



National Title Solutions, Inc.

TRANSFER ON DEATH INSTRUMENTS

And a few other legislative issues . . .

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Transfer on Death Instruments

- ▶ Public Act 97–555, effective January 1, 2012
- ▶ 755 ILCS 27/1, et seq.
 - Tool to transfer real property to beneficiary effective upon the owner's death
 - Failure to comply with requirements of the Act will render TODI void and ineffective



Applicability

- ▶ TODI Act applies to residential real estate only (sec 5)
- ▶ Applies to any TODI “made” before, on, or after January 1, 2012, provided the owner (defined as the individual who “makes” the TODI) died on or after January 1, 2012. See Section 10 of the Act.



Form of TODI

- ▶ Section 40 of the Act requires that a TODI must:
 - Contain the *essential elements and formalities* of a recordable deed;
 - Be executed, witnessed, and acknowledged in compliance with Section 45 (see next section below);
 - State that the transfer to the designated beneficiary is to occur at the owner's death;
 - Be *recorded before the owner's death* in the office of the Recorder of Deeds for the county in which the property is located.



Execution – Requirements

- ▶ Section 45 of the Act sets out the formal requirements
- ▶ The standard for the owner's capacity for making a TODI is the same as the capacity required for making a will.
- ▶ A TODI is valid and effective at the owner's death
- ▶ **Important:** failure to comply with the requirements for form and execution will render the TODI *void* and ineffective. Thus, a defective TODI will not transfer title to the property at the owner's death.
- ▶ **REVIEW:** a TODI must.
 - Contain the essential elements and formalities of a recordable deed;
 - Be signed by the owner and attested in writing by two or more credible witnesses;
 - State that the transfer to the designated beneficiary is to occur at the owner's death;
 - Be recorded before the owner's death in the office of the Recorder of Deeds for the county in which the property is located.
 - *If a TODI does not conform to these four elements, it is void!*



Effect of a TODI during the Owner's Lifetime (Sec 60)

- ▶ A recorded TODI does not affect the right of the owner to sell or encumber the property
- ▶ The TODI does not affect the interest of any third party (transferee, mortgagee, or lienholder), regardless of whether the third party has actual or constructive notice of the TODI.
- ▶ The beneficiary under the TODI has no present interest in the property while the owner is alive. Creditors of the beneficiary cannot reach the property while the owner is alive.



Effect of TODI upon Owner's Death

- ▶ *Owner must have retained ownership of the property at the time of his or her death.*
- ▶ The beneficiary must record a Notice of Death Affidavit and Acceptance
- ▶ Effective as of the date of the owner's death
- ▶ The transfer is subject to any terms or conditions stated on the TODI, and subject to all existing liens/encumbrances
- ▶ Generally, bene must survive the owner
- ▶ A beneficiary may disclaim all or part of the beneficiary's interest under a TODI (Sec 80)



Notice of Death Affidavit and Acceptance

- ▶ Failure to record a Notice of Death Affidavit and Acceptance in a timely fashion may result in a loss of interest in property
- ▶ If NoDAA not recorded:
 - in 30 days, personal representative may take possession and may be entitled to lien.
 - within 2 years after Owner's death, then the TODI is void and ineffective
- ▶ If fewer than all of the beneficiaries record a notice then the TODI is not yet effective



Revocation

- ▶ TODIs are revocable by
 - Executing a subsequent TODI that revokes either explicitly or implicitly
 - Executing an instrument of revocation that expressly revokes

- ▶ TODI cannot be revoked by an unrecorded instrument or by will (sec 55(b))



Joint Owners

- ▶ The Act permits one or more joint owners to make a TODI. If executed by fewer than all joint tenants or tenants by the entirety, the TODI will not sever the joint tenancy or tenancy by the entirety. (Section 70)
- ▶ Section 70 also covers other possibilities with joint tenants:
 - if all joint tenants execute a TODI, the TODI may only be revoked by all the then living joint tenants at the time of revocation
 - if less than all joint tenants execute one or more TODIs, then the effectiveness of any TODI will be governed by determining which joint tenant is the last to die.
 - If the last joint tenant to die made a TODI, then that designation of beneficiary will control.
 - if the last joint tenant to die never made (or revoked) a TODI, then any TODI of a prior deceased joint tenant is ineffective
 - Presumably, if all joint tenants make a TODI, then the designation of beneficiary by the last of the joint tenants to die will control



Limitations of Actions

- ▶ Any action to set aside or contest the validity of a TODI must be filed within the earlier of:
 - 2 years after the date of the owner's death or
 - 6 months after the date letters of office are issued. (Sec 90)



Transfer on Death Instruments

Title Clearance

- Title company will:
 - Review TODI and notice of death affidavit for compliance with statutory provisions, and recorded prior to Owner's death
 - Verify owner is deceased
 - Need to verify all conditions and contingencies have been satisfied
 - Ensure all beneficiaries are ascertainable, in good standing, etc.
 - Verify TODI not revoked prior to Owner's death by subsequent TODI or revocation instrument
- ▶ Owners' and Loan Policies for party executing TODI remains subject to an exception



Transfer on Death Title Clearance

(continued)

- Commitment/policy will contain exception for the right of any interested party to challenge or set aside title based on TODI
 - Two years from date of owner's death or six months after letters of office issued in a probate proceeding
 - Cannot be waived for a bona fide purchaser or mortgagee
 - Remains for owners' policies
- Standard Probate Clearance practice applies generally



POSSIBLE ISSUES

- ▶ TODI made by the wrong party, not in title
- ▶ TODI doesn't conform to statutory requirements
- ▶ Multiple TODIs, revocations
- ▶ Bene(s) not informed of TODI
- ▶ Bene(s) not a family member, heirs and legatees may dispute



POSSIBLE AMENDMENTS

- ▶ BFP protection – conveyance from TODI beneficiary (likely proposed amendment)
- ▶ Grantee of the heirs – protection from subsequent notice of acceptance
- ▶ Repair problem of Notice of Acceptance signed by fewer than all beneficiaries
- ▶ POAs, Co-ops, mixed-use properties, condo parking spaces . . .



Other Pending Legislation

- ▶ HB3372 – easements by eminent domain not recorded
- ▶ HB4148 – tax liens for erroneous homestead assessments
- ▶ FORECLOSURE: SB16 (counseling), SB1335 (local govt notice), SB2534 (Abandoned property)
- ▶ SB1227 – mobile homes
- ▶ SB1259 (short sales) – public Act 97-0666
- ▶ SB1746 – Torrens repeal
- ▶ SB3792 – Mechanics lien time periods –



▶ Questions?

▶ Thank you!



1031 EXCHANGE HOT TOPICS

Presented By:

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BACK TO THE BASICS

DEFINITION:

A 1031 exchange is a simple transaction that allows taxpayers to **defer** paying **capital gains tax** on the sale of investment property by purchasing a new piece of **like kind** investment property in a specific time frame.

WHY DO SELLERS PARTICIPATE IN 1031 EXCHANGE?

- o Defer capital gains tax as well as depreciation recapture tax
- o Dramatically increase purchasing power
- o “Swap Till You Drop”



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WHAT TYPES OF REAL ESTATE IS EXCHANGEABLE?

EXCHANGEABLE

- Residential
- Commercial
- Vacant Land
- Farmland
- Held in Land Trusts
- TIC
- Leasehold Interest
- Mineral Rights, Air rights, Oil and Gas Royalties

NOT-EXCHANGEABLE

- Property held primarily for sale
- Stocks, Bonds, Notes
- Interests in a partnership
- Choses In Action
- Money, Cash or Cash Equivalents
- Certificates of Trust or Beneficial Interest
- Primary Residence



COMMON 1031 ATTORNEY MISTAKES

1. Referring a closing to another attorney because the perspective client is participating in a 1031 exchange.
2. Not bringing up 1031 exchanges during the initial call or meeting with the client
3. Believing that “1031 language” must be in the contract
4. Not checking how title is held before setting up the 1031 exchange
5. Telling your clients they only need to reinvest the proceeds from the sale to achieve full tax deferral
6. Assuming that all exchanges last 180 days



1031 TIME PERIODS

- The taxpayer has 45 days from the sale to identify new property to purchase
 - 3 PROPERTY RULE
 - 200% RULE
 - 95% RULE property
- The taxpayer typically has 180 days to purchase one of the identified properties



COMMON 1031 ATTORNEY MISTAKES

7. Not knowing that tax deferral is possible when selling on installment
8. Assuming there are no rules for related party transactions
9. Forgetting that personal property can also be exchanged



PERSONAL PROPERTY EXCHANGES

- Aircraft
- Railcar
- Automobiles
- Barges and Vessels
- Artwork
- Collectibles
- Franchise rights
- Copyrights



PARTNERSHIP ISSUES

COMMON SCENARIOS:

1. A partnership owns property and wishes to sell it. Some of the partners want to engage in a 1031 tax deferred exchange upon the sale and some do not.
2. A partnership owns property and wishes to sell it. All of the partners would like to participate in a 1031 tax deferred exchange, but the partners do not want to purchase the new property together



POSSIBLE SOLUTIONS

IF MOST OF THE PARTNERS IN THE PARTNERSHIP WISH TO COMPLETE THE 1031 EXCHANGE TOGETHER:

1. The partnership could sell the relinquished property, distribute a portion of the proceeds to the partners who wish to cash out and use the remaining proceeds to purchase the new property.
 - **ISSUE:** The partners that are cashing out would receive a special allocation of the gain from the sale of the property. This gain maybe greater for the partners that cashed out.
2. The partnership could buy out the partners that do not wish to participate in the 1031 exchange.



POSSIBLE SOLUTIONS

WHAT IF THE PARTNERS DO NOT WISH TO PURCHASE THE NEW PROPERTY TOGETHER?

THE PARTNERSHIP CAN BE LIQUIDATED AND TERMINATED AND THE RELINQUISHED PROPERTY DISTRIBUTED TO THE PARTNERS AS TENANTS IN COMMON.

- This should be done as far in advance of the sale as possible.
- If a distribution or dissolution occurs shortly prior to the sale, the key issue is whether the relinquished property was “held for productive use in a trade or business or for investment purposes.”



SCARY STORIES



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SECURITY OF 1031 FUNDS

Millions of Taxpayer 1031 Funds have been lost over the last five years

HOW DID THIS HAPPEN?

1. Qualified Intermediaries are not regulated or monitored by the Federal Government, but a few states have recently enacted legislation.
2. Treasury Reg §1.1031(k)-1(f) Taxpayers must not have actual or constructive receipt of the sale proceeds from their relinquished property until the replacement property has been purchased and the exchange has terminated.



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QUESTIONS TO ASK REGARDING THE QI

- Who owns the Qualified Intermediary? How financially stable are its owners?
- Is it a publicly traded corporation?
- Will the Qualified Intermediary provide you with its financial statements?
- What is the package of security that the Qualified Intermediary is offering your client?
 - Fidelity Bond
 - Corporate Guarantee
 - Errors and Omissions Insurance
- Does the Qualified Intermediary have trained professionals (Attorney or CPA) on staff?



QUESTIONS TO REGARDING THE BANKS THE QI USES

- What criteria does QI use to pick its bank or will it use any bank?
- Does the bank send bank statements to taxpayer?
- What are account structures does that bank offer to protect against bank failure?
 - 100% FDIC Insured Account
 - Qualified Escrow/ Qualified Trust
 - Surety Bond



QUESTIONS TO ASK REGARDING THE ACCOUNT STRUCTURE THE QI USES

- Does the 1031 Intermediary deposit 1031 funds in segregated accounts under the exchanger's name and Taxpayer Identification Number?
- Are funds commingled?
- Does the 1031 documentation state exactly what type of an account structure is being used?
- Does the QI require written authorization to disburse funds?
- Does the 1031 Intermediary invest 1031 funds?



SECURITY FEATURES SHOULD YOU LOOK FOR IN A QI

- Performance Guaranty issued on each exchange
- Fidelity Bond
- Errors and Omissions Insurance
- Transparency about entire organization
- Exchange funds deposited into segregated, interest bearing bank accounts that are separately identified to each Exchanger.
- Disbursement of exchange funds requiring written authorization of the Exchanger
- Exchange funds deposited into highly rated financial institutions.



Questions



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AN OVERLOOKED ASSET – YOU

Asking probing questions allows you to be the Center of Influence.

When is the last time you discussed:

- what your clients were contemplating selling,
- when they were planning on marketing their property,
- if they would be deferring their gain and
- into what property type they will be exchanging?

Proactive communication and introductions to problem-solving partners is key to establishing long-term relationships.

You hold the key to the “connection castle,” and I would like to be an arrow in your quiver.



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AN ARROW IN YOUR QUIVER – ME & SJC

Clients exchanging out of management intensive property and into passive investments will benefit from working with a dual specialist.

I am a real estate investment broker specializing in single-tenant net leased property for tax deferral driven investors. My background includes accounting, auditing and tax deferral advisory which provides my Buyer's with meaningful insight and market intelligence. When you think of me, think of the following:

Dual Specialist – Net lease broker and tax deferral advisor

Buyer's Advocate – Buyer's purchasing power is treated with the same acumen as a listing

Quarterback – Meaningful insight and market intelligence throughout the disposition to acquisition continuum

Access to the Marketplace – One source filtering, organizing and disseminating listings

Success – Increased probability that you will provide the legal counsel for the acquisition

Stan Johnson Company is a national, commercial real estate investment company exclusively focused in the single-tenant net lease arena. When you think of SJC, think of:

Net Lease Authority – Ranked as number one firm for single-tenant retail net leased assets by Real Capital Analytics

Nothing But Net – Buyer and listing representation for single-tenant net leased assets involving all tenant types

Closers – We closed over \$1.5 billion dollars of net leased property last year alone

COMPETITIVE ADVANTAGE – EFFECTIVE TRIFECTA

Combining our skill sets and resourcefulness provides our Buyer's with a competitive advantage and puts us in an efficacious position.