



Caution: Court Case Highlights a Possible Property and Casualty Insurance Pitfall when Using a TOD for Real Estate

The First District Court of Appeals in Walker^[1], in upholding the lower court's decision, highlighted the importance of naming all relevant parties as additional insureds on a property and casualty policy for real estate but perhaps more importantly, the Court also implied that the use of a Transfer-on-Death Designation Affidavit ("TODDA") could cause a lapse in property and casualty insurance coverage upon the death of the owner, which cannot be easily cured by naming an additional insured.

What are my options?

For those readers just wanting to know what the solution is, here are a few suggestions:

Add the beneficiary as an additional insured (this may or may not be allowable) under your property and casualty insurance policy;

Work with your agent to tailor your property and casualty insurance policy to account for the situation where the insured has died and the named beneficiary has not yet acquired a new policy; or

Work to ensure that the beneficiary is in a position in which they can obtain a new property and casualty insurance policy as near as possible to the death of the owner/policy holder.

Current Ohio Law

To fully understand this possible pitfall, it may be helpful to further understand our current law and the methods people utilize to transfer real estate upon death. Ohio law allows individuals who do not want or need a formal administration of their estate in the Probate Court to provide for the automatic transfer of their real property to one or more named beneficiaries. Specifically, Ohio currently allows for

the use of a TODDA that becomes effective upon the death of the owner if the owner showed clear intent to transfer the real property to the named beneficiary.

A TODDA, when properly recorded, permits the direct transfer of the described real property to the designated beneficiary or beneficiaries upon the death of the owner, thus avoiding Probate administration. After the owner has died, the recording of the transfer is accomplished by filing a death certificate and an affidavit stating the facts. The owner of the real property can change or even revoke a TODDA at any time.



Case Study

The TODDA is a popular tool because it is easy to prepare, simple to record and allows for the avoidance of Probate. The Walker case provides a cautionary tale for the many people who have or who intend to rely upon the TODDA as a means of transferring their real estate.

In Walker, the decedent died on October 27, 2013 owning a home that was properly insured, but which only listed the decedent as a named insured.

On December 5, 2013, the estate was opened in Hamilton County. On January 13, 2014, a Report of Distribution along with a Certificate of Transfer was filed transferring the property to 6 heirs. On the same day, 5 of the heirs conveyed the property to the 6th, giving that heir sole title to the property (the heir actually had a fractional interest in the property before the decedent's death and this gave the heir the rest of the ownership). Ten days later, on January 23, a fire substantially damaged the home. At no time after the October 27, 2013 death did anyone add an additional insured to the homeowners policy and, as such, coverage for the fire damage was denied.

What is most interesting in the Walker case is the reasoning by the Court that during the time the estate was being administered from October 27, 2013 through January 13, 2014 the loss would have been covered. This is so because the policy contained very standard language that indicated that after the death of the insured, the policy would continue to insure the legal representative of the deceased and even a person having proper temporary custody of the property until a legal representative was appointed.

The key fact in Walker was that when the property was transferred out of the estate on January 13, 2014, the prior coverage lapsed resulting in 10 days without insurance including the day of the fire on January 23. While this was undoubtedly a bad outcome for the Walker family, much more concern can be gleaned from the Court's rationale.

The Court in its reasoning made clear that typical insurance policies cover both the fiduciary of an estate as well as the interim period between the death of the policy holder and the opening of the estate. What can be inferred from the reasoning is that in a situation where the ownership changes hands and there is neither an appointed fiduciary for the estate nor an interim period before such appointment, the insurance coverage would lapse.

Coverage Lapses

In the context of the TODDA this could lead to coverage lapses that occur at the moment the policy holder dies. By bypassing the Probate process, the TODDA has created a situation that is not provided for in standard property and casualty

insurance policies.

So what can you do if you want to use a TODDA without the risk of losing property and casualty insurance coverage? There are a few options. One solution would be to try to add the beneficiary as an additional insured. Whether or not a beneficiary whose interest has not legally vested has an insurable risk could be an issue, but it's certainly worth discussing this option with your insurance agent. If the beneficiary cannot be added, then they need to be in a position in which they can obtain a new policy as near as possible to the death of the owner/policy holder. This may or may not be practical. If it is not, then perhaps the TODDA might not be the best fit for your situation and other techniques could be considered. We are hoping for a change in the law to cover this developing situation or perhaps a shift in the policy language to account for this method of transferring property such as the more traditional language that covers the fiduciary of an estate as well as the interim period before appointment.

If you have any questions about TODDA or your estate plan please contact your lawyer at Carlile Patchen & Murphy LLP or any member of the Family Wealth & Estate Planning Group.

[1] Walker v. Albers Ins. Agency, 1st Dist. Hamilton No. C-180207, 2019-Ohio-1316