

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
IN SANTA FE, NEW MEXICO
JULY 9-16, 2009

WITH PREFATORY NOTE AND COMMENTS

COPYRIGHT © 2009

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 30, 2009

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 118th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

**DRAFTING COMMITTEE ON UNIFORM REAL PROPERTY TRANSFER
ON DEATH ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

NATHANIEL STERLING, 4180 Oak Hill Ave., Palo Alto, CA 94306, *Chair*
TURNERY P. BERRY, 2700 PNC Plaza, Louisville, KY 40202
RHODA B. BILLINGS, 5525 Williams Rd., Lewisville, NC 27023
TOM BOLT, 5600 Royal Dane Mall, St. Thomas, VI 00802-6410
THOMAS L. JONES, University of Alabama School of Law, University Station, P.O. Box 865557, Tuscaloosa, AL 35486-0050
EDWARD F. LOWRY, JR., 4200 N. 82nd St., Suite 2001, Scottsdale, AZ 85251
ROBERT L. MCCURLEY, JR., Alabama Law Institute, P.O. Box 861425, Tuscaloosa, AL 35486
JAMES R. PENDER, 4001 North Rodney Parham Rd., Suite 101, Little Rock, AR 72212
PATRICK A. RANDOLPH, JR., University of Missouri-Kansas City School of Law, 5100 Rockhill Rd., Kansas City, MO 64110
GLEE S. SMITH, P.O. Box 667, Lawrence, KS 66044
MICHAEL P. SULLIVAN, 80 South 8th St., 500 IDS Center, Minneapolis, MN 55402-3796
THOMAS P. GALLANIS, University of Iowa, Boyd Law Building, Iowa City, IA 52242,
Reporter

EX OFFICIO

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563,
President
ANNE L. MCGIHON, 837 Sherman St., Denver, CO 80203, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

DENNIS M. HORN, 2099 Pennsylvania Ave. NW, Washington, DC 20006, *ABA Advisor*
SUSAN N. GARY, University of Oregon School of Law, 1515 Agate St., Eugene, OR 97403,
ABA Section Advisor

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

TABLE OF CONTENTS

Prefatory Note	1
SECTION 1. SHORT TITLE	2
SECTION 2. DEFINITIONS	2
SECTION 3. APPLICABILITY	3
SECTION 4. NONEXCLUSIVITY	4
SECTION 5. TRANSFER ON DEATH DEED AUTHORIZED	4
SECTION 6. TRANSFER ON DEATH DEED REVOCABLE	5
SECTION 7. TRANSFER ON DEATH DEED NONTESTAMENTARY.	5
SECTION 8. CAPACITY OF TRANSFEROR	6
SECTION 9. REQUIREMENTS	6
SECTION 10. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT REQUIRED	8
SECTION 11. REVOCATION BY INSTRUMENT AUTHORIZED; REVOCATION BY ACT NOT PERMITTED	8
SECTION 12. EFFECT OF TRANSFER ON DEATH DEED DURING TRANSFEROR'S LIFE	12
SECTION 13. EFFECT OF TRANSFER ON DEATH DEED AT TRANSFEROR'S DEATH	14
SECTION 14. DISCLAIMER	18
SECTION 15. LIABILITY FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES	21
[SECTION 16. OPTIONAL FORM OF TRANSFER ON DEATH DEED	22
[SECTION 17. OPTIONAL FORM OF REVOCATION	26
SECTION 18. UNIFORMITY OF APPLICATION AND CONSTRUCTION	28
SECTION 19. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT	28
SECTION 20. REPEALS	29
SECTION 21. EFFECTIVE DATE	29

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 growing 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.

Thirteen states have enacted statutes authorizing 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), Minnesota (2008), and Indiana (2009).

The time is ripe for a Uniform Act to facilitate this emerging form of nonprobate transfer and to bring uniformity and clarity to its use and operation.

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Real Property Transfer on Death Act.

SECTION 2. DEFINITIONS. In this [act]:

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

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

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

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

(5) “Property” means an interest in real property located in this state which is transferable on the death of the owner.

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

(7) “Transferor” means an individual who makes a transfer 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 a “beneficiary” to the definition of a “person.” A beneficiary can be any person, including the trustee of 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 13 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 13 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 may create a substitute gift in favor of *Z*. In such a case, 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 11 and 13.

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 located in this state 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. In some states with existing transfer on death deed legislation, the legislation has instead used the term “beneficiary deed.” The term “transfer on death deed” is preferred, to be consistent with the transfer on death registration of securities. See Article 6, Part 3, of the Uniform Probate Code, containing the Uniform TOD Security Registration 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 or other representative. If a transfer on death deed is made by an agent on behalf of a principal or by a conservator, guardian, or judge on behalf of a ward, the principal or ward is the transferor. By way of analogy, see Uniform Trust Code §103(15) (defining “settlor”) and the accompanying Comment (excluding an individual “acting as the agent for the person who will be funding the trust”). The power of an agent to make or revoke a transfer on death deed on behalf of a principal is determined by other law, such as the Uniform Power of Attorney Act, as indicated in the Comments to Sections 9 and 11.

SECTION 3. APPLICABILITY. This [act] applies to a transfer on death deed made 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 made 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 4. 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 a present transfer with a retained legal life estate. Consider the following examples:

Example 1. *A* conveys Blackacre to *B* while reserving *A*'s right to remain in possession until *A*'s death. By this conveyance, *A* has made a present transfer of a future 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*.

As illustrated in these examples, the two methods of transfer have different effects and are governed by different rules.

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

Comment

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

The transferor is an individual, but the singular includes the plural. Multiple individuals can readily act together to transfer property by a transfer on death deed, as in the common case of a husband and wife who own the property as joint tenants or as tenants by the entirety. On the

effect of a transfer on death deed made by joint owners, see Section 13(c) and the accompanying Comment.

The transferor may select any form of ownership, concurrent or successive, absolute or conditional, contingent or vested, valid under state law. Among many other things, this permits the transferor to reserve interests for his estate (e.g., mineral interests); to specify the nature and extent of the beneficiary's interest; and to designate one or more primary beneficiaries and one or more alternate beneficiaries to take in the event the primary beneficiaries fail to survive the transferor. This freedom to specify the form and terms of the transferee's interest comports with the fundamental principle of American law recognized by the Restatement (Third) of Property (Wills and Other Donative Transfers) §10.1 that the donor's intention should be "given effect to the maximum extent allowed by law." As the Restatement explains in Comment c to §10.1, "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."

Notwithstanding this freedom of disposition, transferors are encouraged as a practical matter to avoid formulating dispositions that would complicate title. Dispositions containing conditions or class gifts, for example, may require a court proceeding to sort out the beneficiaries' interests. Other estate planning mechanisms, such as trusts, may be more appropriate in such cases.

SECTION 6. TRANSFER ON DEATH DEED REVOCABLE. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

Comment

A fundamental feature of a transfer on death deed under this Act is that the transferor retains the power to revoke the deed. Section 6 is framed as a mandatory rule, for two reasons. First, the rule prevents an off-record instrument from affecting the revocability of a transfer on death deed. Second, the rule protects the transferor who may wish later to revoke the deed.

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

SECTION 7. TRANSFER ON DEATH DEED NONTESTAMENTARY. A transfer on death deed is nontestamentary.

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 is not a will and does not have to be executed in compliance with the formalities for wills, nor does the instrument need to be probated.

Whether a document that is ineffective as a transfer on death deed (e.g., because it has not been recorded before the transferor’s death) should be given effect as a testamentary instrument will depend on the applicable facts and on the wills law of the jurisdiction. Section 2-503 of the Uniform Probate Code provides in pertinent part: “Although a document ... was not executed in compliance with Section 2-502, the document ... is treated as if it had been executed in compliance with that section if the proponent of the document ... establishes by clear and convincing evidence that the decedent intended the document ... to constitute ... (iii) an addition to or alteration of the [decedent’s] will”

SECTION 8. 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.

Comment

This section provides that the capacity required to make or revoke a transfer on death deed, which is a revocable will substitute, is the same as the capacity required to make a will. It is appropriate that a will and a transfer on death deed require the same level of capacity, for both mechanisms are revocable and ambulatory, the latter term meaning that they do not operate before the grantor’s death. This approach is consistent with the Restatement (Third) of Property (Wills and Other Donative Transfers) §8.1(b), which applies the standard of testamentary capacity, and not the 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 9 and 11.

SECTION 9. REQUIREMENTS. A transfer on death deed:

(1) except as otherwise provided in paragraph (2), must contain the essential elements and

formalities of a properly recordable inter vivos deed;

(2) must state that the transfer to the designated beneficiary is to occur at the transferor's death; and

(3) must be recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the property is located.

Legislative Note: *Because a transfer on death deed does not have present effect and is revocable, it may be useful to title searchers and insurers if the recording or indexing of the deed identifies it as a transfer on death deed. Information about how a recorder of deeds should record and index a transfer on death deed is available from the recorders of deeds in states having experience with such deeds. By way of example, the recorder of deeds of Clay County, Missouri, uses a grantor-grantee index that is fully searchable online, at http://recorder.claycogov.com/pages/online_access.asp.*

Comment

Paragraph (1) requires a transfer on death deed to contain the same essential elements and formalities, other than a present intention to convey, as are required for a properly recordable inter vivos deed under state law. "Essential elements" is a term with a long usage in the law of deeds of real property. The essential elements of a deed vary from one state to another but commonly include the names of the grantor and grantee, a clause transferring title, a description of the property transferred, and the grantor's signature. In all states, the essential elements of a properly recordable deed include the requirement that the deed be acknowledged by the grantor before a notary public or other individual authorized by law to take acknowledgments. See Thompson on Real Property §92.04(c) (observing that a "certificate of acknowledgment or attestation is universally required to qualify an instrument for recordation"). In the context of transfer on death deeds, the requirement of acknowledgment fulfills at least four functions. First, it cautions a transferor that he or she is performing an act with legal consequences. Such caution is important where, as here, the transferor does not experience the wrench of delivery because the transfer occurs at death. Second, acknowledgment helps to prevent fraud. Third, acknowledgment facilitates the recording of the deed. Fourth, acknowledgment enables the rule in Section 11 that a later acknowledged deed prevails over an earlier acknowledged deed.

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

Paragraph (3) requires a transfer on death deed to be recorded before the transferor's death in the county (or other appropriate administrative division of a state, such as a parish)

where the land is located. If the property described in the deed is in more than one county, the deed is effective only with respect to the property in the county or counties where the deed is recorded. The requirement of recordation before death helps to prevent fraud by ensuring that all steps necessary to the effective transfer on death deed are completed during the transferor's lifetime. The requirement of recordation before death also enables all parties to rely on the recording system. For these reasons, all thirteen states that have already enacted transfer on death deed statutes require the deed to be recorded before the transferor's death.

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

SECTION 10. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT REQUIRED. A transfer on death deed is effective without:

- (1) notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or
- (2) consideration.

Comment

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

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

Paragraph (2) is consistent with the law of donative transfers. A deed need not be supported by consideration.

**SECTION 11. REVOCATION BY INSTRUMENT AUTHORIZED;
REVOCATION BY ACT NOT PERMITTED.**

- (a) Subject to subsection (b), an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument:

(1) is one of the following:

(A) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) an instrument of revocation that expressly revokes the deed or part of the deed; or

(C) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor:

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

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

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the property.

Comment

This section concerns revocation by instrument and revocation by act. On revocation by change of circumstances, such as by divorce or homicide, see Section 13 and the accompanying Comment.

Subsection (a) provides the exclusive methods of revoking, in whole or in part, a recorded transfer on death deed by a subsequent instrument. Revocation by an instrument not specified, such as the transferor's will, is not permitted.

The rule that a transfer on death deed may not be revoked by the transferor's subsequent will is a departure from the Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 comment e (see also the corresponding Reporter's Note), which encourages the revocability of will substitutes by will. However, there is a sound reason for the departure in the specific case of a transfer on death deed. A transfer on death deed operates on real property, for which certainty of title is essential. This certainty would be difficult, and in many cases impossible, to achieve if an off-record instrument, such as the grantor's will, could revoke a recorded transfer on death deed. The rule in this Act against revocation by will is also consistent with the uniform acts governing multiple-party bank accounts. See Uniform Probate Code §6-213(b) ("A right of survivorship arising from the express terms of the account, Section 6-212, or a POD designation, may not be altered by will.")

A recorded transfer on death deed may be revoked by instrument only by (1) a subsequently acknowledged transfer on death deed, (2) a subsequently acknowledged instrument of revocation, such as the form in Section 17, or (3) a subsequently acknowledged inter vivos deed containing an express revocation clause. Consider the following examples:

Example 1. T executes, acknowledges, and records a transfer on death deed for Blackacre. Later, T executes, acknowledges, and records a second transfer on death deed for Blackacre, containing an express revocation clause revoking "all my prior transfer on death deeds concerning this property." The second deed revokes the first deed. The revocation occurs when the second deed is recorded. (For the result if the second deed had not contained the express revocation clause, see Example 5.)

Example 2. T executes, acknowledges, and records two transfer on death deeds for Blackacre. Both deeds expressly revoke "all my prior transfer on death deeds concerning this property." The dates of acknowledgment determine which deed revoked the other. The first deed is acknowledged November 1; the second deed is acknowledged December 15. The second deed is the later acknowledged, so it revokes the first deed. The revocation occurs when the second deed is recorded.

Example 3. T executes and acknowledges a transfer on death deed for Blackacre. T later executes and acknowledges a revocation form. Both instruments are recorded. Because the revocation form is acknowledged later than the deed, the form revokes the deed. The revocation occurs when the form is recorded.

Example 4. T executes and acknowledges a transfer on death deed for Blackacre. T later executes and acknowledges an inter vivos deed conveying Blackacre and expressly revoking the transfer on death deed. Both instruments are recorded. Because the inter vivos deed contains an express revocation provision and is acknowledged later than the transfer on death deed, the inter vivos deed revokes the transfer on death deed. The revocation occurs when the inter vivos deed is recorded. (For the result if the inter vivos deed had not contained an express revocation clause, see the discussion below on "ademption by extinction.")

The same rules apply whether the revocation is total or partial. In the previous examples, suppose instead that the initial transfer on death deed provides for the transfer of two parcels,

Blackacre and Whiteacre, and that the subsequent instrument revokes the transfer on death deed as to Blackacre. The subsequent instrument revokes the transfer on death deed in part.

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

Subsection (a)(1)(A) speaks of revocation “expressly or by inconsistency.” This provision references the well-established law of revocation by inconsistency of wills. Consider the following examples:

Example 5. *T* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the designated beneficiary. Later, *T* executes, acknowledges, and records a transfer on death deed for the same property, Blackacre, containing no express revocation of the earlier deed but naming *Y* as the designated beneficiary. Later, *T* dies. The recording of the deed in favor of *Y* revokes the deed in favor of *X* by inconsistency. At *T*’s death, *Y* is the owner of Blackacre.

Example 6. *T*, the owner of Blackacre in fee simple absolute, executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the designated beneficiary. Later, *T* executes, acknowledges, and records a transfer on death deed containing no express revocation of the earlier deed but naming *Y* as the designated beneficiary of a life estate (or a mineral interest) in Blackacre. Later, *T* dies. The recording of the deed in favor of *Y* partially revokes the deed in favor of *X* by inconsistency. At *T*’s death, *Y* is the owner of a life estate (or a mineral interest) in Blackacre, and *X* is the owner of the remainder.

The question is sometimes raised whether a recorded inter vivos deed *without an express revocation clause* operates as a revocation of an earlier transfer on death deed. The answer highlights the important distinction between “revocation” and “ademption by extinction.” See Atkinson on Wills §134. Revocation means that the instrument is rendered void. Ademption by extinction means that the transfer of the property cannot occur because the property is not owned by the transferor at death. The doctrines are different.

In some instances, revocation and ademption have the same practical effect: the designated beneficiary of the property receives nothing. Nothing in this section changes that fact, as indicated in subsection (d). However, there are other instances where the doctrines have differing effects. Consider the following illustration, drawn from the law of wills.

Example 7. *T* executes a will devising Blackacre to *A*. Later, *T* becomes legally incompetent, and *G* is appointed as *T*’s conservator. *G*, acting within the scope of his authority, sells Blackacre to *B* for \$100,000. Later, *T* dies.

The law of wills provides that the devise to *A* is adeemed rather than revoked. This means that *A* is not entitled to Blackacre but is entitled to a pecuniary devise in the amount of \$100,000. See Atkinson on Wills §134; *Wasserman v. Cohen*, 606 N.E.2d 901, 903 (Mass. 1993); Uniform Probate Code §2-606(b). The result is designed to effectuate *T*’s presumed intention.

The Joint Editorial Board for Uniform Trust and Estate Acts has begun a conversation on whether the Uniform Probate Code's provisions on ademption should be extended to nonprobate transfers, thus harmonizing the treatment of wills and will substitutes on this aspect of the law. This act accepts the well recognized distinction between revocation and ademption in order to leave the door open for such future harmonization, which would effectuate the presumed intention of nonprobate grantors.

Subsection (b) supplies rules governing revocation by instrument in the event of a transfer on death deed made by multiple owners. Subsection (b)(1) provides that revocation by a transferor does not affect a transfer on death deed as to the interest of another transferor. Subsection (b)(2) provides that a transfer on death deed of joint owners is revoked only if it is revoked by all of the living joint owners. This rule is consistent with Uniform Probate Code §6-306, which provides in pertinent part: "A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary." Subsection (b)(2) applies only to a deed of joint owners. A joint tenant who severs the joint tenancy, thereby destroying the right of survivorship, is no longer a joint owner.

Subsection (c) provides that a recorded transfer on death deed may not be revoked by a revocatory act performed on the deed. Such an act includes burning, tearing, canceling, obliterating, or destroying the deed or any part of it.

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

SECTION 12. EFFECT OF TRANSFER ON DEATH DEED DURING

TRANSFEROR'S LIFE. During a transferor's life, a transfer on death deed does not:

(1) affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

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

- (5) create a legal or equitable interest in favor of the designated beneficiary; or
- (6) subject the property to claims or process of a creditor of the designated beneficiary.

Comment

A fundamental feature of a transfer on death deed under this Act is that it does not operate until the transferor's death. The transfer occurs at the transferor's death, not before.

Paragraph (1): A transfer on death deed, during the transferor's lifetime, does not affect the interests or property rights of the transferor or any other owners. Therefore, the deed does not, among many other things: affect the transferor's right to transfer or encumber the property inter vivos; sever a joint tenancy or a joint tenant's right of survivorship; trigger a due-on-sale clause in the transferor's mortgage; trigger the imposition of real estate transfer tax; or affect the transferor's homestead or real estate tax exemptions, if any.

Paragraph (2): A transfer on death deed does not affect transferees, whether or not they have notice of the deed. Like a will, the transfer on death deed is ambulatory. It has no effect on inter vivos transfers.

Paragraph (3): A transfer on death deed, during the transferor's lifetime, does not affect pre-existing or future creditors, secured or unsecured, whether or not they have an interest in the property or notice of the deed.

Paragraph (4): A transfer on death deed, during the transferor's lifetime, does not affect the transferor's or designated beneficiary's eligibility for any form of public assistance, including Medicaid. On this point, the drafting committee specifically disapproves of the contrary approach of Colo. Rev. Stat. §15-15-403.

Paragraph (5): During the transferor's lifetime, a transfer on death deed does not create a legal or equitable interest in the designated beneficiary. The beneficiary does not have an interest that can be assigned or encumbered. Note, however, that this rule would not preclude the doctrine of after-acquired title. A warranty deed from a designated beneficiary to a third party would operate to pass the beneficiary's title to the third party after the transferor's death.

Paragraph (6): A transfer on death deed, during the transferor's lifetime, does not make the property subject to claims or process of the designated beneficiary's creditors. The deed has no more effect than a will.

If a transferor combines an inter vivos transfer of an interest in property (such as a mineral interest) with a transfer on death of the remainder interest, the inter vivos transfer may have present effect even though the transfer on death does not occur until the transferor's death.

SECTION 13. EFFECT OF TRANSFER ON DEATH DEED AT TRANSFEROR'S DEATH.

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

(1) Subject to paragraph (2), the interest in the property is transferred to the designated beneficiary in accordance with the deed.

(2) The interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor. The interest of a designated beneficiary that fails to survive the transferor lapses.

(3) Subject to paragraph (4), concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.

(4) If the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one which lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

(b) Subject to [cite state recording act], a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and [cite state recording act], the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

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

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

or

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

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Legislative Note: *In light of the growing harmonization of the rules governing probate and nonprobate transfers, states enacting this act should consider extending to nonprobate mechanisms, such as transfer on death deeds, the probate rules governing antilapse, revocation by divorce, revocation by homicide, survival and simultaneous death, and the elective share of a surviving spouse.*

One of the significant trends in the law of property in the twentieth century has been the growing harmonization of the constructional and substantive rules governing deathtime transfers, whether the transfers occur in or outside of the probate process. Section 7.2 of the Restatement (Third) of Property (Wills and Other Donative Transfers) provides: “Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions.”

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

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

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

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

See also the Legislative Note to Section 14 on disclaimers.

Comment

Subsection (a) states four default rules, except as otherwise provided by the transfer on death deed, by this section, or by other provisions of state law governing nonprobate transfers. On this last, and the desirability of extending the probate rules governing antilapse, revocation on divorce or homicide, survival and simultaneous death, and the elective share of the surviving spouse to nonprobate instruments such as transfer on death deeds, see the Legislative Note.

The four default rules established by subsection (a) are these. First, the property that is the subject of an effective transfer on death deed and owned by the transferor at death is transferred at the transferor's death to the designated beneficiaries as provided in the deed. The rule implements the transferor's intention as described in the deed. Consider the following example:

Example 1. A executes, acknowledges, and records a transfer on death deed for Blackacre naming X as the primary beneficiary and Y as the alternate beneficiary if X fails to survive A. Both X and Y survive A. Blackacre is transferred to X at A's death in accordance with the provisions of the deed.

This default rule implements the fundamental principle that the provisions of the deed control the disposition of the property, unless otherwise provided by state law.

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

The bracketed language at the beginning of subsection (a) enables a state to make the default rules subject to other statutes, such as an antilapse statute or a statute providing for revocation on divorce. Consider the following examples:

Example 2. A executes, acknowledges, and records a transfer on death deed for Blackacre naming X as the primary beneficiary and Y as the alternate beneficiary if X fails to survive A. In fact, X and Y fail to survive A, who is survived only by X's child, Z. Assume that the state's antilapse statute applies to transfer on death deeds and creates a substitute gift in Z. (For such a statute, see Uniform Probate Code §2-706.) Blackacre is transferred to Z at A's death in accordance with the provisions of the deed as modified by the antilapse statute.

Example 3. A executes, acknowledges, and records a transfer on death deed for Blackacre naming her spouse, X, as the primary beneficiary and Y as the alternate beneficiary if X fails to survive A. Later, A and X divorce. Assume that the state's statute on revocation by divorce applies to transfer on death deeds and revokes the designation in favor of X, with the effect that the provisions of the transfer on death deed are given effect as if X had disclaimed. (For such a

statute, see Uniform Probate Code §2-804.) Assume further that the effect of the putative disclaimer is that *X* is treated as having failed to survive *A*. (See the Uniform Disclaimer of Property Interests Act §6(a)(3)(B).) Blackacre is transferred to *Y* at *A*'s death in accordance with the provisions of the deed as modified by the revocation on divorce and disclaimer statutes.

Note that the property must be owned by the transferor at death. Property no longer owned by the transferor at death cannot be transferred by a transfer on death deed, just as it cannot be transferred by a will. This is the principle of ademption by extinction, discussed in the Comment to Section 11.

In almost every instance, the transferor will own the property not only at death but also when the transfer on death deed is executed, but the latter is not imperative. Consider the following example. *H* and *W*, a married couple, hold Blackacre as tenants by the entirety. *H* executes, acknowledges, and records a transfer on death deed for Blackacre in favor of *X*. *W* later dies, at which point *H* owns Blackacre in fee simple absolute. Later, *H* dies. Under the law of some states, there may be a question whether the transfer on death deed is effective, given that *H* executed it when Blackacre was owned, not by *H* and *W*, but by the marital entity. The correct answer is that the transfer on death deed is effective at *H*'s death because Blackacre is owned by *H* at *H*'s death. See, e.g., *Mitchell v. Wilmington Trust Co.*, 449 A.2d 1055 (Del. Ch. 1982) (mortgage granted by one tenant by the entirety is not void upon execution but remains inchoate during the lives of both spouses, and becomes a valid lien if the spouse who executed the mortgage survives the other spouse or if the spouses get divorced).

The second default rule established by subsection (a) is that the interest of a designated beneficiary is contingent on surviving the transferor. This default rule treats wills and will substitutes alike. The interest of a designated beneficiary who fails to survive the transferor lapses. On the desirability of extending statutory antilapse protection to will substitutes such as transfer on death deeds, see the Legislative Note.

The third default rule established by subsection (a) is that concurrent beneficiaries receive equal and undivided interests with no right of survivorship among them. This default rule is consistent with the general presumption in favor of tenancy in common. See Powell on Real Property §51.02. The rule is also consistent with Uniform Probate Code §6-212 governing multiple-party accounts and §6-307 governing the transfer on death registration of securities.

The fourth and last default rule established by subsection (a) is that, in the event of the lapse or failure of an interest to be held concurrently, the share that lapses or fails passes proportionately to the surviving concurrent beneficiaries. Consider the following example:

Example 4. *A* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X*, *Y*, and *Z* as the designated beneficiaries. *X* and *Y* survive *A*, but *Z* fails to survive *A*. The transfer on death deed is effective and, in the absence of an antilapse statute, transfers Blackacre to *X* and *Y*. This default rule is consistent with the transferor's probable intention in the absence of an antilapse statute and also with Uniform Probate Code §2-604(b) on the lapse of a residuary devise. On the desirability of extending statutory antilapse protection to will substitutes such as transfer on death deeds, see the Legislative Note.

Subsection (b) concerns the effect of transactions during the transferor's life. The subsection states an intermediate rule between two extremes. One extreme would provide that transactions during the transferor's life affect the beneficiary only if the transactions are recorded before the transferor's death. This would unfairly disadvantage the transferor's creditors and inter vivos transferees. The other extreme would provide that transactions during the transferor's life always supersede the beneficiary's interest, even if the recording act would provide otherwise. Between these two positions is the rule of subsection (b).

Subsection (b) provides that the beneficiary's interest is subject to *all* conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. "Liens" includes liens arising by operation of law, such as state Medicaid liens.

The only exception to this rule arises when the state recording act so provides. The state recording act will so provide only when two conditions are met: (1) the inter vivos conveyance or encumbrance is unrecorded throughout the transferor's life (the legal fiction in this subsection protects persons who transact with the transferor and record any time before the transferor's death); and (2) the beneficiary is protected by the recording act. These two conditions will be met only in rare instances. Most beneficiaries of transfer on death deeds are gratuitous, whereas state recording acts typically protect only purchasers for value. See Powell on Real Property §82.02.

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

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

SECTION 14. DISCLAIMER. A beneficiary may disclaim all or part of the beneficiary's interest as provided by [cite state statute or the Uniform Disclaimer of Property Interests Act].

Legislative Note: *States should check their disclaimer statutes for any necessary amendments. The following are conforming amendments to the Uniform Disclaimer of Property Interests Act:*

SECTION 12. DELIVERY OR FILING.

(a) *In this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:*

- (1) *an annuity or insurance policy;*
- (2) *an account with a designation for payment on death;*

- (3) a security registered in beneficiary form;
- (4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or
- (5) any other nonprobate transfer at death.
- (b) Subject to subsections (c) through (l), delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in its receipt.
- (c) In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:
- (1) a disclaimer must be delivered to the personal representative of the decedent's estate; or
- (2) if no personal representative is then serving, it must be filed with a court having jurisdiction to appoint the personal representative.
- (d) In the case of an interest in a testamentary trust:
- (1) a disclaimer must be delivered to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate; or
- (2) if no personal representative is then serving, it must be filed with a court having jurisdiction to enforce the trust.
- (e) In the case of an interest in an inter vivos trust :
- (1) a disclaimer must be delivered to the trustee then serving;
- (2) if no trustee is then serving, it must be filed with a court having jurisdiction to enforce the trust; or
- (3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.
- (f) In the case of an interest created by a beneficiary designation which is disclaimed ~~made~~ before ~~the time~~ the designation becomes irrevocable, ~~the~~ the disclaimer must be delivered to the person making the beneficiary designation.
- (g) In the case of an interest created by a beneficiary designation which is disclaimed ~~made~~ after ~~the time~~ the designation becomes irrevocable;:
- (1) ~~the~~ the disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest; and
- (2) the disclaimer of an interest in real property must be recorded in [the office of the county recorder of deeds] of the [county] where the real property that is the subject of the disclaimer is located.
- (h) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.
- (i) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:
- (1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or
- (2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.
- (j) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power ; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(k) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.

(l) In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

Comment

The rules set forth in Section 12 are designed ~~so that anyone who has the duty to distribute the disclaimed interest will be notified to provide notice~~ of the disclaimer. For example, a disclaimer of an interest in a decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only ~~when there is no one person or entity to whom delivery can be made~~ in very limited circumstances.

SECTION 15. RECORDING OF DISCLAIMER. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Except as otherwise provided in Section 12(g)(2), ~~Failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.~~

Comment

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which ~~only~~ referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice. The reference to Section 12(g)(2) concerns the disclaimer of an interest in real property created by a "beneficiary designation" as that term is defined in Section 12(a). Such a disclaimer must be recorded.

Comment

A beneficiary of a transfer on death deed may disclaim the property interest the deed attempts to transfer. While this section relies on other law, such as the Uniform Disclaimer of

Property Interests Act, to govern the disclaimer, two general principles should be noted.

First, there is no need under the law of disclaimers to execute a disclaimer in advance. During the transferor's life, a designated beneficiary has no interest in the property. See Section 12. Nothing passes to the designated beneficiary while the transferor is alive, hence there is no need to execute a disclaimer during that time.

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

SECTION 15. LIABILITY FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES.

Alternative A

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

Alternative B

(a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under subsection (a) is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than [18 months] after the transferor's death.

End of Alternatives

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

Comment

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

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

For states not favoring the comprehensive approach of UPC §6-102(b) or the equivalent, Alternative B provides an *in rem* liability rule applying to transfer on death deeds. The property transferred under a transfer on death deed is liable to the transferor’s probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

One of the functions of probate is creditor protection. UPC §6-102, referenced in Alternative A, attempts to provide comprehensive creditor protection within the realm of nonprobate transfers. In addition, this Act in Alternative B provides more creditor protection than is typically available under current law. For many transferors, the transfer on death deed will be used in lieu of joint tenancy with right of survivorship. Under the usual law of joint tenancy, the unsecured creditors of a deceased joint tenant have no recourse against the property or against the other joint tenant. Instead, the property passes automatically to the survivor, free of the decedent’s debts. See Comment 5 to UPC §6-102. If the debts cannot be paid from the probate estate, the creditor is out of luck. Under Alternative B, in contrast, the property transferred under a transfer on death deed is liable to the probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

[SECTION 16. OPTIONAL FORM OF TRANSFER ON DEATH DEED. The following form may be used to create a transfer on death deed. The other sections of this [act] govern the effect of this or any other instrument used to create a transfer on death deed:

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. You May Want to Consult a Lawyer Before Using This Form.

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

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

_____	_____
Printed name	Mailing address

_____	_____
Printed name	Mailing address

Legal description of the property:

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me.

_____	_____
Printed name	Mailing address, if available

ALTERNATE BENEFICIARY – Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

_____	_____
Printed name	Mailing address, if available

TRANSFER ON DEATH

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

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 liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each [county] where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the “legal description” of the property necessary? Yes.

How do I find the “legal description” of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in [the office of the county recorder of deeds] for the [county] where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I “record” the TOD deed? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is in more than one [county], you should record the deed in each [county].

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each [county] where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each [county] where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit

some but not all situations. If you have other questions, you are encouraged to consult a lawyer.]

Legislative Note: *This section and the next section are bracketed for states wishing to provide optional statutory forms. An enacting jurisdiction should review its statutory requirements for deeds and for acknowledgments and amend the statutory forms provided in Sections 16 and 17 where necessary for conformity with those requirements. If an enacting jurisdiction changes the act, the jurisdiction should review the answers to the common questions in Sections 16 and 17 to ensure the answers remain accurate.*

Comment

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

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

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

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

[SECTION 17. OPTIONAL FORM OF REVOCATION. The following form may be used to create an instrument of revocation under this [act]. The other sections of this [act] govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

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

IDENTIFYING INFORMATION

Owner or Owners of Property Making This Revocation:

Printed name

Mailing address

Printed name

Mailing address

Legal description of the property:

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

Signature

[(SEAL)]

Date

Signature

[(SEAL)]

Date

ACKNOWLEDGMENT

(insert acknowledgment here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form.

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

How do I find the “legal description” of the property? This information may be on the TOD deed. It may also be available in [the office of the county recorder of deeds] for the

[county] where the property is located. If you are not absolutely sure, consult a lawyer.

How do I “record” the form? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is located in more than one [county], you should record the form in each of those [counties].

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.]

Comment

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

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

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

SECTION 18. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

SECTION 19. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

U.S.C. Section 7003(b).

SECTION 20. REPEALS. The following are repealed:

***Legislative Note:** This section is for states wishing to replace their transfer on death deed statutes with this Act.*

SECTION 21. EFFECTIVE DATE. This [act] takes effect