Transfer on Death Instrument: Requirements, Amendments & Considerations

Jeffrey Ramirez

On January 1st, 2012, the Illinois Legislature passed the Illinois Residential Real Property Transfer on Death Instrument Act (“Act”). The purpose of the Act is to allow an owner of residential real estate to designate a beneficiary who would receive the residential real estate upon the owner’s death. This transfer was memorialized through a Transfer on Death Instrument (“TODI”). This article examines the statutory requirements for creating a TODI, analyzes notable amendments to the Act, and discusses key advantages to consider before using a TODI as part of your estate plan.

I. Statutory Requirements

There are four essential elements required to create a TODI. First, the TODI must contain the same elements and formalities as required to execute an inter vivos deed. In other words, the TODI must be done in writing, contain words of conveyance, and provide a legal description of the real estate. Second, the TODI must be signed by the owner and two witnesses who must attest to the fact they believe the owner is exercising a free and voluntary will and is of sound mind and memory and both the owner and witnesses signatures must be notarized. Third, the TODI must expressly designate a beneficiary.

II. Considerations

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Aunt Rena and Julia, the ‘Service Dog, in Commercial Establishments’

By Margherita M. Albarello

Aunt Rena Albarello was born in 1925 in the Town of Pullman. She lost her sight at age 4 from spinal meningitis. In her late teens, she attended a residential guide dog school in Michigan where she was paired with Julia, a beautiful black Doberman Pinscher. Julia was taught by skilled instructors to safely guide her ward through the complexities of pedestrian travel. Julia provided Rena with increased independence and they loved each other very much.

Shop owners in Pullman and Roseland, like Fattoris Square Deal and Frigo Bros. Foods, freely allowed Julia to accompany Rena into their establishments. Julia was harnessed. She had impeccable manners. She was not a pet. These business owners accommodated Rena long before the passage of the Illinois White Cane Law, the Service Animal Access Act, and the Americans with Disabilities Act of 1990 (ADA).

Title III (public accommodations and commercial facilities) of the ADA makes it illegal for places like restaurants, theaters, schools, and hospitals to interfere with the ability of people with disabilities to come onto the premises and access services. Today, Julia would be deemed a service animal under the ADA. The ADA defines a service animal narrowly as any dog that is individually trained to do work or perform tasks for the benefit of a person with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. In certain circumstances, businesses also must permit the use of a miniature horse. Notably, the ADA regulations specify that the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks.

If Rena entered the Italian Village today for a meal of polenta and roast chicken, she could not be turned away. The restaurant legally could not ask her about the nature or extent of her disability because her blindness is open and obvious and the work performed by Julia for Renas disability is readily apparent. The restaurant legally could not ask Rena for proof that Julia has been certified or trained as a service animal. Special identification and certification are not required by the ADA. Neither a deposit nor a surcharge may be required as a condition of allowing the service animal to accompany the individual.

However, if Renas disability was a non-apparent seizure condition and Julias work or task relative to the condition was not readily apparent, the restaurant legally could make two inquiries to determine whether Julia qualified as a service animal.
Aunt Rena and Julia, the Service Dog, in Commercial Establishments

1) Is this a service animal that is required because of a disability? and 2) What work or tasks has the animal been trained to perform? If the answer to the first question is yes, and the second question is answered, further inquiries are impermissible, and the restaurant cannot ask that Julia demonstrate her ability to perform the work or task for which she is trained.

The restaurant has some protection. If Julia is out of control and Rena does not take effective action to control her, or Julia does not control her waste or acts in a manner that poses a direct threat to the health or safety of others, the Italian Village legally could deny Julia access to the restaurant. However, a determination that a service animal poses a direct threat must be based on an individualized assessment based on the animal's actual conduct. The restaurant legally cannot deny Julia access because of a stereotype that Doberman Pinschers are dangerous.

The law concerning assistance animals in the housing context differs from the above. I will address this topic in a future article.

Whose Ring Is It Anyway?

Julia Smolka

Love is in the air. Between Christmas and Valentine’s Day, there is a surge of wedding proposals. There is also a surge in the purchase of expensive diamond engagement rings. Usually those engagements end in wedding bells and nuptials. However, sometimes they do not. Current statistics show twenty percent of engaged couples break off engagements before weddings take place.

When the engagement ends, who ends up with the ring?

An engagement ring, given as part of a proposal, has been found to be a conditional gift, meaning if the marriage does not happen, the ring should be returned to the proposing party. But what happens if the party proposed to breaks off the engagement? What if the party in possession of the ring acts in such a way which makes going forward with the marriage impossible? What if the proposing party commits adultery during the engagement? What if there exists other abuse, addiction or other faults committed by the proposing party, making calling off the wedding a valid choice by the party in possession of the engagement ring? What if the proposing party is at fault for the breakup? The cases as they are now being decided find that fault does not matter. The ring must be returned if the marriage does not go forward.

The underlying law used as basis for the lawsuit is called a replevin action, and under Illinois replevin laws, there is no mention of assessing or considering “fault” when determining who is entitled to keep the ring. It matters who purchases the ring, why it was purchased, and why the party has the ring in his or her possession. The judges do not look at the party who was “bad.” The judge must decide which party has the right to possess and keep the ring.

I recently represented a woman who was given a very expensive diamond cocktail ring by her boyfriend. They broke up and she kept the ring. Six years after the breakup, the former boyfriend filed suit for return of the ring, claiming it was an engagement ring and my client had wrongfully kept it. My client maintained the position that it was just a gift, no proposal was made, no acceptance given and no engagement, meaning no conditional gift was made and the ring belonged to my client. The judge dismissed the action, without having to decide whether the ring was an engagement ring because the former boyfriend brought the lawsuit six years after the breakup. There is a five-year statute of limitations from the time of a breakup to bring an action to recover an engagement ring. My client’s former boyfriend was a year too late.

This was a interesting case, and I enjoyed working on it. If you have any interesting litigation cases, call me. I would love to discuss them with you.
and state the transfer to the designated beneficiary is contingent upon the owner's death. Fourth, the TODI must be recorded in the county where the residential real estate is located in prior to the owner's death.

II. Notable Amendments

On January 1st, 2015, the Illinois Legislation amended the Act in two notable ways. The first notable amendment limited the class of individuals who have the right to create or revoke a TODI. In the original text of the Act, there were two individuals who had the power to create or revoke a TODI. First, the owner of real estate has the power to create or revoke a TODI. Second, the owner could previously vest their right to create or revoke a TODI in a third party by expressly granting that third party the power to create or revoke a TODI through a power of attorney for property. Under the amended Act, an owner no longer had the ability to vest their right to create or revoke a TODI in a third person. The amendment limited that right strictly in the owner of the real estate. However, the amended Act does not restrict an agent, pursuant to a power of attorney for property, to sell, transfer, or encumber the residential real estate; which ultimately has the same effect of revoking the TODI.

The second notable amendment eliminated a requirement placed on a beneficiary receiving real estate through a TODI. In the original text of the Act, a beneficiary receiving real estate under a TODI had to file a notice of death affidavit within 30 days of the owner's death to make the transfer. Otherwise, the beneficiary would be liable to the personal representative of the owner's estate for the expenses incurred in the management and care of the property subject to the TODI. The original text also contained a 2 year statute of limitations period by which a beneficiary was required to file a notice of death affidavit. Otherwise, the TODI in its entirety would be null and void to transfer the real estate to the designated beneficiary. Fundamentally, the amendment to the Act eliminated the burden on a beneficiary and it no longer made the filing of a notice of death a condition to the transfer of the real estate.

III. Considerations

Further, there are some considerations to keep in mind when determining whether a TODI is an appropriate estate planning tool for your estate plan. First, the creation of a TODI does not affect an owner's right to sell, encumber, mortgage, refinance, receive public assistance, grant a legal interest to a designated beneficiary, or subject the owner's real estate to a beneficiary's creditors. Much like transferring a piece of real estate to a self-declaration life time trust and re-titling the real estate in the name of the trust; the owner does not lose any ownership rights or control with respect to that real estate. Likewise, the mere creation of a TODI does not affect an owner's present ownership interest, right, and control with respect to the real estate subject to the TODI because the TODI does not become effective until the owners death.

Second, the Act defines a TODI as a non-testamentary instrument. To keep it simple, a non-testamentary instrument generally passes outside of probate. Much like contracts, life insurance policies, and promissory notes, those instruments are considered non-testamentary and are generally excluded from a decedent's probate estate. In effect, property passing outside of a probate estate is not subject to decedent's probate creditors or claimants. Therefore, a TODI can be used as way to transfer a residential real estate to a beneficiary and may provide a level of protection against a decedent's creditors.

Lastly, using a TODI to transfer residential real estate to a designated beneficiary can make it simpler, less costly, and more efficient to refinance instead of using a Land Trust. In most cases, lenders require real estate held in a Land Trust to be deeded out of the Land Trust to refinance the real estate. Consequently, the owner must deed the property back into his or her name to proceed with the refinance. Then after the refinance is completed, the owner has to remember to deed the property back into the Land Trust. This process is repeated every time an owner applies for a refinance. Alternatively, if the owner used a TODI instead of a Land Trust to hold the residential real estate, the owner would not have to go through the same process of deeding the real estate back into their name and then deed it back afterwards. This is because the TODI does not become effective until the owner of the real estate passes away. Thus, using a TODI instead of a Land Trust to hold residential real estate makes the refinance process much simpler, less costly, and more efficient.

Always consult your estate planning attorney, financial advisor, and tax specialist to determine whether a TODI is an appropriate estate planning strategy for your estate plan.

jramirez@dimontelaw.com

DiMonte & Lizak - Highlights

Di Monte & Lizak welcomes Maria Laftchiyska to the firm.

Maria Laftchiyska graduated from Carlson School of Management at the University of Minnesota in 2009. She received her J.D. in 2013 from Loyola University Chicago School of Law. While at Loyola University, Maria was a member of the ABA National Appellate Advocacy Competition team and National Moot Court team.

Maria focuses her practice on estate planning, asset protection, and taxation. She assists business owners and families to create individualized estate plans, including preparation of wills and trust. She works closely with clients to restructure personal and professional assets to maximize wealth preservation and minimize gift and estate taxation. Maria also has experience in general business and taxation matters for corporations, limited liability companies, and partnerships.
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