/her own coverage. [Examples: Indiana, Minnesota, Missouri, Nebraska.] Other variations in these statutes include extending coverage only to property damage but not liability coverage. Indiana's statute also requires a statutory notice in its TOD deed form that alerts the beneficiary to the exposure to loss of insurance coverage after the owner's death. [IC 32-17-14-11.]

Disclaimer Solution? If there is a loss incurred after the owner's death, consider whether a qualified disclaimer should be made, which has the legal effect of treating the named beneficiary as having predeceased the owner. If there is a disclaimer, the property might then pass to the decedent's probate estate, where there might be insurance coverage under the estate/fiduciary definition of 'insured' in the deceased owner's applicable homeowner policy. However, there may be no guarantee that the disclaiming beneficiary will then benefit from the property under the decedent's Will or trust.

Conclusion: All of this is a long way of saying that the beneficiary of a ladybird deed (or a TODD) needs to understand the need for their own insurance, and frankly the urgency that is required to obtain that insurance coverage for 'their' property.

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