

2011 HOUSE JUDICIARY

HB 1138

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1138
January 10, 2011
12731

Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1138.

Rep. Bill Kretschmar, Chair of the ND Commission on Uniform Laws: Sponsor, support. Rep. Klemin and I, Sens. Nething and Hogue are on the commission as well. This is one of the Uniform laws that our Commission is recommending this session to the Legislature. It's called the Uniform Real Property Transfer on Death Act (see attached literature 1). This act is one of the more recent acts of the National Commission on Uniform Laws and it was promulgated this past summer. A bill similar to this was introduced into the 2009 session and we, members of the commission, knew that this was coming forward through the Uniform Laws, so we convinced the sponsor that we should wait and look at the Uniform Law that is coming along. Basically, this Uniform Law is strictly for real estate, houses, land, etc. that one can make a deed to a beneficiary and record the deed during your lifetime. Upon the transferor's death, that property goes to the beneficiary and under the terms of the Act, the transformer, if he has a change of mind, or wants to do something different, can always during their lifetime rescind that deed by putting another deed on record. I think it is one more tool in estate planners' tool box to use in individual cases as people want to have them. I believe there are laws in about a dozen or so states that allow this. Some of these laws are not the Uniform Law. Our Commission is trying to do is to get these laws uniform in all of the states of the nation. It's been introduced in several states, but not passed in too many states yet. It is being introduced this year in ND. If someone owns a house, etc. and they want to transfer it to their children, spouse, whomever, they may do so under the terms of this Uniform Law. That basically is what the Uniform Law does. Our Commission is working to make these laws regarding real property, uniform throughout the nation. One of the handouts is a letter from the American Bar Association that stresses the need for uniformity in some of these areas. I believe this is a good step forward for ND, it doesn't require anyone to do anything, but allows them to do that to transfer their property before their death, if they wish to do so.

Rep. Koppelman: I'm familiar with the fact that other assets can be transferred this way now, this deals with just real property, or would it be broader.

Rep. Kretschmar: This is just for real property. As far as personal property, like stocks, bonds, savings accounts, there are ways to transfer those now before one's passing. They can put payable on death on CD's.

Rep. Koppelman: What advantage does this present, is it just a simplification so you don't have to do it through a will, or does it have some tax advantages as well.

Rep. Kretschmar: I think it is advantageous probably more for the small estates and things like that. Estate planners can look at it and see if a transferor would like to do that, they are free to do it if they want to. In those ways, I think it is advantageous. I believe this property under federal tax law, under estate tax, would be part of the person's estate for tax purposes because he has the ownership of it up to the point of his death, just like adding a life estate, etc.

Chairman DeKrey: How does this differ from the life estate?

Rep. Kretschmar: It differs from a life estate, in that, once you place property and retain a life estate, if you ever want to sell it or mortgage it, the remainder persons have to sign off on it. In this situation, the beneficiaries in this type of deed do not have any interest in the property until the transformer has died.

Rep. Boehning: A lot of times people go to the nursing homes, you have to have the property deeded over to a family member's name, so they don't have any money and the nursing home can't go back and sell the property, would this affect that process or not.

Rep. Kretschmar: I do not believe so. Under this Uniform Law, the transferor, the owner of the property, owns it until he passes away. So if that person is required to go a nursing home and apply for Medicare or Medicaid, they would have to list this as an asset of their estate. As I understand it, property that has been in your name in the past five years is counted if you apply for Medicaid or Medicare.

Chairman DeKrey: Thank you. Further testimony in support.

Malcolm Brown, Real Property & Probate Section of the State Bar Association: Our section supports this bill. I'm happy to say that we support it without any suggestions or amendments. It truly could be a Uniform Law. Our section has been thinking about this for the last few years, because we knew the Uniform Commission was working on it. You will recall, last session, there was a bill that was introduced that was going to try and do this, and everybody decided to wait until the Uniform Commission came out with their recommendations. Again, it is something more that estate planners can use. If a client decides to do this, they can do it. They can change their mind at any time. It's always an asset of theirs until they die. It's subject to creditors claims, it's part of their estate for tax purposes. Creditors could

set it aside, but it's just another tool that we think has advantages for estate planners here in ND.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Tim Austin, Department of Human Services: Opposed (see attached testimony 2).

Rep. Klemin: How are you informed of the death of a person now, who owns real property at the time of his death?

Tim Austin: When a probate is commenced in ND, the attorney and the personal representative have notified the Dept of that probate. We actually receive a copy of the application for the letters and when we receive that application, we then check that against our records to determine whether or not there is a claim against either the deceased or the deceased's spouse.

Rep. Klemin: That's the way it has been working is that you get notice of every probate that is commenced so that you can check against your own records to see if the Dept. might have a claim.

Tim Austin: Yes, that's correct.

Rep. Klemin: Can you give us some idea of the % of the time that you find that the Dept. actually does have a claim against an estate. In terms of all the cases, what % of those would the Dept have a claim.

Tim Austin: That I do not know.

Rep. Klemin: Would it be very small or large.

Tim Austin: Right now, we open about 13 probates a month. That would be probates that come in that we actually have a claim.

Rep. Klemin: Out of all the probates that might be done in a year, you would have about 150 of those a year, where you had the claim.

Tim Austin: Yes.

Rep. Klemin: In your testimony you state that the Dept. would have claim and that's because of both federal and state law, is that right.

Tim Austin: Yes, the state is mandated by federal law to do estate recovery from Medicaid recipients' estates. That's why this state recovery section was enacted by the Legislature. If we do not do that recovery, we put federal Medicaid funding at risk.

Rep. Klemin: One of the items handed out by Rep. Kretschmar and actually is something that I did provide to your department also, is a letter from the American Bar Association endorsing this act. In this letter it states that 13 states currently authorize these transfers on death, similar to this act, and that the act is currently pending in some additional 17 states. The 13 states, as I understand it, have laws going back to 1989, in fact the author of this letter is from Ohio and says that Ohio has had transfer on death deeds since August, 2000. Those other states, many of those other states, are much, much larger in population than ND; how do they handle the same issue that they are required to do under federal law.

Tim Austin: That's a very interesting point. What that letter does not address is the fact that ND is only one of 18 states that does not use a lien to collect state recoveries in Medicaid cases. Other states use both pre-death liens (liens that are filed at the time a Medicaid application is taken out and secures the property, similar to a mortgage) or they use post-death liens right after death. If a lien is filed against a property, even under this act, upon death or upon the transfer, the lien goes with the property. However, ND doesn't use liens. So we have no way to protect our interest when a person is on Medicaid and the property is then transferred.

Rep. Klemin: To get back to my question, you don't know what these other states are doing then, these 13 states that have transfer on death deeds now, you don't know what procedure they follow to handle the same kind of claim that you are talking about here.

Tim Austin: No I do not have that information on those particular states. All I know is that we are only 1 of 18 states in the Union that don't use liens.

Rep. Klemin: As I understand it, the experience in these other states goes back to at least 1989, which is 21 years ago, so they must have come up with some alternative methods to handle the relatively small % of cases in which there might be a claim versus the very large number of cases where there's actually probate.

Tim Austin: Actually the pre-death Medicaid lien, goes back to the TEFRA Act of 1982, so that lien would have been allowed by the federal government, long before the transfer on death acts actually took place in the 13 states we are talking about.

Rep. Klemin: Have you given any consideration to what the Dept. would do in the event that this act passes to enable you to continue to make those kinds of claims.

Tim Austin: The Dept. would have to staff and track deeds and conveyances in order to follow what's happening with the recipient's real estate. The other thing that is important to note in this act, that under the general probate code, the non-claim statute is 3 years, meaning we have 3 years from the date of death to file a Medicaid claim. This act, the non-claim statute, is 18 months. So not only do we have to attempt to track the claim, but we have to track the claim within not later than 18

months after the transferor's death. So it would require very prompt action and a staff to track these deeds, so we could make a claim. I have noted that, within the legislation itself, claims are valid and can be asserted despite the fact that the transfer has been made, but we have no way to track them and we have very little time (18 months) to do it.

Rep. Onstad: What's the process when a recipient is going to get medical assistance from state or federal? They are recorded and they are already on this list.

Tim Austin: The Medicaid recipient files an application. During the application process, depending on whether they are married or single, they have asset limitation amounts, \$3,000 for a single person and \$6,000 for a married couple. There are certain assets that are exempt. Those assets are then excluded from that \$3,000 amount. If they are found to be Medicaid eligible, then they are entered into the system and the payments made on behalf of that recipient can be tracked. That is the sum we use down the road when the recipient passes away and we attempt to do a state recovery. We cannot do a state recovery against a recipient who is married and has a surviving spouse. If husband is on Medicaid and passes away, spouse is still in the home, she is entitled to the home because she lives there. If she's not on Medicaid, years and years can go by until we can actually make a claim against her former spouse's interest in that home when she passes away.

Rep. Onstad: But, once they are on assistance, and even though the person dies that is receiving the benefits, and the spouse is still living, do you not keep a monthly track or something to this point for communication, or does communication end at that point.

Tim Austin: They end at that point. If we have no Medicaid eligible person in the household, in other words the spouse is not on Medicaid, all communications then end. We file an informational claim in the estate of the deceased's spouse that was getting Medicaid and then we have to wait until the other spouse passes away before we can file our claim.

Chairman DeKrey: When I get complaints from constituents, my experience is that Human Services Dept. knows that they have assets long before anyone passes away. They've already depleted what they can of those assets. It just seems strange to me that this is all of a sudden, surprise when somebody dies that they might have property. It seems like that has been settled long before they die.

Rep. Klemin: I understand that when a person applies for assistance, they have to give a total listing of all of their assets to the Dept. as part of that application, is that not correct.

Tim Austin: That's correct; they are supposed to supply the Dept. with a complete list of all of their assets. However, as I mentioned earlier, some assets are exempt.

One of the most important assets that we're finding right now, in a state recovery that is exempt, are mineral interests. They've, historically, were very difficult to value and because of that, there is not a lot of information given about those on the initial applications. We are discovering those mineral interests because a probate has to be commenced to pass those interests to the heirs. They are resulting in very substantial recoveries for the Dept.

Rep. Klemin: To get back to my question, a person does have to disclose all of their assets when they apply for assistance, correct.

Tim Austin: Yes, that's correct.

Rep. Klemin: Then I also understand that there is also an annual review on each recipient of Medicaid assistance to bring that up to date so that the Dept. would know if there has been any changes or additional assets (such as inherited property), isn't there an annual review of that person's continued eligibility for assistance.

Tim Austin: Yes, that is correct. The eligibility workers should be doing annual reviews.

Rep. Klemin: I'm not sure about this, but it seems to me that the Dept. also gets notice or tracks notices of every person that dies that appears in the paper, that you have a clipping service that cuts out all of the obituaries and other notices that are looked at. Is that how it works.

Tim Austin: I'm not aware of that. The only way that I am aware of, is that we get notice is through the probate proceedings.

Rep. Klemin: It seems to me that I have seen letters from the Dept. saying that they are aware that this person has died, how come you didn't send us a copy of the application for probate, or whatever. Doesn't that happen?

Tim Austin: Yes, that happens with some regularity. We get a lot of calls from county eligibility workers who are much more familiar with the recipient and their assets. They may advise us of anything that they know or anything that is out of the ordinary. In fact, that is one way that we presently find out about a transfer of interest.

Rep. Klemin: I guess my point is that you do have some alternative means of tracking these assets, other than by monitoring every deed that gets recorded, as you mentioned in your testimony, isn't that correct.

Tim Austin: There may be other ways to do it.

Rep. Koppelman: Change is hard. We all get comfortable with the way we do things. Isn't it fair to say that, particularly under the new federal health care legislation and regulations that will be coming, the Dept. will probably have to adjust many of its procedures?

Tim Austin: Yes, a lot of those procedures I'm not familiar with, but I am sure that there will be a lot of adjustments that are being made under the new health care act. I'm fairly certain of that.

Rep. Delmore: I have a question about the \$1.5 million. How did you reach that as the cost? I checked but there isn't any fiscal note on this bill. How did you come to the \$1.5 million figure?

Tim Austin: The Dept. reviewed the data sheets, which would be the checks and deposits for the year 2010; then we looked at any check that was \$25,000 or above, or any check that we knew was a check for a mineral deposit, oil & gas payments that totaled roughly about \$1.2 million. We then doubled that for a biennium figure, which would be \$2.5 million. That number was then reduced by a million dollars because all of the money does not go into the General Fund. Some of the money has to be paid back to the federal government, because Medicare is a federal and state funded program. When we reduced that, we came up with the \$1.5 million per biennium. Then that figure was run by Fiscal, who came up using their calculations with about the same figure.

Rep. Delmore: If you could track it that way, why couldn't you track the people that would be affected if they used this choice, rather than a Will or whatever? If you're able to find all of that out, why would it be so difficult and costly to your Dept. not to be able to do it and find out who has used another tool, because they like it better.

Tim Austin: We could track this because we had the checks. We were just tracking deposits. If the oil and gas company hasn't made a deposit or land hasn't been sold, we would have no way to know who that is. Here we were just tracking deposits that had already been made.

Rep. Hogan: It's my understanding, that under this procedure, you will still have the authority to make those claims; you just don't have the procedures to get to it. It doesn't mean you can't go after the claims, but just that it is a procedural problem.

Tim Austin: That's correct. It makes it just that more difficult to try to figure out where the claims are and to collect them; in both the process and in the timeframe because we would only have 18 months rather than 3 years to get the process going.

Rep. Hogan: Did the Dept. look at any ways that you might modify this bill so that the procedures would be doable, rather than simply opposing the bill. We did take a look at that; it was the Dept.'s opinion that the bill could not be modified so that we could make it work.

Rep. Koppelman: I know that you're an attorney; I presume you may not be an expert in real estate law. I suspect you deal with it quite a bit for the kind of work you have described

here today. If I'm thinking this through correctly, I assume that if an individual who passes away has property, it is currently recorded in their name, at the local level, I would think.

Tim Austin: That is correct.

Rep. Koppelman: I would also assume that if this law was to pass, and it requires a transfer on death, there would be a new change in the ownership of that property recorded at that time.

Tim Austin: Yes, that is also correct.

Rep. Koppelman: It's already been established that you could track deaths through obituaries, and you probably already do that; you said you weren't aware if we do or not. I know that there are clipping services around, through the ND Newspaper Association, and other ways to get that information and probably better electronic means today. Wouldn't it make sense then that you could, maybe just by changing procedure, be able to track these kinds of transactions?

Tim Austin: I think they could be tracked. It would just require additional staffing and funding. It would be much more difficult, but I certainly wouldn't say that it couldn't be done.

Chairman DeKrey: Thank you. Further testimony in opposition to HB 1138. We will close the hearing. We will take a look at HB 1138.

Rep. Klemin: I would move a Do Pass on HB 1138.

Rep. Maragos: Seconded.

Rep. Klemin: If I could just elaborate on this, HB 1138 provides a very simple way of transferring real property, without the need to go through a probate. This type of law has been in effect in 13 other states, going back to 1989, with the State of Missouri. As noted in the letter that was presented by Rep. Kretschmar from the American Bar Association, this is being considered in 17 other states. The only opposition to this bill that we heard was from the Dept. of Human Services, because it would not be as convenient for them to track estates in which they might have a potential claim, due to the previous receipt of Medicaid benefits by a recipient. I don't know how many deaths there are in ND each year, the Dept. of Human Services knows that because they've got a division of vital statistics, so they have access to all of the death records already. It seems to me it would be very simple for them to make a check from the death records that they get, you are required to file all of those death certificates with the Dept. of Human Services, in the Division of Vital Statistics. It would be pretty easy for them to check those records against the records they already have on who are getting benefits. The people that apply for assistance are required to disclose of their assets so that the agency can determine if they are eligible or not. They do an annual review of these recipients to determine whether they continue to be eligible or not. They know, or should know, where all of their property is. I think that maybe the agency needs to do a little more due diligence and find out how these other larger states are doing this, before they come in and ask us to throw out a perfectly good law that's being adopted everywhere just because it is going to make it more difficult for them to follow these claims. So I'm really speaking to the opposition, I guess. They may have a legitimate claim against this in some cases. Certainly, there are other means for them to know about that, other than

throwing out the bill. They had no proposal for an alternative way to handle this, nor had they looked into how they might do it. I would support the bill as a good estate planning device and recommend that we give a Do Pass to this bill.

Rep. Hogan: Obviously, I know this Medicaid estate issue from my prior experience in Social Services. Typically most of the preliminary work is done at the county level. It will have a pretty significant impact on county eligibility workers, so that the Committee is aware of that. I think when a person who is on Medicaid currently dies; the county eligibility worker typically knows it and begins the process. The hard part has been getting the legal staff to get all of the required paperwork done. My biggest concern about this is the 18 months. I know many of the estate claims clearly work beyond those 18 months. The second piece is on the cases where it's not the Medicaid client that has a claim against it; it's the surviving spouse; that often was 15-20 years later. So at that point, you don't have any current information on the individual and then the research on finding that person, and those are the cases that I think might likely get lost. I think we should consider the idea of extending that 18 months to 3 years. What do you think about that?

Rep. Kretschmar: I really would have no objection. I don't think that would affect the Uniformity of the law in a significant way. We've done that before in some of the other uniform laws. But you see, under this law, the person still owns this land or house, etc. They own the real estate, so when they apply for Medicaid or Medicare, they must, to be truthful have to list this as one of their assets; then they check them each year, they can put a question on the form, have you transferred in any way, your real estate. Yes or no. It seems to me that the Dept. can figure out a way to do this. They may need some more time and I agree with that. Of course, under the Uniform Probate Code, the statute of limitations is three years, instead of 18 months. I don't know how many Medicaid or Medicare cases, or what % of the population of ND applies for Medicaid, it seems to me that it would be a smaller % than the other people of our state. By defeating this bill, we take that estate planning tool away from all of our citizens, not just the small amount that the Dept. of Human Services deals with. I'm sure that if this bill survives in the House, it will be over in the Senate with guns blazing and they will tell us that they will need another \$2 million to put this into effect. I can see a potential problem with mineral rights. In my area, there are people who don't know they are mineral rights. Nobody has produced oil in our county, although lots of land in previous years has been leased or minerals sold so if they ever discover oil or natural gas in McIntosh County, it's going to be a field day for lawyers. I certainly support this bill; I think it's a good bill, a good tool for estate planning for people who want to use it; it's not mandatory, it's just there to be used if they wish to.

Rep. Klemin: Just to speak to your proposal here, we don't have an amendment before us. I think if the agency thinks it needs more time to do this, all of these agencies come in with amendments, if that's the case. They didn't do that in this case, they just came in and said, no don't pass it. I guess I don't have a big problem with extending it from 18 months to 3 years, but it seems to me it's not called for, if they have something they want to do in the Senate if this passes the House, then certainly they can consider it. But there's no motion on the table to provide an amendment. I would say let's not do things like that unless we've got something before us.

Rep. Hogan: Just a point of information, if a Medicaid recipient dies, spouses don't report routinely, and so those are the people that get lost. Right now, there are around 60,000 people receiving Medicaid in ND, about 1/10 of the population group.

Rep. Delmore: They have the staff to handle it.

Chairman DeKrey: Clerk will call the vote.

12 YES 0 NO 2 ABSENT

DO PASS

CARRIER: Rep. Kretschmar

Date: 4/11/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1138

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Klemin Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg	✓	
Rep. Beadle			Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	0				
Rep. Steiner	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1138: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1138 was placed on the Eleventh order on the calendar.

2011 SENATE JUDICIARY

HB 1138

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1138
3/28/11
Job #16051

Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to the Uniform Real Property Transfer at Death Act

Minutes:

There is written testimony

Senator Nething – Chairman

Representative Kretschmar – Introduces the bill and provides a handout on why states should adopt URPTODA by Judge Gail Haggerty. He describes the difference of real property and personal property for Senator Sitte.

Senator Olafson – States the difference of a life estate and this, this is revocable but a life estate is locked in.

Rep. Kretschmar – Agrees and gives an example. He also explains in joint tenancy you cannot change your mind unless you're all in agreement.

Senator Sitte – Asks if this would property would avoid estate tax.

Rep. Kretschmar – Said he doesn't believe it would avoid a state tax but Federal has a 3.5 million exemption.

Malcolm Brown – Real Property and Probate Section of the State Bar Association – See written testimony.

Senator Nething – Asked if we wouldn't have a probate file open if you did 100% of this.

Brown – Answered if all the land you owned was subject to transfer on death deed there would be no probate. He suspects what a person would do if they had a claim against someone whose property went on a transfer and death deed, creditors cannot open probates. A creditor can be appointed as a personal representative under our current law. He suspects that's the process that would happen. A creditor would open a probate estate in order to go after the asset to get it to pay a claim.

Senator Nething – Says you have to have a court order.

Opposition – 0

Neutral – 0

Close the hearing on HB1138

Committee work

Senator Olafson moves a do pass

Senator Sitte seconded

Roll call vote – 6 yes, 0 no

Senator Nething will carry

Date: 3/78
 Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 1138

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Senator Olafson Seconded By Senator Sitte

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson - V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 6 No 0

Absent _____

Floor Assignment Senator Nelson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1138: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1138 was placed on the
Fourteenth order on the calendar.

2011 TESTIMONY

HB 1138



A Few Facts About The...

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT (2009)

PURPOSE:

The Uniform Real Property Transfer on Death Act provides a mechanism for the non-probate transfer of land. The Act allows an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by means of a recorded transfer on death (TOD) deed. During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed.

ORIGIN:

Completed by the Uniform Law Commission in 2009.

STATE ADOPTIONS:

2010 INTRODUCTIONS:

Hawaii
Nebraska
Oklahoma
South Dakota
Utah

For any further information regarding this Act, please contact
Kieran Marion or Katie Robinson at 312-450-6600.

© 2002 National Conference of Commissioners on Uniform State Laws
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

tel: (312) 450-6600 | fax: (312) 450-6601 | e-mail: nccusl@nccusl.org



Why States Should Adopt the...

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

The Uniform Real Property Transfer on Death Act (URPTODA) enables an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by operation of law by means of a recorded transfer on death (TOD) deed.

During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed. On the owner's death, the property passes to the beneficiary, much like the survivorship feature of joint tenancy.

The TOD deed offers a number of advantages over joint tenancy. Because the TOD deed does not convey an immediate interest to the beneficiary, the property is not subject partition or to the beneficiary's creditors. The deed remains revocable, enabling the owner to make a different disposition of the property. It does not trigger an acceleration clause in a mortgage or a property tax reassessment during the transferor's life. Nor does it create adverse Medicaid consequences for either the owner or the beneficiary.

A decedent routinely passes personal property to a named beneficiary outside of probate. Common examples include a beneficiary designation in a life insurance policy or pension plan, registration of securities in TOD form, and a pay on death bank account. But a straightforward, inexpensive, and reliable means of passing real property (which may be the decedent's major asset) directly to a beneficiary is not generally available.

Thirteen states have previously enacted legislation authorizing a TOD deed: Missouri (1989), Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana. The device is popular in those states and experience with it is favorable. The TOD deed has proved to be a useful addition to the tools available to an estate planner.

The Uniform Real Property Transfer on Death Act builds on the existing state statutes. It spells out the operation and effect of the TOD deed and provides a standardized method for the straightforward nonprobate transfer of real property. It has been developed with the assistance of the estate planning, real property, title insurance, banking, and senior legal communities. There is substantial interest in the Uniform Act, and it is appropriate for enactment in all states.

© Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

tel: (312) 450-6600 | fax: (312) 450-6601



SUMMARY

Uniform Real Property Transfer on Death Act

Asset-specific mechanisms for the non-probate transfer of personal property and funds at death are now common. They are known informally as "will substitutes." The proceeds of life insurance policies and pension plans, securities registered in transfer on death form, and funds held in pay on death bank accounts, are examples of personal property that have benefitted from this trend in modern law to recognize and support the use of will substitutes. However there is no generally available straightforward, inexpensive, and reliable means of passing real property, which may be a decedent's major asset, directly to a beneficiary at death. The Uniform Real Property Transfer on Death Act (URPTODA), promulgated by the Uniform Law Commission in 2009, enables an owner of real property to pass the property to a beneficiary on the owner's death simply, directly, and without probate.

Under URPTODA, real property passes by means of a recorded transfer on death (TOD) deed. URPTODA establishes the requirements for the creation and revocation of a TOD deed and clarifies the effect of the TOD deed on all parties while the transferor is living and after the transferor dies. URPTODA provides optional forms to create or revoke a TOD deed.

Key elements of URPTODA include:

The TOD deed is not subject to the statute of wills and passes title directly to the named beneficiary without probate.

The TOD deed must contain all of the essential elements and formalities of a properly recordable inter vivos deed. The TOD deed must state that the transfer to the beneficiary occurs on the transferor's death and must be properly recorded during the transferor's lifetime in the office of the recorder of deeds where the property is located.

The capacity required to create a TOD deed is the same as the capacity to make a will.

A TOD deed does not operate until the transferor's death and remains revocable until then. The transferor may revoke the deed by recording a revocatory instrument such as a direct revocation of the TOD deed or a subsequent TOD deed that names a different beneficiary. If the transferor disposes of the property during lifetime, the TOD deed is ineffective.

Until the transferor's death, a recorded TOD deed has no effect — it does not affect any right or interest of the transferor or any other person in the property. The TOD deed creates no legal or equitable interest in the designated beneficiary; it does not affect the designated beneficiary's eligibility for public assistance; it does not subject the property to the designated beneficiary's creditors.

Assuming the transferor dies owning the property and has not revoked the TOD deed and assuming that the designated beneficiary survives the transferor, the TOD deed passes the property to the designated beneficiary on the transferor's death.

Liability of the beneficiary and property for claims against the transferor's estate is limited to cases where the estate is insolvent.

A designated beneficiary may disclaim all or part of the transferred interest.

Before promulgation of URPTODA some states enacted legislation to enable a TOD deed of real property. URPTODA builds on these statutes. It provides an uncomplicated, effective, and affordable option to pass this important type of asset at death.

© Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

tel: (312) 450-6600 | fax: (312) 450-6601

AMERICAN BAR ASSOCIATION

Commission on Law and Aging
740 15th Street, N.W.
Washington, D.C. 20005-1019
Phone: 202-662-8690
Fax: 202-662-8698
E-mail: abaaging@abanet.org
Internet: <http://www.abanet.org/aging>

CHAIRPERSON
Jeffrey J. Snell
Sagamore Hills, OH

Dr. Arthur Dersé
Milwaukee, WI

Israel Doron
Haifa, Israel

David M. English
Columbia, MO

Robert B. Friedland
Washington, DC

Marla Greene
Marietta, GA

Allison Hirschel
Lansing, MI

Sarah Lenz Lock
Washington, DC

Rudolph N. Patterson
Macon, GA

Robert L. Roth
Washington, DC

Barbara A. Soniat
Washington, DC

Hon. John M. Vitone
Washington, DC

Linda S. Whitton
Valparaiso, IN

Kathleen Wilber
Los Angeles, CA

Hon. Rhonda Reid Winston
Washington, DC

BOARD OF GOVERNORS LIAISON
Charles E. English
Bowling Green, KY

STAFF
Charles P. Sabatino, Director
Erica F. Wood
Lorl A. Stiegel
Leslie B. Fried
David M. Godfrey
Ellen M. Klem
Iamle Philpotts
Sonia M. Arce
Trisha Bullock

January 14, 2010

Robert A. Stein, President
Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

Dear Mr. ^{Rob:} Stein,

I am writing on behalf of the American Bar Association Commission on Law and Aging in support of the Uniform Real Property Transfer on Death Act (Act).

The Act, promulgated by the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws), enables an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by operation of law by means of a recorded transfer on death (TOD) deed.

Non-probate transfers of personal property to beneficiaries have become common in our society. Examples include beneficiary designations in life insurance policies or pension plans, registration of securities in TOD form, and payable on death bank accounts. These mechanisms are inexpensive, user-friendly, and help to avoid probate. However, a straightforward, inexpensive, and reliable means of passing real property (which may be the decedent's major asset) directly to a beneficiary is not generally available.

The Act makes this option available by building on the existing state statutes to provide an uncomplicated, effective, and affordable option to pass this important type of asset at death. It spells out the operation and effect of the TOD deed and provides a standardized method for the straightforward non-probate transfer of real property after the owner's death. During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed. On the owner's death, the property passes to the beneficiary, much like the survivorship feature of joint tenancy.

The TOD deed offers a number of advantages over joint tenancy. Because the TOD deed does not convey an immediate interest to the beneficiary, the property is not subject partition or to the beneficiary's creditors. The deed remains

revocable, enabling the owner to make a different disposition of the property. It does not trigger an acceleration clause in a mortgage or a property tax reassessment during the transferor's life. Nor does it create adverse Medicaid consequences for either the owner or the beneficiary.

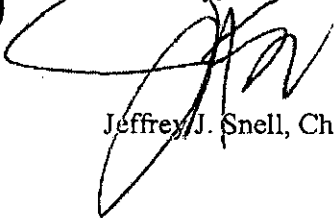
The American Bar Association Commission on Law and Aging along with the estate planning, real property, title insurance, banking, and senior legal communities, participated in the development of the Act. It has the endorsement not only of the American Bar Association Commission on Law and Aging, but also the American Bar Association Real Property, Trust & Estate Law Section.

Thirteen states currently authorize real property transfers on death, and the Act is currently pending in some additional 17 states. In addition, several of the remaining states are studying the Act for future consideration.

My state of Ohio has had TOD deeds since August 2000. I have found them to be very useful in my practice.

As more and more states adopt the concept of real property transfers on death, the need for adoption of a uniform act increases. The American Bar Association Commission on Law and Aging urges states and territories to adopt the Uniform Real Property Transfer on Death Act.

Sincerely,



Jeffrey J. Snell, Chair

Testimony
House Bill Number 1138 – Department of Human Services
House Judiciary Committee
Representative Duane DeKrey, Chairman
January 11, 2011

Chairman DeKrey, members of the Human Services Committee, I am Tim Austin, an attorney with the Department of Human Services. I am here today to oppose House Bill 1138.

The Department, as required by state and federal law, must file a claim against an estate of a deceased medical assistance recipient (or upon the death of a deceased recipient's spouse) to collect up to the amount of medical assistance paid on behalf of the recipient. Section 50-24.1-07 sets forth a list of preferred claims against a decedent's estate if the decedent or the decedent's spouse was a recipient of medical assistance. Additionally, section 50-24.1-07 requires the personal representative of an estate to notify the Department that a probate is commenced. (A probate is typically commenced to transfer real property or for any estate exceeding \$50,000 in assets.) The Department reviews the probate documents to determine if it has a claim against the estate.

If this bill is enacted and a medical assistance recipient or the recipient's spouse transfers real property of any value, which includes mineral interests, under this Bill, the Department would not be notified of that transfer as the transfer is considered nontestamentary (See HB No. 1138, page 3, lines 23 and 24). Since a nontestamentary transfer is not subject to probate, there will be no need to commence a probate, unless additional assets exceed \$50,000. If no probate is commenced the Department will receive no notification to check its records to determine if there is a potential claim against the estate. If the Department is unable

to file claims against recipients' estates to collect the assets to repay the Medicaid program for payments made on the recipient's behalf while the recipient was alive, the amount of funds the Department recovers will decrease resulting in a negative fiscal impact. The estimated loss of revenue from estate recoveries which will result in an increased need in funds from the general fund is approximately \$1.5 million.

If House Bill 1138 passes, the Department would need to track all beneficiary deeds filed at county recorders' offices and compare the names with medical assistance recipients and spouses. In addition, to assert and collect against its claim, it is presumed that the Department will need to commence the probate proceedings. The Department also would have to track down the original will to commence a probate action as required by chapters 30.1-14 and 30.1-15.

This concludes my testimony. I would be happy to try to answer any questions the committee may have. Thank you.

Why States Should Adopt URPTODA (HB1138)

The Uniform Real Property Transfer on Death Act (URPTODA) enables an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by operation of law by means of a recorded transfer on death (TOD) deed. During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed. On the owner's death, the property passes to the beneficiary, much like the survivorship feature of joint tenancy.

The TOD deed offers a number of advantages over joint tenancy. Because the TOD deed does not convey an immediate interest to the beneficiary, the property is not subject to partition or to the beneficiary's creditors. The deed remains revocable, enabling the owner to make a different disposition of the property. It does not trigger an acceleration clause in a mortgage or a property tax reassessment during the transferor's life. Nor does it create adverse Medicaid consequences for either the owner or the beneficiary.

A decedent routinely passes personal property to a named beneficiary outside of probate. Common examples include a beneficiary designation in a life insurance policy or pension plan; registration of securities in TOD form, and a pay on death bank account. But a straightforward, inexpensive, and reliable means of passing real property (which may be the decedent's major asset) directly to a beneficiary is not generally available.

Thirteen states have previously enacted legislation authorizing a TOD deed: Missouri (1989), Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana. The device is popular in those states and experience with it is favorable. The TOD deed has proved to be a useful addition to the tools available to an estate planner.

In Support of House Bill 1138

Real Property Transfer on Death Act Summary

Asset-specific mechanisms for the non-probate transfer of personal property and funds at death are now common. They are known informally as "will substitutes." The proceeds of life insurance policies and pension plans, securities registered in transfer on death form, and funds held in pay on death bank accounts, are examples of personal property that have benefitted from this trend in modern law to recognize and support the use of will substitutes. However there is no generally available straightforward, inexpensive, and reliable means of passing real property, which may be a decedent's major asset, directly to a beneficiary at death. **The Uniform Real Property Transfer on Death Act (URPTODA), promulgated by the Uniform Law Commission in 2009, enables an owner of real property to pass the property to a beneficiary on the owner's death simply, directly, and without probate.**

Under URPTODA, real property passes by means of a recorded transfer on death (TOD) deed. URPTODA establishes the requirements for the creation and revocation of a TOD deed and clarifies the effect of the TOD deed on all parties while the transferor is living and after the transferor dies. URPTODA provides optional forms to create or revoke a TOD deed.

Key elements of URPTODA include:

- The TOD deed is not subject to the statute of wills and passes title directly to the named beneficiary without probate.
- The TOD deed must contain all of the essential elements and formalities of a properly recordable inter vivos deed. The TOD deed must state that the transfer to the beneficiary occurs on the transferor's death and must be properly recorded during the transferor's lifetime in the office of the recorder of deeds where the property is located.
- The capacity required to create a TOD deed is the same as the capacity to make a will.
- A TOD deed does not operate until the transferor's death and remains revocable until then. The transferor may revoke the deed by recording a revocatory instrument such as a direct revocation of the TOD deed or a subsequent TOD deed that names a different beneficiary. If the transferor disposes of the property during lifetime, the TOD deed is ineffective.
- Until the transferor's death, a recorded TOD deed has no effect — it does not

affect any right or interest of the transferor or any other person in the property. The TOD deed creates no legal or equitable interest in the designated beneficiary; it does not affect the designated beneficiary's eligibility for public assistance; it does not subject the property to the designated beneficiary's creditors.

- Assuming the transferor dies owning the property and has not revoked the TOD deed and assuming that the designated beneficiary survives the transferor, the TOD deed passes the property to the designated beneficiary on the transferor's death.
- Liability of the beneficiary and property for claims against the transferor's estate is limited to cases where the estate is insolvent.
- A designated beneficiary may disclaim all or part of the transferred interest.

Before promulgation of URPTODA some states enacted legislation to enable a TOD deed of real property. URPTODA builds on these statutes. It provides an uncomplicated, effective, and affordable option to pass this important type of asset at death.

Senate Judiciary Committee
March 28, 2011
House Bill 1138

My name is Malcolm H. Brown and I am appearing on behalf of the Real Property and Probate Section of the State Bar Association in support of 1138.

Our interest in this bill is in Section 3, which adopts the Uniform Law Commission Real Property Transfer on Death Act.

This Act creates a new tool for estate planners. By use of a Transfer on Death deed, one can provide for an effortless method of transfer of real property on that persons death. It is less complicated than deeds of real property that reserve life estates, because a Transfer on Death deed can be revoked at any time by the transferor without the cooperation of remaindermen. Likewise, the property subject of the deed is always considered to be an asset of the transferor as long as it is unrevoked.

It is important to note that a Transfer on Death deed does not affect the rights of creditors (page 5, line 3) and if necessary to satisfy claims against the decedent, the claim can be enforced against the transferred property (page 6, line 11-14).

I anticipate that our Section will draft a deed form for use by North Dakota lawyers that will incorporate the requirements of the bill.

I urge your support for this bill.