

2009 HOUSE JUDICIARY

HB 1325

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1325

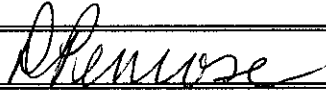
House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 2/2/09

Recorder Job Number: 8359

Committee Clerk Signature



Minutes:

Ch. DeKrey: We will open the hearing on HB 1325.

Rep. Lois Delmore: Sponsor, support, explained the bill (attachment from Tom Edwards).

Rep. Klemin: Are you going to explain the bill. I believe someone is coming behind me that will do that.

Rep. Koppelman: Did this come from some other state.

Rep. Delmore: I believe it is based on the Arizona law.

Rep. Koppelman: How many states have this.

Rep. Delmore: I believe there are nine states.

Chairman DeKrey: Thank you. Further testimony in support.

Marilyn Foss, ND Bankers Association: (attachment/amendment) We don't take a substantive position on the bill, which is designed to set up a vehicle for transferring real estate upon the death of the grantor. In doing some background on this, this morning, the information I found was that there are now 12 states that have adopted similar legislation to this. There is also a uniform law commission on this. The information I had was that the Uniform bill will be ready for presentation this year, and then be ready for adoption by the states. Whether in this bill or in another format, the idea of a method for transferring real estate without having to

initiate or go through probate proceedings is one that is growing in popularity. As I was looking through the site on whether we should put this kind of legislation in place, again it seemed that it addressed quite a few of the issues except possibly whether or not if you have a divorce that will affect the transfer or not. I think our divorce laws would handle that. That was the only thing that I didn't see addressed in this bill. The amendment that I am proposing, it would transfer rights in the bill, pg 1, lines 14-21, addresses a transfer of property, including property that is essentially mortgaged and provide that the person that survives, that it does not trigger a due on sale clause. That language needs to be added to page 4, line 11, adding a new 16, and where it talks about the rights of creditors, and says that the rights of the creditors and others are the same as for a POD account. I don't think that creates a problem. So #16 would read as follows: "Rights under conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime are not affected by this section. The rights of other creditors and other persons are the same as for a POD account under section 30.1-31-12."

Rep. Kretschmar: Under this bill, would the grantee beneficiary acquire any present right in the real estate.

Marilyn Foss: No, the entire conveyance vests on the death of the owner.

Rep. Griffin: Do you believe that this bill would affect other sections of the Code, maybe should put in a definition of augmented estate deed to qualify.

Marilyn Foss: I'm not a probate attorney. It's my understanding that the augmented estate does incorporate property transfers of all sorts, but whether the definition of augmented estate should be in there, I don't know, it states a POD account. If it gets that specific then you might want to look at these and then would want a transfer on death account (?).

Rep. Klemin: Do you see anywhere in here a right to renounce this property. If you got something with a liability that you don't want to take, are you stuck with it?

Marilyn Foss: I do think you can choose it, on page 2, line 22, it can be revoked by anyone.

Rep. Klemin: I'm not talking about revocation. I'm talking about a situation where somebody has died, and now the grantee under this beneficiary deed wants to renounce this, because there may be some liability attached to that and you don't want that liability. So do you see anything in here about renunciation. What if I don't want this property because it's full of asbestos or some other contaminant.

Marilyn Foss: I did not see a provision relating to renunciation.

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

Neutral testimony. We will close the hearing. We will appoint a subcommittee of Rep. Klemin, Rep. Griffin, and Rep. Kretschmar.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1325

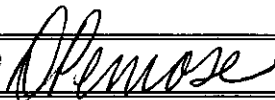
House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 2/9/09

Recorder Job Number: 9012

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will take a look at HB 1325.

Rep. Klemin: HB 1325 is the bill that was presented on beneficiary deeds that is the law from AZ. What I've handed out are some emails I've received from the Bar Association, members of the Real Property Probate Trust section, and also from D. Street an attorney from Minot, who had some detailed comments about the bill. Finally, some comments from the Dept. of Human Services. Our subcommittee met on this and we're not making any recommendations for changing the bill, but rather would make a recommendation that we wait on this subject until the next session. The reason for that is that the Uniform Law Commission has been working on the Uniform Law relating to transfer on death deeds, and we had the first reading of that Uniform Law last summer at the annual meeting. The Uniform Law Commission requires that the entire thing be read and commented on at two annual meetings and in the meantime draft committees have been working on this. So in the 2009 annual meeting, they will take the second vote on this and I'm pretty confident that this is going to be approved as a uniform law for adoption by the states so that it will be ready for introduction as a Uniform Law Commission bill in the next session of the ND legislature. The subcommittee recommends that we not introduce HB 1325 now, but rather we wait until the Uniform Law Commission has completed

its work on this and then we introduce a bill on a Uniform Law that is going to be presented to all the other states in the next session. I might point out that there are a number of ways that a person can actually deal with this now without doing the beneficiary deed that is proposed in this bill. A very simple way would be for a person who has real property just to deed that property to himself and the other person as a joint tenant. What happens then is if the original owner dies, then the other person that claims it by operation of law is the surviving joint tenant without going through probate. That's the typical way things are done. Another way to do it is to deed the property, divide the interest into a life estate and a remainder interest, so that the person who owns the property continues to hold it for the rest of their life and then as soon as he dies it goes to the remainder person, and that's another common way to do it. We recommend a do not pass on this bill.

Rep. Delmore: Two things bother me about that, 1) not one of these people showed up to oppose the bill when we heard it, and 2) there are states that already have this statute. So I don't understand why we couldn't work in those problems into the bill in a way that would make it allowable for people to do this in the next two years. I understand what you're group is trying to do, but I don't understand why, with the intent of this bill, and with it being adopted in a number of other states, where's the problems.

Rep. Klemin: Typically what happens is that states start adopting statutes that aren't uniform and the Uniform Law Commission picks up on that occasionally and tries to come up with a Uniform Law so that things are handled the same all the way across the states. As I understood from the testimony, this was an AZ statute and some other states have done something similar, I don't know that they've done something identical. That's why we have the Uniform Laws, so that hopefully they would be doing something that would be identical so that a person in AZ who has property in ND, if they both adopted this, then they will know that

it will be the same result in both places. We didn't hear from anybody in support of this either, other than yourself.

Rep. Delmore: True, but it was a bill that did something we're doing in other states and there is a constituent of mine who wants to utilize this bill to do a very good for UND. There may be other people at NDSU and other areas that it can help.

Rep. Griffin: I do understand some of the concerns. Even though you pulled the AZ out and you read it, there are still a number of areas where other parts of our probate code and I know myself, I don't have the expertise that Rep. Klemin and Rep. Kretschmar have as a probate lawyer, but in the next few days to come up with this new law that would blend in with our existing code is just too much of a rush, I think we should let the Uniform Law Commission, and State Bar Association committee that works on that area, go through and adapt it to our law.

Rep. Delmore: Haven't we already adopted a Uniform Law already for this.

Rep. Klemin: No, we will introduce it in the next session. It's not a uniform law yet. That is a draft, but it's pretty close to the final draft.

Chairman DeKrey: Rep. Delmore, what would you like to do, a Do Not Pass or have it withdrawn.

Rep. Delmore: I would rather withdraw it then because I don't want to see a Do Not Pass on the bill, because I don't want people to think it's not a good idea.

Rep. Klemin: I don't want to give you the impression that we think it's a bad idea; we just think that there is better language in the Uniform Act that will be coming out.

Rep. Delmore: Can we make sure that it incorporates this bill into the law, as you are going through the uniform law, so that there is some hope two years from now we will say there's a uniform law coming out to constituents.

Rep. Klemin: Well it will be coming in the next session. I can certainly send you that draft I gave you on paper in an email and you can forward that to your constituent to look at.

Rep. Kretschmar: Looking on page 5 of the draft of the Real Property Transfer on Death Act, it says an individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed. That's basically your bill and then in section 202, transfer on death deed is revocable. A transfer on death deed is revocable even if the deed or a separate agreement contains a contrary provision. That is what your proposed law is looking at.

Rep. Delmore: Thank you.

Chairman DeKrey: We will have the bill withdrawn in tomorrow's floor session.

Bill withdrawn.

2009 TESTIMONY

HB 1325

RE: Transfer-on Death Deeds

tom edwards [tomedwards47@yahoo.com]

Sent: Tuesday, January 06, 2009 11:02 PM**To:** Delmore, Lois M.

Thanks for looking into the "transfer on death" deeds

Tom

--- On Tue, 1/6/09, Delmore, Lois M. <lodelmore@nd.gov> wrote:

> From: Delmore, Lois M. <lodelmore@nd.gov>
> Subject: RE: Transfer-on Death Deeds
> To: "tomedwards47@yahoo.com" <tomedwards47@yahoo.com>
> Date: Tuesday, January 6, 2009, 12:39 PM
> Tom-

>
> I am having someone in legislative council look into this.

>
> Lois

> From: tom edwards [tomedwards47@yahoo.com]

> Sent: Sunday, January 04, 2009 6:05 PM

> To: Delmore, Lois M.

> Cc: Tom Edwards

> Subject: Transfer-on Death Deeds

>
> Lois,

>
> First I hope you are staying warm up in North Dakota, we
> are lucky enough to be snow-birding in Green Valley,
> Arizona. It's amazing how good your golf game can get
> when you can play twelve months out of the year.

>
> The reason I am writing is to see if new bills can still be
> introduced in the legislature. In Arizona and nine other
> states an owner of a house can transfer the property at
> death to another person (after the spouse is also dead)
> without going through PROBATE. Jackie and I have set it up
> so that our house in Green Valley will go to the University
> of North Dakota Foundation upon both of our deaths.

>
> I believe a lot of individuals with property in North
> Dakota would like this option to avoid probate. The
> advantages of a T.O.D. Deed (transfer on death) are: 1) it
> reduces the dollar amount that must go through probate, thus
> saving your heirs a considerable amount of money.

>
> 2) it is easy to create, usually

> 3) you can change your mind at any time

> 4) after your death, it is easy for the beneficiary to

> transfer title
>
> The Cons
> 1) you may need a lawyer to help you prepare a deed valid
> in your state
>
> Lois, the states that allow their citizens this benefit are
> as follows:
>
> Arizona -- Ariz. Rev. Stat. Ann. 33-405
> Arkansas -- Ark. Code Ann. 18-12-608
> Colorado -- Colo. Rev.Stat. 15-15-402
> Kansas -- Kan. Stat. 59-3501
> Missouri -- Mo.Rev.Stat. 461.025
> Montana -- Mont. Code Ann. 72-6-121
> Nevada -- Nev.Rev.Stat. 111.109
> New Mexico -- N.M. Stat. Ann. 45-6-401
> Ohio -- Ohio Rev. Code 5302.22
> Wisconsin -- Wisc.Stat. Ann 705.15
>
> Let me thank you in advance for your help in this manner.
>
> Tom & Jackie Edwards

16. The rights of persons under conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime are not affected by this section. The rights of other creditors and other persons are the same as for a pay on death account under section 30.1-31-12.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1325

Page 4, line 11, after “16.” insert “Rights under conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, and other encumbrances made by the owner or to which the owner was subject during the owner’s lifetime are not affected by this section.”

Page 4 line 11, after “of” insert “other”

Page 4, line 11, replace “others” with “other persons”

Klemin, Lawrence R.

From: Larry Klemin [lklemin@bkmpc.com]
Sent: Wednesday, February 04, 2009 8:52 AM
To: Klemin, Lawrence R.
Subject: FW: 1325

From: Malcolm H. Brown [mailto:mhblaw@btinet.net]
Sent: Wednesday, February 04, 2009 8:42 AM
To: Larry Klemin
Subject: 1325

I polled my group re 1325 and the consensus was unanimous; not a good bill. See Atty Van de Streeks memo I previously forwarded. Comment was that if we amend this bill to make it a little better, that then the "problem" is fixed and there might be some resistance to a Uniform bill next session. I reviewed the latest draft of the Uniform bill and find it to be very comprehensive and would serve our purposes well. Can this topic wait?

I know it is unpleasant for a sponser to have his/her bill killed, but another 2 years would not be fatal.

If you think the committee will insist on amendments to the current bill, I do have some ideas. I will be in office all day. 224-8825.

Klemin, Lawrence R.

From: Larry Klemin [lklemin@bkmpc.com]
Sent: Wednesday, February 04, 2009 8:53 AM
To: Klemin, Lawrence R.
Subject: FW: HB 1325

From: Malcolm H. Brown [mailto:mhblaw@btinet.net]
Sent: Thursday, January 22, 2009 10:49 AM
To: Larry Klemin
Subject: Fw: HB 1325

----- Original Message -----

From: nevin@srt.com
To: 'Malcolm H. Brown'; 'Fred Strege'; 'Grant Shaft'; 'David L. Wanner'; 'Sean Smith'; 'Bruce A. Selinger'; 'Dean A. Rindy'
Sent: Wednesday, January 21, 2009 4:28 PM
Subject: RE: HB 1325

Malcolm—

I have four comments about HB 1325.

1.

I think it should provide an explicit rule as to the effect of the death of the “grantee beneficiary” prior to the death of the “owner” (to use the terminology of the bill, instead of “grantee” and “grantor.”) There is an explicit provision for the naming in a “beneficiary deed” of a successor beneficiary which suggests that the transfer (or potential transfer) lapses if the beneficiary dies before the owner, or conversely it suggests that the beneficiary’s interest (an “expectancy” I would suppose, as the beneficiary deed can be revoked), survives the beneficiary’s death if (1) the beneficiary deed is not revoked prior to the death of the owner, and (2) the beneficiary deed does not name a successor beneficiary. Whatever is intended in that regard should be stated explicitly and not left to argument.

In stating the foregoing, I am not oblivious to the fact that the sample deed in the law does contain a “checklist” whereby the owner can specify survivability or not in respect to the beneficiary. However, the law itself does not lay down a “default” rule to apply when a non-conforming deed is employed which omits the checklist, or a deed is used which employs the checklist but neither item therein is checked (and the county recorder does not bounce the deed because of that omission).

(On a side issue, perhaps something should be said as to whether a beneficiary’s expectancy is alienable.)

2.

I question whether transfers by deeds of this nature are includable in the augmented estate for purposes of an election by the surviving spouse under Ch. 30.1-05 (“Surviving Spouse Elective Share”). Subsection 16 of the bill speaks of the rights of “creditors and others” and then cross-references NDCC 30.1-31-12 as being the font of those rights. The term “others” would appear to be inclusive enough to include a surviving spouse.

However, NDCC 30.1-31-12 provides for a recovery from a transferee (beneficiary under this newly-created "beneficiary deed"), for creditors' claims and for "statutory allowances to the surviving spouse and children." This last language much more closely fits Chapter 30.1-07 ("Exempt Property and Allowances"), than it does Ch. 30.1-05.

To be sure, there is a good argument to be made that a beneficiary deed represents "property . . . held in POD, TOD, or coownership registration with right of survivorship" under NDCC 30.1-05-02(2)(b)(1)(c) and thus constitutes part of the augmented estate, but this argument seems to be based more on analogy than on definition. (Unfortunately, neither "POD" nor "TOD" is defined in Chapter 30.1-05.) I question whether the "owner"/"beneficiary grantee" relationship under a beneficiary deed is "coownership" (particularly as the deed can be revoked), and, moreover, whether it provides for a "right of survivorship" depends, I think, on how one resolves the issue presented in part 1.

Again, it would be better to be explicit as to what the actual rule is (which rule should be, one would think, that it is part of the augmented estate).

3.

Somewhat similarly to point 2, I wonder if a beneficiary deed trumps a non-title holder surviving spouse's homestead rights under NDCC 47-18-01 and NDCC 30.1-07-01? Subsection 2 of Section 1 of the bill states in pertinent part that a beneficiary deed "transfers the deceased owner's interest to the grantee beneficiary designated by name in the beneficiary deed effective on the death of the owner, subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime." (My emphasis.) An argument can be made that the right to the homestead allowance or exemption recognized or provided for in NDCC 30.1-07-01 does not arise until the owner's death, and thus does not fall within the language quoted above.

To be sure, typically the grantee beneficiary or grantee beneficiaries have no intention of throwing mom out of the family house, but I have seen enough situations to know the same sentiment may not apply when the surviving spouse is a second or third spouse, and not a parent of the grantee beneficiary or grantee beneficiaries.

Personally, I think the courts would construe the statutes (by brute force, if necessary), to say that the homestead rights of a non-title owner surviving spouse prevail over the rights of a grantee beneficiary, but why invite an opportunity for the issue to arise in the first instance? I think the bill should explicitly nod in a friendly fashion towards homestead rights under the probate code.

4.

[A]

Finally I note what appears to me to be somewhat of an anomaly under the bill, or perhaps an unintended consequence. My concerns center around section 7 of the bill which doesn't seem to make much sense from a policy point of view. In so far as it addresses the revocation of a beneficiary deed by the sole owner of land who executed the beneficiary deed, I have no quarrel with it. When it gets into multiple ownership issues, however, I believe it goes astray.

[B]

In the multiple ownership context it addresses two cases, where there is joint tenancy and where there is not. Presumably when there is not joint tenancy the property is most often held as tenants in common (although

there could be a life estate and a remainder interest, or a remainder interest on a remainder interest, or many of the other arrangements we studied in real property law).

If the property is held as tenants in common, and if two or more of the tenants in common have executed a beneficiary deed, then why should the revocation of this deed by one of these owners nullify the effect of the beneficiary deed in respect to the other owners who signed it? Presumably they are content with their individual undivided interests in the property going to the beneficiary grantee as they originally contemplated. Indeed, they may have no notice whatsoever that one of their number has filed a revocation, which under this bill negates that which they have done. Are they to check the records in the county recorder's office every day to assure this has not happened?

Moreover, cannot an individual tenant in common execute a fully effective beneficiary deed without regard as to what the other owner or owners does? If not, why not? If so, then what sense does it make to say that if the tenants in common join in on a beneficiary deed then any one of the grantors may unilaterally undo the work of himself or herself and of all the others?

[C]

Nor are the joint tenancy rules in respect to the revocation of a beneficiary deed without problems.

As I read section 7 of the bill if (1) there are multiple owners who execute a beneficiary deed, and (2) such owners were joint tenants at the time of the execution of the deed, then a revocation of the beneficiary deed is not effective unless and until there is only one surviving joint tenant owner and that owner proceeds to execute a revocation, or has executed a revocation before becoming the surviving joint tenant. (If the surviving joint tenant did not execute the beneficiary deed in the first instance, then the beneficiary deed became a nullity upon the death of the last surviving joint tenant who did sign the beneficiary deed.)

This rule seems somewhat contradictory of Subsection 2 of Section 1 quoted in part 3 above. This subsection states that the beneficiary grantee takes the property "subject to all conveyances" of the owner. Does this certainly not suggest, and was it not intended to suggest, that an owner can entirely convey away the property which is the subject of a beneficiary deed without going through the formality of revoking the beneficiary deed?

This interpretation is reinforced by subsection 11 of the bill, which states that "[t]he signature, consent, or agreement of, or notice to, a grantee beneficiary of a beneficiary deed is not required for any purpose during the lifetime of the owner." Presumably, then, the sole owner of land which is the subject of a prior beneficiary deed given by that owner can grant, let us say, a valid easement to the local telephone co-op without any consent or ratification of the beneficiary grantee being required. And presumably, as just stated, he can convey away the entire property without going through the formality of revoking the beneficiary deed. Why should the rule be any different for an individual joint tenant?

That is, under the present law a joint tenant can choose to sever the joint tenancy by conveying away his interest. Indeed, he can even convey to a strawman, and then the strawman can convey back to him, creating a tenancy in common where previously there was a joint tenancy. (Presumably where there are more than two joint tenants, the joint tenants who did not participate in this strawman transaction remain joint tenants with one another.)

Is it the intention of this bill to take away the right of a joint tenant to sever the joint tenancy by conveyance when (1) he and other joint tenants have executed a beneficiary deed, and (2) the other joint tenants who signed the beneficiary deed cannot be persuaded to revoke it? In other parts of the bill there are differing consequences depending upon whether two or more — but less than all — the joint tenant owners have executed a beneficiary

deed, but as I read section 7 such distinction does not come into operation in respect to revocation of a beneficiary deed which has been executed by joint tenants.

(Perhaps it should be noted here that the last sentence of section 5 provides that the mere execution of a beneficiary deed by less than all of the joint tenant owners does not accomplish a severance of the joint tenancy, which is why the “severance” question being examined in this part 4 of my e-mail — involving a conveyance by a joint tenant owner to a third party following the execution by that joint tenant owner of a unrevoked beneficiary deed — is pertinent.)

If a beneficiary deed signed by joint tenant owners is to have this disabling effect (in respect to severing the joint tenancy by a later conveyance by one of the signatory joint tenant owners), should it not be made more explicit, and not left to be teased out of the details of the bill?

Let me say that I don’t disagree in principle that when it comes to revocation of a beneficiary deed executed by joint tenants then the dynamics are somewhat different than when a beneficiary deed is executed by tenants in common.

Under a rule whereby one joint tenant may revoke the beneficiary deed unilaterally and without notice to the other owners who executed the deed, there is the same potential for frustrating the intention of the other owners as was noted above in respect to the present provision in the bill whereby one tenant in common can revoke the beneficiary deed without notice to the other tenants in common who signed it. On the other hand, if unanimity among the joint tenant owners who signed the beneficiary deed is required in order to revoke the deed, then the question aired above — about the possible disabling effect on the ability of a joint tenant to sever the joint tenancy by conveyance — is presented.

[D]

seems to me that the solution in the case of either tenants in common or joint tenants is for the owners who execute the beneficiary deed to specify in the deed itself what the effect of the deed is on the questions raised in this part 4.

Earlier I asserted that if a number of tenant in common owners executed a beneficiary deed, it probably was true more often than not that in the event of the repudiation of the deed by one or more of the signers, those who don’t revoke would just as soon see the deed remain in effect as to their respective interests. This would not necessarily be universally true, however. Perhaps the arrangement was entered into because of the mutuality of it.

If so, then the concept of an enforceable contract to make joint and mutual wills (as in a divorce situation) might be useful in this context. Why could not the tenants in common provide in their beneficial deed that it survives in operation as to the respective interest of each grantor therein who does not revoke as to the deed? As an alternative, the beneficial deed could lay down a rule that revocation by one grantor is revocation by all the grantors. Or, as a second and final alternative, the beneficial deed could say that unanimous action is required to revoke, which would be the parallel to a contract to create joint and mutual wills. (In case the deed specifies none of these alternatives, then the first alternative would be the default rule.)

Somewhat similarly, in the joint tenancy context the deed could specify that the incidents of joint tenancy govern over the incidents of a beneficiary deed, or vice-versa.

What I have in mind in the first instance is this: A, B, and C are joint tenant owners of Blackacre, which they convey to D in a beneficial deed which recites that the incidents of joint tenancy govern over the incidents of the beneficial deed. A dies and B revokes the beneficiary deed. Whether the beneficiary deed will be operative

depends upon whether C survives A, in which case it will so operate (if C does not revoke it prior to his death), or whether B survives C, in which case it will not.

In the second alternative, where the parties stipulate that the incidents of a beneficial deed will govern over the incidents of joint tenancy, we can assume the same underlying facts as above, with A, B, and C joint tenant owners who enter into a beneficial deed with D as the beneficiary. A dies and B revokes. In this scenario if C outlives B then the beneficial deed is operative (assuming C does not revoke it prior to his death), whereas if B survives C then the deed would still be operative, but only in a limited sense. That is, upon C's death B would have, in effect, one-third ownership in fee simple, and two-thirds ownership in the form of a life estate, with a remainder interest to D.

There should also be a "default rule" which is applicable in the event the grantors do not choose between these two alternatives. My preference would be for the first.

Of course, provision should be made for A, B, and C jointly to revoke the beneficial deed to D, in which case it would be a nullity.

(Also, it should be noted, the joint tenant owners would also have the right to initially sever the joint tenancy and become tenants in common, and then proceed as outlined above in respect to tenancy in common property.)

[E]

Also, as recognized in the present bill draft (see section 5), some provision should be made to address the situation where the property is owned in joint tenancy but not all the owners join in on a beneficial deed. The rule in the present bill draft seems simple enough; the last surviving joint owner takes free of the effects of the beneficial deed if that person did not sign the beneficiary deed. But this rule may thwart the intentions of those owners who did sign the beneficiary deed, and who may have quite reasonably expected that they would outlive the non-signing owner, but who failed to do so.

I would address this situation by saying that unless a contrary intent appears in a beneficiary deed which is signed by less than all of the joint tenancy owners of the land conveyed, then the beneficiary deed operates as a type-2 ("incidents of a beneficiary deed govern over incidents of joint tenancy") deed described above. In other words, such a deed would be construed, by statute, as though each grantor said: "If I am not the last surviving joint tenant of this property, then upon my death a life estate goes to each surviving joint tenant (in an equal undivided fractional interest as my interest may appear), with the remainder to the beneficiary named herein." To be sure, such remainder interest would be "vested" at this point, but so what?

In other words, what I am saying is that this new law should allow less than all the joint tenant owners to convert what is now a joint tenancy in fee simple to a joint tenancy in life estates, with a remainder over the beneficiary named in the beneficiary deed.

[F]

Now granted that the foregoing suggestions in respect to a beneficiary deed signed by joint tenants gets a little complicated, so I have an alternative suggestion. This bill could simply say: "No beneficiary deed executed by an owner is effective upon the death of the owner unless the owner at such time is the sole fee simple owner of the property which is the subject of the deed, or the deed conveys a lesser interest (or reasonably can be so construed), and the owner at such time is the sole owner of such lesser interest." This rule would forego the nuanced and flexible approach advocated for above in subpart D, but would be much more simple to understand and to enforce. That is, a person claiming under a beneficiary deed would have to establish (a) the existence of the deed; (b) the claimant is the beneficiary named in the deed or a successor thereto; (c) the death of the owner

named therein from whom the claimant's claim is derived; and (d) that such owner was, at the time of his death, the sole owner of the property interest which the claimant claim under the beneficiary deed. It would be up to the defender against such a claim to establish that such owner revoked the deed prior to his death, or to establish such other defense as might be applicable.

This solution, it seems to me, would adequately and appropriately address the problems presented by tenancies in common and joint tenancies, both as to the effect of unrevoked beneficiary deeds signed by less than all of the owners, and as to the manner and effect of revoking the same. Again, it does represent a blunter and less useful tool than those described in subpart D, but the sophisticated and well-advised landowners can duplicate those tools by severing a joint tenancy, when appropriate, and by employing common law estates in land, or by using trust documents, or by both.

[G]

I would also explicitly provide that notwithstanding a beneficiary deed signed by joint tenants, in whatever form, each joint tenant retains the full right to sever the joint tenancy at any time, even by means of a strawman conveyance (or, I suppose, a conveyance to oneself which announces that the purpose is to sever the joint tenancy).

Why do so? Does this not defeat or at least severely undercut the purpose of the two kinds of beneficiary deeds by joint tenants for which I have just advocated in subpart D?

It is easier for me to suggest, than it is to articulate fully, my thinking here, which can be done by looking at the present situation without beneficial deeds being available. A joint tenant is often confronted with this choice: "Look, I can sever the joint tenancy and be assured that — creditors willing or avoidable — I can leave the property upon my death exactly to those who I wish to give it to, or sell it and move to Florida. On the other hand, if I live long enough, and if no one else severs the joint tenancy, I have a chance upon my death to leave the whole enchilada to those I wish to benefit, or to sell it and move to the south of France or Tahiti."

So, notwithstanding the right to sever, there is often a significant incentive not to sever. If you accept this reasoning then it does not make nugatory the two types of beneficial deeds by joint tenants which I have posited above. That being the case, it seems more sensible from a title examiner's point of view to provide explicitly (as the current bill does not), that property subject to a beneficial deed may be conveyed by the owner to a third party which has the effect, *ipso facto*, of revoking such beneficial deed, and that this is true even if a severance of joint tenancy occurs or even if it is contrary to a "unanimous consent required to revoke deed" given by tenants in common.

[H]

A word on that last point. Above I stated that tenant in common owners who give a beneficial deed should have the right to chose among three alternatives, to wit, (1) a revocation by one owner affects that owner only, (2) a revocation by one owner operates on behalf of all owners, or (3) no revocation is effective without unanimous consent.

Allowing the conveyance of an undivided tenancy in common interest subject to a beneficial deed in category (1) or (2) should present no doctrinal problems. The deed would be the equivalent of a revocation (which should be explicit in the law, somewhere), and the effect of such revocation would depend upon whether the deed being revoked is of type 1 or type 2.

Such a conveyance is contrary to the spirit, and probably the letter, of the arrangement contemplated and provided for in the third alternative tenant in common deed. Nevertheless, it should be allowed (for the ease of

the title examiner, frankly). That is, the law should provide that if such a form of deed is employed, it does not create a restraint on alienation or other form of encumbrance on the land which is the subject of the deed, but rather any party thereto, or beneficiary thereof, who may be injured by an act contrary to the restrictions of the deed shall have a private cause of action against the offending party for money damages, or, unless the rights of third parties (with or without notice) have intervened, a right of injunctive relief.

If this seems a little strong, then instead the law could recognize only the first two forms of tenant in common beneficiary deeds, and outlaw the third (which would still leave the door open for revocation by unanimous consent of the beneficiary deed).

From: Malcolm H. Brown [mailto:mhblaw@btinet.net]

Sent: January 20, 2009 1:43 PM

To: Fred Strege; Grant Shaft; David L. Wanner; Sean Smith; Bruce A. Selinger; Nevin Van de Streek; 'Dean A. Rindy'

Subject: HB 1325

Surprise! Check this one out. Let me know if you have any comments. SBAND taking no position on. Does this mirror MN law? or? Interesting set of sponsors.

Klemin, Lawrence R.

From: Alm, Jonathan E.
Sent: Wednesday, February 04, 2009 2:10 PM
To: Klemin, Lawrence R.
Subject: HB 1325 - Department of Human Services
Attachments: HB 1325 - PROPOSED AMENDMENT.docx

Representative Klemin:

As per our discussion on Tuesday, the Department of Human Services has reviewed HB 1325 and has several concerns regarding subsection 8. The attached amendment addresses the Department's concern while maintaining the intent of the bill.

Currently section 50-24.1-07 sets forth a list of preferred claims against a decedent's estate if decedent or the decedent's spouse was a recipient of medical assistance. The amendment proposed by the Department reflects this priority. Representative Delmore testified before the Committee that the intent of this bill is to allow an owner of real property to transfer property upon that individual's death without the need of a probate. The Department, as required by state and federal law, must file a claim against an estate to collect up to the amount of medical assistance paid on behalf of the recipient.

If a medical assistance recipient transferred real property in accordance with this Bill, the Department would have to find a way and a means to assert a claim against the property as no estate proceedings would be commenced. This bill does not set forth how a claim would be asserted. Without any clarification, the Department as a result will need to track all beneficiary deeds and compare the names with medical assistance recipients. In addition, to assert and collect against its claim, it is presumed that the Department would either have to commence a probate proceeding or some other sort of legal proceeding. The problem of commencing a probate proceeding is that the property has already transferred to the grantee beneficiary upon the death of owner. The Department also would have to track down the original will to commence a probate action. I expect that there would be a fiscal impact to the Department that is not anticipated in the Executive Budget if this Bill passes without the amendment proposed

by the Department. Even with the proposed amendment, there may be a fiscal impact in regards to the missed estate recovery opportunities as a result of a grantee beneficiary or personal representative not commencing a probate action within three years of the decedent's death.

With this proposed amendment, real property would not be able to be transferred by a beneficiary deed if the Department has a potential claim. The amendment would require a probate in order for the property to be transferred while still maintaining the preferred claims as set forth in section 50-24.1-07.

In addition, an applicant for medical assistance may be disqualified by a beneficiary deed. For example, if husband owned some property and filed a beneficiary deed giving the property to his son and husband dies transferring the property to his son. Surviving spouse applies for medical assistance within five years of husband's death. The surviving spouse would have a disqualifying period where she would not be entitled to receive medical assistance as a result of her husband's beneficiary deed.

I am available to answer any questions you or the Committee may have. Thank you,

Jon Alm

Jon Alm

Legal Advisory Unit

ND Department of Human Services

701-328-3311

PROPOSED AMENDMENT TO HOUSE BILL 1325

Page 2, line 30, remove "If an individual who is a recipient of Medicaid conveys an interest in real property"

Page 2, remove line 31

Page 3, remove line 1

Page 3, replace line 2 with "Real property of a medical assistance recipient or the recipient's spouse subject to potential claims made under section 50-24.1-07 may not be transferred under this section."

Renumber accordingly

This amendment has been prepared by the Department of Human Services. Without this amendment, the Department of Human Services expects this Bill to have a fiscal impact which is not accommodated in the Executive budget. If this amendment is adopted, there may be a fiscal impact for this amendment which the Department believes is not accommodated in the Executive budget due to missed estate recovery opportunities.

DRAFT
FOR DISCUSSION ONLY

REAL PROPERTY TRANSFER ON DEATH ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For December 5-7, 2008 Drafting Committee Meeting

With Prefatory Note and Partial Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

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UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

Prefatory Note

One of the main innovations in the property law of the twentieth century has been the development of asset-specific will substitutes for the transfer of property at death. By these mechanisms, an owner may designate beneficiaries to receive the property at the owner's death without waiting for probate and without the beneficiary designation needing to comply with the witnessing requirements of wills. Examples of specific assets that today routinely pass outside of probate include the proceeds of life insurance policies and pension plans, securities registered in transfer on death (TOD) form, and funds held in pay on death (POD) bank accounts.

Today, nonprobate transfers are widely accepted. The trend has largely focused on assets that are personal property, such as the assets described in the preceding paragraph. However, long-standing uniform law speaks more broadly. Section 6-101 of the Uniform Probate Code (UPC) provides: "*A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary*" (emphasis supplied).

A small but emerging number of jurisdictions have implemented the principle of UPC §6-101 by enacting statutes providing an asset-specific mechanism for the nonprobate transfer of land. This is done by permitting owners of interests in real property to execute and record a transfer on death (TOD) deed. By this deed, the owner identifies the beneficiary or beneficiaries who will succeed to the property at the owner's death. During the owner's lifetime, the beneficiaries have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke the TOD deed.

Twelve states currently authorize TOD deeds. In the chronological order of the statutes' enactment, the states are: Missouri (1989), Kansas (1997), Ohio (2000), New Mexico (2001), Arizona (2002), Nevada (2003), Colorado (2004), Arkansas (2005), Wisconsin (2006), Montana (2007), Oklahoma (2008), and Minnesota (2008).

This draft is for the committee's consideration on December 5-7, 2008. The draft is divided into four articles. Article 1 contains general provisions. Article 2 authorizes transfer on death deeds and addresses the formal and substantive issues concerning such deeds. Article 3 contains optional statutory forms. Article 4 contains miscellaneous provisions.

1 **UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT**

2
3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

5
6 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Uniform Real Property
7 Transfer on Death Act.

8 **SECTION 102. DEFINITIONS.** In this [act]:

9 (1) “Beneficiary” means a person that receives property under a transfer on death deed.

10 (2) “Designated beneficiary” means a person designated to receive property in a transfer
11 on death deed.

12 (3) “Joint owner” means an individual who owns property concurrently with one or more
13 other individuals with a right of survivorship. The term includes a joint tenant[,][and] [an owner
14 of community property with a right of survivorship[,][and a tenant by the entirety]. The term
15 does not include a tenant in common [or an owner of community property without a right of
16 survivorship].

17 (4) “Person” means an individual, corporation, business trust, estate, trust, partnership,
18 limited liability company, association, joint venture, public corporation, government or
19 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

20 (5) “Property” means an interest in real property that is transferable on the death of the
21 owner.

22 (6) “Transfer on death deed” means a deed authorized under this [act].

23 (7) “Transferor” means an individual who executes and acknowledges a recorded transfer
24 on death deed.

Comment

Paragraph (1) defines a beneficiary as a person that receives property under a transfer on death deed. This links the definition of “beneficiary” to the definition of a “person.” A beneficiary can be any person, including a revocable trust.

Paragraph (2) defines a designated beneficiary as a person designated to receive property in a transfer on death deed. This links the definition of a “designated beneficiary” to the definition of a “person.” A designated beneficiary can be any person, including a revocable trust.

The distinction between a “beneficiary” and a “designated beneficiary” is easily illustrated. Section 209 provides that, on the transferor’s death, the property that is the subject of a transfer on death deed is transferred to the designated beneficiaries who survive the transferor. If *X* and *Y* are the designated beneficiaries but only *Y* survives the transferor, then *Y* is a beneficiary and *X* is not. A further illustration comes into play if Section 209 is made subject to the state’s antilapse statute. If *X* fails to survive the transferor but has a descendant, *Z*, who survives the transferor, the antilapse statute creates a substitute gift in favor of *Z*. The designated beneficiaries are *X* and *Y*, but the beneficiaries are *Y* and *Z*.

Paragraph (3) provides a definition of a “joint owner” as an individual who owns property with one or more other individuals with a right of survivorship. The term is used in Sections 207 and 209.

Paragraph (4) is the standard Uniform Law Commission definition of a “person.”

The effect of Paragraph (5) is that the act applies to all interests in real property that are transferable at the death of the owner.

Paragraph (6) provides that a “transfer on death deed” is a deed authorized under this act. The term includes a transfer on death provision in a deed. Consider the following examples.

Example 1. *A*, the owner of Blackacre, executes, acknowledges, and records a deed comporting with the requirements of Section 205 to transfer Blackacre to *B* at *A*’s death. The deed is a transfer on death deed. The effect of the deed is controlled by this act.

Example 2. *A*, the owner of Blackacre, conveys Blackacre inter vivos by deed to *B*, who wishes to take title while naming *C* as a designated beneficiary to receive Blackacre at *B*’s death. *B* executes and acknowledges a transfer on death provision in favor of *C* in the *A*-to-*B* deed. The provision comports with the requirements of Section 205. The provision is a “transfer on death deed,” and the effect of the provision is controlled by this act.

Paragraph (7) limits the definition of a “transferor” to an individual. The term “transferor” does not include a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any legal or commercial entity other than an individual. The term also does not include an agent. The power of an agent to create or revoke a

transfer on death deed is determined by other law, such as the Uniform Power of Attorney Act, as indicated in the Comments to Sections 205 and 207.

SECTION 103. APPLICABILITY. This [act] applies to a transfer on death deed executed before, on, or after [the effective date of this [act]] by a transferor dying on or after [the effective date of this [act]].

Comment

This section provides that the act applies to a transfer on death deed executed before, on, or after the effective date of the act by a transferor dying on or after the effective date of the act. This section is consistent with the Uniform Probate Code’s provisions governing transfer on death registration of securities. Those provisions “appl[y] to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date].” Uniform Probate Code §6-311.

SECTION 104. NONEXCLUSIVITY. This [act] does not affect any method of transferring property otherwise permitted under the law of this state.

Comment

This section provides that the act is nonexclusive. The act does not affect any method of transferring property otherwise permitted under state law.

One such method is the present transfer of a springing executory interest. Consider the following examples.

Example 1. *A* conveys Blackacre “to *B*, to vest in possession at my death.” By this conveyance, *A* has made a present transfer of a future interest (a springing executory interest) to *B*. The transfer is irrevocable. The future interest will ripen into possession at *A*’s death, even if *B* fails to survive *A*.

Example 2. *A* executes, acknowledges, and records a transfer on death deed for Blackacre, naming *B* as the designated beneficiary. During *A*'s lifetime, no interest passes to *B*, and *A* may revoke the deed. If unrevoked, the deed will transfer possession to *B* at *A*'s death only if *B* survives *A*.

Note that these two methods of transfer have different effects and are governed by different rules.

1 [ARTICLE] 2

2 **TRANSFER ON DEATH DEED**

3
4 **SECTION 201. TRANSFER ON DEATH DEED AUTHORIZED.** An individual
5 may transfer property to one or more beneficiaries effective at the transferor's death by a transfer
6 on death deed.

7 **Comment**

8 This section authorizes a transfer on death deed and makes it clear that the transfer is not
9 an inter vivos transfer. The transfer occurs at the transferor's death.

10
11 The transferor may select any form of ownership, concurrent or successive, absolute or
12 conditional, contingent or vested, valid under state law. Among many other things, this permits
13 the transferor to designate one or more primary beneficiaries and one or more alternate
14 beneficiaries to take in the event the primary beneficiaries fail to survive the transferor. This
15 freedom to specify the form of the transferee's interest comports with the fundamental principle
16 articulated in Restatement (Third) of Property (Wills and Other Donative Transfers) §10.1 that
17 the donor's intention should be "given effect to the maximum extent allowed by law." As the
18 Restatement explains in Comment c to §10.1, "American law curtails freedom of disposition
19 only to the extent that the donor attempts to make a disposition or achieve a purpose that is
20 prohibited or restricted by an overriding rule of law."
21
22

23 **SECTION 202. TRANSFER ON DEATH DEED REVOCABLE.** A transfer on death
24 deed is revocable even if the deed or a separate agreement contains a contrary provision.

25 **Comment**

26 A fundamental feature of a transfer on death deed is that the transferor retains the power
27 to revoke the deed. Section 202 is framed as a mandatory rule in order to protect uniformed
28 grantors.
29

30 If the transferor promises to make the deed irrevocable or not to revoke the deed, the
31 promisee may have a remedy under other law if the promise is broken. The deed remains
32 revocable despite the promise.
33

34 **SECTION 203. TRANSFER ON DEATH DEED NONTTESTAMENTARY.** An
35 effective transfer on death deed is nontestamentary.

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Comment

This section is consistent with Uniform Probate Code §6-101(a), which provides: “A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary.”

As the Comment to Uniform Probate Code §6-101 explains, because the mode of transfer is declared to be nontestamentary, the instrument of transfer does not have to be executed in compliance with the formalities for wills, nor does the instrument need to be probated.

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SECTION 204. CAPACITY OF TRANSFEROR. The capacity required to make or

revoke a transfer on death deed is the same as the capacity required to make a will.

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Comment

This section is consistent with Restatement (Third) of Property (Wills and Other Donative Transfers) §8.1(b), which applies the standard of testamentary capacity, and not the higher standard of capacity for inter vivos gifts, to revocable will substitutes: “If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.” This section is also consistent with Uniform Trust Code §601: “The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.”

A transfer on death deed is not affected if the transferor subsequently loses capacity. On the ability of an agent under a power of attorney to make or revoke a transfer on death deed, see the Comments to Sections 205 and 207.

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38
SECTION 205. REQUIREMENTS. A transfer on death deed must:

- (1) contain the essential elements of a recordable inter vivos deed, except as otherwise provided in paragraph (2);
- (2) state that the transfer to the designated beneficiary is to occur at the transferor’s death;
- (3) be acknowledged by the transferor before a notary public or other individual

1 authorized by law to take acknowledgments; and

2 (4) be recorded before the transferor's death in the [county] where the property is located.

3 **Comment**

4
5 Paragraph (1) requires a transfer on death deed to contain the same essential elements of a
6 recordable deed, other than a present intention to convey, as are required for inter vivos deeds
7 under state law.

8
9 Paragraph (2) emphasizes an important distinction between an inter vivos deed and a
10 transfer on death deed. An inter vivos deed evidences a intention to transfer, at the time of the
11 conveyance, an interest in property, either a present interest or a future interest. In contrast, a
12 transfer on death deed evidences an intention that the transfer occur at the transferor's death.
13 Under no circumstances should a transfer on death deed be given effect as an inter vivos deed; to
14 do so would violate the transferor's intention that the transfer occur at the transferor's death.

15
16 Paragraph (3) requires a transfer on death deed to be acknowledged by the transferor
17 before a notary public or other individual authorized by law to take acknowledgments. The
18 requirement of acknowledgment fulfills at least four functions. First, it cautions a transferor that
19 he or she is performing an act with legal consequences. Such caution is important where, as here,
20 the transferor does not experience the wrench of delivery because the transfer occurs at death.
21 Second, acknowledgment helps to prevent fraud. Third, acknowledgment facilitates the recording
22 of the deed. Fourth, acknowledgment enables the rule in Section 207 that a later acknowledged
23 deed prevails over an earlier acknowledged deed.

24
25 Paragraph (4) requires a transfer on death deed to be recorded before the transferor's
26 death in the county (or other appropriate administrative division of a state, such as a parish)
27 where the land is located. If the property described in the deed is in more than one county, the
28 deed is effective only with respect to the property in the county or counties where the deed is
29 recorded. The requirement of recordation before death helps to prevent fraud and enables all
30 parties to rely on the recording system.

31
32 The act does not define, but instead relies on other law to determine, the authority of an
33 agent. An individual's agent may execute a transfer on death deed on the individual's behalf to
34 the extent permitted by other law, such as the Uniform Power of Attorney Act.

35
36 **SECTION 206. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT**
37 **REQUIRED.** A transfer on death deed is effective without:

38 (1) notice or delivery to or acceptance by the designated beneficiary during the
39 transferor's lifetime; or

1 (2) consideration.

2 **Comment**

3
4 This section makes it clear that a transfer on death deed is effective without notice or
5 delivery to or acceptance by the beneficiary during the transferor's lifetime (Paragraph (1)) and
6 without consideration (Paragraph (2)).
7

8 Paragraph (1) is consistent with the fundamental distinction between a transfer on death
9 deed and an inter vivos deed. Under the former, but not under the latter, the transfer occurs at the
10 transferor's death. Therefore, there is no requirement of notice, delivery or acceptance during the
11 transferor's lifetime. This does not mean that the beneficiary is required to accept the property.
12 The beneficiary may disclaim the property as explained in Section 210 and the accompanying
13 Comment.
14

15 Paragraph (2) is consistent with the law of inter vivos deeds. An inter vivos deed need not
16 be supported by consideration.
17

18
19 **SECTION 207. REVOCATION.**

20 (a) Except as provided in this section, no instrument revokes a recorded transfer on death
21 deed.

22 (b) Subject to subsection (c), a transferor may revoke a recorded transfer on death deed by
23 an instrument, recorded before the transferor's death in the [county] where the property is
24 located, that is either:

25 (1) the transferor's subsequently acknowledged transfer on death deed that
26 revokes the previously acknowledged deed expressly or by inconsistency; or

27 (2) the transferor's subsequently acknowledged revocation form that revokes the
28 previously acknowledged deed either by description of the property or by reference to the
29 recording information of the deed.

30 (c) The following rules apply to a transfer on death deed made by more than one
31 transferor:

32 (1) Revocation by a transferor does not affect the deed as to the interest of another

1 transferor.

2 (2) A deed of joint owners is revoked only if it is revoked by all of the living joint
3 owners.

4 (d) After a transfer on death deed has been recorded, it may not be revoked by a physical
5 act performed on the deed.

6 **Comment**

7 Subsections (a) and (b) provide that a recorded transfer on death deed may be revoked by
8 instrument only (1) by a subsequently acknowledged transfer on death deed or (2) a subsequently
9 acknowledged revocation form. Consider the following examples:

10
11 *Example 1.* T executed, acknowledged and recorded two transfer on death deeds for
12 Blackacre. Both deeds expressly revoked "all my prior transfer on death deeds concerning this
13 property." The dates of acknowledgment determine which deed revoked the other. Deed 1 was
14 acknowledged November 1; Deed 2 was acknowledged December 15. Deed 2 is the subsequently
15 acknowledged deed, so it revoked Deed 1. The revocation occurred when Deed 2 was recorded.

16
17 *Example 2.* T executed and acknowledged a transfer on death deed for Blackacre. T later
18 executed and acknowledged a revocation form. Both instruments were recorded. Because the
19 revocation form was acknowledged later than the deed, the form revoked the deed. The
20 revocation occurred when the form was recorded.

21
22 If the property described in the original deed is in more than one county, the revocation is
23 effective only with respect to the property in the county or counties where the revoking deed or
24 revocation form is recorded.

25
26 By the terms of subsection (a), subsection (b) provides the exclusive methods of
27 revocation by instrument. Revocation by another instrument, such as the transferor's will, is not
28 permitted.

29
30 The question is sometimes raised whether a deed of conveyance to a third party operates
31 as a revocation. The answer highlights the important distinction between revocation and
32 ademption by extinction. Ademption by extinction can have the same practical effect as
33 revocation. However, the doctrines are different. Revocation means that the transfer on death
34 deed is rendered void. The revocation occurs when the instrument of revocation is recorded.
35 Ademption by extinction means that the transfer cannot occur because the property to be
36 transferred is not owned by the transferor at death. The ademption occurs at the transferor's
37 death. Consider the following examples:

38
39 *Example 3.* T executed, acknowledged and recorded a transfer on death deed for
40 Blackacre, identifying X as the designated beneficiary. Later, T executed, acknowledged and

1 recorded a revocation form for Blackacre. When the revocation form was recorded, the transfer
2 on death deed was revoked.

3
4 *Example 4.* *T* executed, acknowledged and recorded a transfer on death deed for
5 Blackacre identifying *X* as the designated beneficiary. Later, *T* conveyed Blackacre to *Y*. Later, *T*
6 died. The deed conveying Blackacre to *Y* did not revoke the transfer on death deed. However, at
7 *T*'s death, Blackacre was not owned by *T*. Therefore, the attempted transfer on death of
8 Blackacre from *T* to *X* was adeemed by extinction. *Y* is the owner of Blackacre.

9
10 *Example 5.* *T* executed, acknowledged and recorded a transfer on death deed for
11 Blackacre identifying *X* as the designated beneficiary. Later, *T* conveyed Blackacre to *Y*. Later, *Y*
12 conveyed Blackacre back to *T*. Later, *T* died, owning Blackacre. There is no revocation or
13 ademption. At *T*'s death, the transfer on death deed is effective to transfer Blackacre to *X*.

14
15 The inter vivos conveyance from *T* to *Y* had the same practical effect as a revocation in
16 Example 4, but not in Example 5.

17
18 Subsection (b)(1) speaks of revocation "expressly or by inconsistency." This provision
19 references the well-established law of revocation by inconsistency of wills. Consider the
20 following examples:

21
22 *Example 6.* *T* executed, acknowledged and recorded a transfer on death deed for
23 Blackacre designating *X* as the beneficiary. Later, *T* executed, acknowledged and recorded a
24 transfer on death deed for the same property, Blackacre, containing no express revocation of the
25 earlier deed but designating *Y* as the beneficiary. Later, *T* died. The recording of the deed in favor
26 of *Y* revoked the deed in favor of *X* by inconsistency. At *T*'s death, *Y* is the owner of Blackacre.

27
28 *Example 7.* *T*, the owner of Blackacre in fee simple absolute, executed, acknowledged
29 and recorded a transfer on death deed for Blackacre designating *X* as the beneficiary. Later, *T*
30 executed, acknowledged and recorded a transfer on death deed containing no express revocation
31 of the earlier deed but designating *Y* as the beneficiary of a life estate in Blackacre. Later, *T* died.
32 The recording of the deed in favor of *Y* partially revoked the deed in favor of *X* by inconsistency.
33 At *T*'s death, *Y* is the owner of a life estate in Blackacre, and *X* is the owner of the remainder.

34
35 Subsection (c) supplies rules governing revocation in the event of multiple owners.
36 Subsection (c)(1) provides that revocation by a transferor does not affect a transfer on death deed
37 as to the interest of another transferor. Subsection (c)(2) provides that a transfer on death deed of
38 joint owners is revoked only if it is revoked by all of the living joint owners. This rule is
39 consistent with Uniform Probate Code §6-306, which provides in pertinent part: "A registration
40 of a security in beneficiary form may be canceled or changed at any time by the sole owner or all
41 then surviving owners without the consent of the beneficiary."

42
43 Subsection (d) provides that a recorded transfer on death deed may not be revoked by a
44 physical act performed on the deed. A physical act includes burning, tearing, canceling,
45 obliterating, or destroying the deed or any part of it.

1 This act does not define, but instead looks to other law to determine, the authority of an
2 agent. An individual's agent may revoke a transfer on death deed on the individual's behalf to the
3 extent permitted by other law, such as the Uniform Power of Attorney Act.
4
5

6 **SECTION 208. EFFECT OF DEED DURING TRANSFEROR'S LIFETIME.**

7 During the transferor's lifetime, a transfer on death deed does not:

8 (1) affect the interests or rights of the transferor or any other owners;

9 (2) affect the interests or rights of creditors or transferees, whether or not they have notice
10 of the deed;

11 (3) affect the transferor's or designated beneficiary's eligibility for any form of public
12 assistance;

13 (4) create a legal or equitable interest in favor of the designated beneficiary;

14 (5) create an expectancy in favor of the designated beneficiary that can be assigned or
15 encumbered in law or equity; or

16 (6) make the property subject to claims or process of the designated beneficiary's
17 creditors.

18 **Comment**

19 The fundamental feature of a transfer on death deed is that it does not operate until the
20 transferor's death. The transfer occurs at the transferor's death, not before. Thus, a transfer on
21 death deed, during the transferor's lifetime, does not affect the interests or rights of the transferor
22 or any other owners (Paragraph (1)). It does not affect the transferor's right to transfer or
23 encumber the property, nor does it sever a joint tenancy, nor should it trigger a due-on-sale clause
24 in the transferor's mortgage (Paragraph (1)). It does not affect the interests or rights of pre-
25 existing or future creditors, secured or unsecured, whether or not they have an interest in the
26 property or notice of the deed (Paragraph (2)). It does not affect transferees, whether or not they
27 have notice of the deed (Paragraph (2)). It does not affect the transferor's or designated
28 beneficiary's eligibility for any form of public assistance, including Medicaid (Paragraph (3)). On
29 this point, the drafting committee specifically disapproves of the contrary approach of Colo. Rev.
30 Stat. §15-15-403. During the transferor's lifetime, a transfer on death deed does not create a legal
31 or equitable interest in the designated beneficiary (Paragraph (4)). It does not create an
32 expectancy in favor of the designated beneficiary that can be assigned or encumbered in law or
33 equity. The property is not subject to any anticipatory alienation or encumbrance (Paragraph (5)).

1 Finally, it does not make the property subject to claims or process of the designated beneficiary's
2 creditors (Paragraph (6)).
3
4

5 **SECTION 209. EFFECT OF DEED AT TRANSFEROR'S DEATH.**

6 (a) Except as otherwise provided in this section [or in [cite state statutes on antilapse,
7 revocation by divorce or homicide, survivorship and simultaneous death, and elective share, if
8 applicable to nonprobate transfers]], on the death of the transferor, the following rules apply to
9 property that is the subject of an effective transfer on death deed and owned by the transferor at
10 death:

11 (1) The property is transferred to the designated beneficiaries that survive the
12 transferor in accordance with the deed.

13 (2) Unless the deed provides otherwise, concurrent beneficiaries receive equal and
14 undivided interests in the property with no right of survivorship among them.

15 (3) If no designated beneficiary survives the transferor, the property is transferred
16 to the transferor's estate.

17 (b) Except as otherwise provided by [cite state recording act], a beneficiary's interest in
18 the property is subject to all conveyances, encumbrances, assignments, contracts, mortgages,
19 liens, and other interests to which the property is subject at the transferor's death. For purposes of
20 this subsection and [cite state recording act], the recording of the transfer on death deed is
21 deemed to have occurred at the transferor's death.

22 (c) If a transferor is a joint owner and is

23 (1) survived by one or more other joint owners, the property that is the subject of a
24 transfer on death deed belongs to the surviving joint owner or owners, and the right of
25 survivorship continues among the surviving joint owners;

1 (2) the last surviving joint owner, the transfer on death deed is effective.

2 *Legislative Note: States should determine whether their statutes on antilapse, revocation by*
3 *divorce or homicide, survivorship and simultaneous death, and the elective share of the surviving*
4 *spouse apply to nonprobate transfers such as transfer on death deeds. On the desirability of*
5 *extending these probate rules to nonprobate transfers, see the Legislative Note and Comment to*
6 *Section 403.*

7 8 **Comment**

9 Subsection (a) states three basic rules, except as otherwise provided by this section or
10 other provisions of state law governing nonprobate transfers: (1) property that is the subject of an
11 effective transfer on death deed and owned by the transferor at death is transferred at the
12 transferor's death to the designated beneficiaries as provided in the deed; (2) unless the deed
13 specifies otherwise, concurrent beneficiaries receive equal and undivided interests, with no right
14 of survivorship among them; and (3) if no designated beneficiary survives the transferor, the
15 property passes to the transferor's estate.

16
17 On the desirability of extending the probate rules governing antilapse, revocation on
18 divorce or homicide, survivorship and simultaneous death, and the elective share of the surviving
19 spouse to nonprobate transfers such as transfer on death deeds, see the Comment to Section 403.
20

21 The opening clause of Subsection (a) refers to "property that is the subject of an effective
22 transfer on death deed *and owned by the transferor at death*" (emphasis supplied). In almost
23 every instance, the transferor will own the property *when the deed is executed*, but this is not
24 imperative. Consider the following example. *H* and *W*, a married couple, held Blackacre as
25 tenants by the entirety. *H* executed, acknowledged and recorded a transfer on death deed for
26 Blackacre in favor of *X*. *W* later died, at which point *H* owned Blackacre in fee simple absolute.
27 Under the law of some states, there may be a question whether the transfer on death deed is
28 effective, given that *H* executed it when Blackacre was owned, not by *H* and *W*, but by the
29 marital entity. The correct answer is that the transfer on death deed is effective at *H*'s death
30 because Blackacre is owned by *H* at *H*'s death. See, e.g., *Mitchell v. Wilmington Trust Co.*, 449
31 A.2d 1055 (Del. Ch. 1982) (mortgage granted by one tenant by the entirety is not void upon
32 execution but remains inchoate during the lives of both spouses, and becomes a valid lien if the
33 spouse who executed the mortgage survives the other spouse or if the spouses get divorced).
34

35 Subsection (a)(2) states a rule of construction in the event of concurrent beneficiaries.
36 Unless the deed provides otherwise, concurrent beneficiaries receive equal and undivided
37 interests in the property with no right of survivorship among them. This rule of construction is
38 consistent with the general presumption in favor of tenancy in common. See Powell on Real
39 Property §51.02. The rule is also consistent with Uniform Probate Code §6-212 governing
40 multiple-party accounts and §6-307 governing the transfer on death registration of securities.
41

42 Subsection (b) concerns the effect of transactions during the transferor's lifetime. The
43 subsection states an intermediate rule between two extremes. One extreme would provide that
44 transactions during the transferor's lifetime affect the beneficiary only if the transactions are

1 recorded before the transferor's death. This would unfairly disadvantage the transferor's creditors
2 and transferees. The other extreme would provide that transactions during the transferor's
3 lifetime always supersede the beneficiary's interest, even if the recording act would provide
4 otherwise. Between these two positions is the rule of subsection (b). The subsection provides, as
5 a general rule, that the beneficiary's interest is subject to all conveyances, encumbrances,
6 assignments, contracts, mortgages, liens, and other interests to which the property is subject at
7 the transferor's death. However, there is an exception to this general rule when the state
8 recording act so provides. The state recording act will so provide when two conditions are met:
9 (1) the inter vivos conveyance or encumbrance is unrecorded throughout the transferor's lifetime
10 (the legal fiction in this subsection protects persons who transact with the transferor and record
11 any time before the transferor's death); and (2) the beneficiary is protected by the recording act.
12 These two conditions will both be met only in rare instances. Most beneficiaries of transfer on
13 death deeds are gratuitous, whereas state recording acts protect only purchasers for value. See
14 Powell on Real Property §82.02.

15
16 Subsection (d) provides that the survivorship right of a joint owner takes precedence over
17 the transfer on death deed. This rule is consistent with the law of joint tenancy and wills: the right
18 of survivorship takes precedence over a provision in a joint tenant's will.

19
20 The drafting committee approves of the result in *In re Estate of Roloff*, 143 P.3d 406
21 (Kan. Ct. App. 2006) (holding that crops should be transferred with the land under a transfer on
22 death deed because this result would be reached on the same facts with any other deed).

23
24
25 **SECTION 210. DISCLAIMER.** A beneficiary may disclaim all or part of the
26 beneficiary's interest as provided by [cite state statute or the Uniform Disclaimer of Property
27 Interests Act].

28 *Legislative Note:* States should check their disclaimer statutes for any necessary amendments.
29 For many states, including states with the Uniform Disclaimer of Property Interests Act (1999),
30 the principal amendment would be to replace the usual requirement that the disclaimer be
31 delivered (for here, after the transferor's death, there is no obvious individual to whom delivery
32 can be made) with a requirement that the disclaimer be recorded in the county where the
33 property that is the subject of the disclaimer is located. For a state with the superseded
34 disclaimer provisions of pre-1999 Uniform Probate Code Section 2-801, an amendment should
35 also be made to the provisions governing the time of disclaimer, to treat the beneficiary's
36 interest under a transfer on death deed as if it had devolved under a testamentary instrument.

37 38 **Comment**

39
40 A beneficiary of a transfer on death deed may disclaim the property interest the deed
41 attempts to transfer. While this section relies on other law, such as the Uniform Disclaimer of
42 Property Interests Act, to govern the disclaimer, two general principles should be noted.

1 First, there is no need under the law of disclaimers to execute a disclaimer in advance.
2 During the transferor's lifetime, a designated beneficiary has no interest in the property. See
3 Section 208. Nothing passes to the designated beneficiary while the transferor is alive, hence
4 there is no need to execute a disclaimer during that time.
5

6 Second, an effective disclaimer executed after the testator's death "relates back" to the
7 moment of the attempted transfer, here the death of the transferor. Because the disclaimer
8 "relates back," the beneficiary is regarded as never having had an interest in the disclaimed
9 property. The Uniform Disclaimer of Property Interests Act reaches this result, without using the
10 language of relation back, in §6(b)(1): "The disclaimer takes effect as of the time the instrument
11 creating the interest becomes irrevocable" As the Comment to §6 explains, "This Act
12 continues the effect of the relation back doctrine, not by using the specific words, but by directly
13 stating what the relation back doctrine has been interpreted to mean."
14
15

16 **SECTION 211. NO COVENANTS OR WARRANTIES.** A transfer on death deed
17 transfers property without covenant or warranty of title even if the deed contains a contrary
18 provision.
19

20 **Comment**

21 This section states the mandatory rule that a transfer on death deed transfers the property
22 without covenant or warranty of title. The rule is mandatory for two reasons: first, to prevent
23 mishaps by uninformed grantors; and second, to recognize that a transfer on death deed is a will
24 substitute. The rule of this section is consistent with the longstanding law of wills. As stated by
25 Sir Edward Coke, "an express warranty cannot be created by will." Coke on Littleton 386a.

26 **[SECTION 212. LIABILITY OF BENEFICIARY FOR CREDITOR CLAIMS**
27 **AND STATUTORY ALLOWANCES.**

28 **Alternative A**

29 A beneficiary of a transfer on death deed is liable for allowed claims against the
30 transferor's probate estate and statutory allowances to a surviving spouse and children to the
31 extent provided in [cite state statute or Section 6-102 of the Uniform Probate Code].

32 **Alternative B**

33 (1) A beneficiary of a transfer on death deed is liable for allowed claims against the

1 transferor's probate estate and statutory allowances to a surviving spouse and children to the
2 extent the transferor's probate estate is inadequate to satisfy those claims and allowances. The
3 beneficiary's liability under this section may not exceed the value of the property received by the
4 beneficiary under the transfer on death deed.

5 **End of Alternatives**

6 *Legislative Note: Alternative A is for a state with an existing statute governing creditors' rights*
7 *in nonprobate transfers, such as Uniform Probate Code §6-102. States are encouraged to enact*
8 *such statutes, thereby treating nonprobate transfers comprehensively. Alternative B is a second-*
9 *best approach, supplying creditor protection but governing only transfer on death deeds and not*
10 *other nonprobate mechanisms.*

11
12 *The section is bracketed because some states do not extend creditors' rights to*
13 *nonprobate transfers.*

14 **Comment**

15
16 Alternative A defers to other law, such as Uniform Probate Code §6-102, to establish the
17 liability of a beneficiary of a transfer on death deed for creditor claims and statutory allowances.

18
19 Uniform Probate Code §6-102 was added in 1998 to establish the principle that recipients
20 of nonprobate transfers can be required to contribute to pay allowed claims and statutory
21 allowances to the extent the probate estate is insufficient. The fundamental rule of liability is
22 contained in §6-102(b): "Except as otherwise provided by statute, a transferee of a nonprobate
23 transfer is subject to liability to any probate estate of the decedent for allowed claims against the
24 decedent's probate estate and statutory allowances to the decedent's spouse and children to the
25 extent the estate is insufficient to satisfy those claims and allowances. The liability of a
26 nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by
27 that transferee." The other provisions of UPC §6-102 implement this liability rule.

28
29 For states not favoring the comprehensive approach of UPC §6-102(b), Alternative B
30 provides a liability rule focusing on transfer on death deeds. The beneficiary is liable to the
31 extent the transferor's probate estate is insufficient. The beneficiary's liability is limited to the
32 value of the property received by the beneficiary under the transfer on death deed.]

1

2

3

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7

8

1 Legal description of the property:

2 _____
3 _____
4 _____
5 _____

6 PRIMARY BENEFICIARY

7 I revoke all my previous transfer on death deeds affecting the described property, and
8 designate the following beneficiary if he or she survives me.

9 Printed name Mailing address, if available

10 _____

11 ALTERNATE BENEFICIARY – Optional

12 If my primary beneficiary does not survive me, I designate the following alternate
13 beneficiary if he or she survives me.

14 Printed name Mailing address, if available

15 _____

16 TRANSFER ON DEATH

17 At my death, I transfer my interest in the described property to the beneficiaries as
18 indicated above.

19 Before my death, I have the right to revoke this deed.

20 SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED:

21 _____[(SEAL)] _____
22 (signature) (date)
23 _____[(SEAL)] _____

1 (signature)

(date)

2 ACKNOWLEDGMENT

3 [insert acknowledgment for deed here]

4 (back of form)

5 COMMON QUESTIONS ABOUT THE USE OF THIS FORM

6 WHAT DOES THE TRANSFER ON DEATH (TOD) DEED DO? When you die, this deed
7 transfers the described property, subject to any debts or liens or mortgages (or other
8 encumbrances) you have put on the property during your lifetime. Probate is not required. The
9 TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer
10 the property to someone else during your lifetime. If you do not own any interest in the property
11 when you die, this deed will have no effect.

12 HOW DO I MAKE A TOD DEED? Complete this form. Have it acknowledged before a notary
13 public or other individual authorized by law to take acknowledgments. Record the form in each
14 [county] where any part of the property is located. The form must be acknowledged and recorded
15 before your death or it has no effect.

16 HOW DO I FIND THE "LEGAL DESCRIPTION" OF THE PROPERTY? This information may be on
17 the deed you received when you became an owner of the property. This information may also be
18 available in the office of the [county recorder] for the [county] where the property is located. If
19 you are not absolutely sure, consult a lawyer.

20 HOW DO I "RECORD" THE TOD DEED? Take the completed and acknowledged form to the
21 [county recorder] for the [county] where the property is located. Follow the instructions given by
22 the [county recorder] to make the form part of the official property records. If the property is in
23 more than one [county], you must record the deed in each [county].

1 CAN I REVOKE THE TOD DEED IF I CHANGE MY MIND? Yes. The TOD deed is revocable.
2 No one, including the beneficiaries, can prevent you from revoking the deed.

3 HOW DO I REVOKE THE TOD DEED? There are two ways to revoke a recorded TOD deed:
4 (1) Complete and acknowledge a revocation form, and record it in each [county] where the
5 property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same
6 property, and record it in each [county] where the property is located. In addition, you can
7 transfer the property to someone else during your lifetime.

8 I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO? Do not complete
9 this form under pressure. Seek help from a trusted family member, a friend, or a lawyer.

10 DO I NEED TO TELL THE BENEFICIARIES ABOUT THE TOD DEED? No, but it is
11 recommended. Secrecy can cause later complications and might make it easier for others to
12 commit fraud.

13 (2)

14 (front of form)

15 REVOCABLE TRANSFER ON DEATH DEED

16 LONG FORM

17 NOTICE TO OWNER
18

19 You should carefully read all information on the other side of this form. YOU MAY
20 WANT TO CONSULT A LAWYER BEFORE USING THIS FORM.

21 This form must be recorded before your death, or it will not be effective.

22 IDENTIFYING INFORMATION

23 Owner or Owners Making This Deed:

24 _____

(printed name)

(mailing address)

(printed name)

(mailing address)

Legal description of the property:

PRIMARY BENEFICIARY DESIGNATION

I revoke all my previous transfer on death deeds affecting the described property, and designate the following beneficiaries who survive me to receive the property. They will receive it in equal and undivided shares with no right of survivorship among them, unless I say otherwise here:

I have checked "Yes" or "No" in the far right column to indicate whether, if a beneficiary fails to survive me, the share should instead be transferred to the beneficiary's descendants who survive me, by operation of state law (known as the "antilapse statute").

Printed name

Mailing address, if available

Descendants instead?

yes ☐ no ☐

yes ☐ no ☐

yes ☐ no ☐

ALTERNATE BENEFICIARY DESIGNATION – Optional

If no primary beneficiaries survive me (and, if applicable, state law has not transferred the

property to their descendants by the antilapse statute), I designate the following alternate beneficiaries who survive me to receive the property. They will receive it in equal and undivided shares with no right of survivorship among them, unless I say otherwise here:

Printed name	Mailing address, if available	Descendants instead?	
_____	_____	yes <input type="checkbox"/>	no <input type="checkbox"/>
_____	_____	yes <input type="checkbox"/>	no <input type="checkbox"/>
_____	_____	yes <input type="checkbox"/>	no <input type="checkbox"/>

TRANSFER ON DEATH

I transfer my interest in the described property to the beneficiaries on my death.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED:

_____ [(SEAL)]	_____
(signature)	(date)
_____ [(SEAL)]	_____
(signature)	(date)

ACKNOWLEDGMENT

[insert acknowledgment for deed here]

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

WHAT DOES THE TRANSFER ON DEATH (TOD) DEED DO? When you die, this deed transfers the described property, subject to any debts or liens or mortgages (or other encumbrances) you have put on the property during your lifetime. Probate is not required. The

1 TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer
2 the property to someone else during your lifetime. If you do not own any interest in the property
3 when you die, this deed will have no effect.

4 HOW DO I MAKE A TOD DEED? Complete this form. Have it acknowledged before a notary
5 public or other individual authorized by law to take acknowledgments. Record the form in each
6 [county] where any part of the property is located. The form must be acknowledged and recorded
7 before your death or it has no effect.

8 HOW DO I FIND THE "LEGAL DESCRIPTION" OF THE PROPERTY? This information may be on
9 the deed you received when you became an owner of the property. This information may also be
10 available in the office of the [county recorder] for the [county] where the property is located. If
11 you are not absolutely sure, consult a lawyer.

12 HOW DO I "RECORD" THE TOD DEED? Take the completed and acknowledged form to the
13 [county recorder] for the [county] where the property is located. Follow the instructions given by
14 the [county recorder] to make the form part of the official property records. If the property is in
15 more than one [county], you must record the deed in each [county].

16 CAN I REVOKE THE TOD DEED IF I CHANGE MY MIND? Yes. The TOD deed is revocable.
17 No one, including the beneficiaries, can prevent you from revoking the deed.

18 HOW DO I REVOKE THE TOD DEED? There are two ways to revoke a recorded TOD deed:
19 (1) Complete and acknowledge a revocation form, and record it in each [county] where the
20 property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same
21 property, and record it in each [county] where the property is located. In addition, you can
22 transfer the property to someone else during your lifetime.

23 I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO? Do not complete

1 this form under pressure. Seek help from a trusted family member, a friend, or a lawyer.

2 Do I NEED TO TELL THE BENEFICIARIES ABOUT THE TOD DEED? No, but it is
3 recommended. Secrecy can cause later complications and might make it easier for others to
4 commit fraud.

5 **Comment**

6 The forms in this section are optional. The section is based on Section 4 of the Uniform
7 Health-Care Decisions Act.

8
9 Ten of the twelve states with transfer on death deed statutes provide a statutory form. See
10 Ariz. Stat. §33-405(K); Ark. Stat. §18-12-608(h), Colo. Stat. §15-15-404; Kans. Stat. §59-3502;
11 Minn. Stat. §507.071(24); Mont. Stat. §72-6-121(13); Nev. Stat. §111.109(6); N.M. Stat. §45-6-
12 401(C); Ohio Code §5302.22(A); Okla. H.B. 2639 §3.

13
14 The transfer on death deed is likely to be used by consumers for whom the preparation of
15 a tailored inter vivos revocable trust is too costly. The forms in this section are designed to be
16 understandable and consumer-friendly.

17
18 For examples of statutory forms containing answers to questions likely to be asked by
19 consumers, see the Illinois statutory forms for powers of attorney. 755 Ill. Comp. Stat. 45/3-3
20 (power of attorney for property); 755 Ill. Comp. Stat. 45/4-10 (power of attorney for health care).

21
22
23 **SECTION 302. OPTIONAL FORM OF REVOCATION.** The following form may,
24 but need not, be used to create a form of revocation under this [act]. The other sections of this
25 [act] govern the effect of this or any other writing used to create a form of revocation under this
26 [act].

27 (front of form)

28 **REVOCATION OF TRANSFER ON DEATH DEED**

29 **NOTICE TO OWNER**

30 This revocation must be recorded before you die or it will not be effective. This
31 revocation is effective only as to the interests in the property of owners who sign this revocation.

32 **IDENTIFYING INFORMATION**

1 Owner or Owners of Property Making This Revocation:

2 _____
3 (printed name)

_____ (mailing address)

4 _____
5 (printed name)

_____ (mailing address)

6 Provide either (1) the legal description of the property or (2) the recording information of the
7 transfer on death deed:

8 _____
9 _____
10 _____
11 _____
12 **REVOCATION**

13 I revoke all my previous transfer on death deeds affecting this property.

14 **SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION**

15 _____ [(SEAL)]

16 (signature)

_____ (date)

17 _____ [(SEAL)]

18 (signature)

_____ (date)

19 **ACKNOWLEDGMENT**

20 [insert acknowledgment here]

21 (back of form)

22 **COMMON QUESTIONS ABOUT THE USE OF THIS FORM**

23 **HOW DO I USE THIS FORM TO REVOKE A TRANSFER ON DEATH (TOD) DEED? Complete this**

1 form. Have it acknowledged before a notary public or other individual authorized to take
2 acknowledgments. Record the form in each [county] where the property is located. The form
3 must be acknowledged and recorded before your death or it has no effect.

4 HOW DO I FIND THE “LEGAL DESCRIPTION” OF THE PROPERTY OR THE “RECORDING
5 INFORMATION” OF THE TOD DEED TO BE REVOKED? This information may be on the TOD deed. It
6 may also be available in the office of the [county recorder] for the [county] where the property is
7 located. If you are not absolutely sure, consult a lawyer.

8 HOW DO I “RECORD” THE FORM? Take the completed and acknowledged form to the
9 [county recorder] for the [county] where the property is located. Follow the instructions given by
10 the [county recorder] to make the form part of the official property records. If the property is
11 located in more than one [county], you must record the deed in each of those [counties].

12 I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO? Do not complete
13 this form under pressure. Seek help from a trusted family member, a friend, or a lawyer.

14 **Comment**

15
16 The form in this section is optional. The section is based on Section 4 of the Uniform
17 Health-Care Decisions Act.

18
19 Six of the twelve states with transfer on death deed statutes provide a statutory form for
20 revocation. See Ariz. Stat. §33-405(L); Ark. Stat. §18-12-608(i), Colo. Stat. §15-15-405; Minn.
21 Stat. §507.071(25); Mont. Stat. §72-6-121(14); Nev. Stat. §111.109(7).

22
23 The aim of the form in this section is to be understandable and consumer-friendly.]

1 [ARTICLE] 4

2 MISCELLANEOUS PROVISIONS

3
4
5 SECTION 401. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In

6 applying and construing this uniform act, consideration must be given to the need to promote
7 uniformity of the law with respect to its subject matter among the states that enact it.

8 SECTION 402. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
9 AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal
10 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et. seq.,
11 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
12 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
13 U.S.C. Section 7003(b).

14 SECTION 403. REPEALS. The following acts and parts of acts are hereby repealed:

15 (1)

16 (2)

17 (3)

18 *Legislative Note: In light of the growing harmonization of the rules governing probate and*
19 *nonprobate transfers, states may wish to consider extending to nonprobate mechanisms, such as*
20 *transfer on death deeds, the probate rules governing antilapse, revocation by divorce, revocation*
21 *by homicide, survivorship and simultaneous death, and the elective share of a surviving spouse.*

22 Comment

23 One of the significant trends in the law of family property in the twentieth century has
24 been the growing harmonization of the constructional and substantive rules governing wills and
25 will substitutes. Section 7.2 of the Restatement (Third) of Property (Wills and Other Donative
26 Transfers) provides: "Although a will substitute need not be executed in compliance with the
27 statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject
28 to substantive restrictions on testation and to rules of construction and other rules applicable to
29 testamentary dispositions."

1 The Uniform Probate Code contains statutory provisions treating wills and will
2 substitutes alike for many purposes, including (1) antilapse; (2) revocation by divorce; (3)
3 revocation by homicide (the “slayer rule”), survivorship and simultaneous death, and the elective
4 share of a surviving spouse.
5

6 In some cases, the harmonization is achieved by applying the relevant rule to any
7 “governing instrument,” which is defined in Uniform Probate Code §1-201(18) as “a deed, will,
8 trust, insurance or annuity policy, account with POD designation, security registered in
9 beneficiary form (TOD), pension, profitsharing, retirement, or similar benefit plan, instrument
10 creating or exercising a power of appointment or a power of attorney, or a dispositive,
11 appointive, or nominative instrument of any similar type.” The Uniform Probate Code’s rules on
12 revocation by divorce, revocation by homicide, and survivorship and simultaneous death apply to
13 any governing instrument. See Uniform Probate Code §§2-702 (survivorship and simultaneous
14 death), 2-803 (revocation by homicide), 2-804 (revocation by divorce).
15

16 For the elective share, the Uniform Probate Code treats wills and will substitutes alike by
17 defining the decedent’s “augmented estate” to include both probate and nonprobate transfers. See
18 Uniform Probate Code §2-203(a).
19

20 For antilapse, the Uniform Probate Code has separate sections treating wills (§2-603) and
21 will substitutes (§§2-706, 2-707), but the latter are modeled on the former.
22
23

24 **SECTION 404. EFFECTIVE DATE.** This [act] takes effect