HB

60

<TARGET><BILL>HB 60</BILL><SUBJECT>HB
60</SUBJECT><COMM>HJUD28</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 31, 2014 **FURTHER REFERRALS:**

Date of Committee Action: 4/9/14

The JUDICIARY Committee considered: **HB 60**

HOUSE BILL NO. 60
"An Act adopting and relating to the Uniform Real Property Transfer on Death Act."
HB 60 UNIFORM REAL PROPERTY TRANSFERS ON DEATH

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* HB60 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR **[ ] Same Title [✓] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	DNR			✓

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
	LeDoux	X			
	Greenberg	✓			
	LYNN	X			
Chair:	Keller			✓	
Chair:					

28-LS0265\Y
Bannister
4/6/14

CS FOR HOUSE BILL NO. 60( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GRUENBERG, Muñoz, Kito III

A BILL

FOR AN ACT ENTITLED

"An Act adopting and relating to the Uniform Real Property Transfer on Death Act; relating to establishing the law governing certain trusts; and relating to disclaimers of property interests."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 13.36.035 is amended by adding new subsections to read:

(f) Unless the laws of this state govern the validity, construction, and administration of the trust under (c) of this section, the laws of this state govern the administration of a trust and the courts of this state have exclusive jurisdiction over the trust and its trustees while the trust is administered in this state unless the governing instrument of the trust

(1) specifies that the law of a jurisdiction other than this state governs the administration of the trust;

(2) expressly prohibits a change in the choice of law for the administration of the trust; and

(3) expressly states that a change in the choice of law for the administration of the trust may not occur, even if a trustee from another jurisdiction becomes a trustee of the trust.

(g) In (f) of this section, a trust is considered to be administered in this state if

(1) the governing instrument of the trust specifies that the trust is to be administered in this state;

(2) the principal office of the trustee having custody of the trust's principal assets and records is located in this state, unless the trustee elects to maintain the administration of the trust in the state whose law is specified in the governing instrument to govern;

(3) the only trustee who is acting to administer the trust is a qualified person, unless the trustee elects to maintain the administration of the trust in the state whose law is specified in the governing instrument to govern;

(4) a majority of all trustees acting to administer the trust consists of qualified persons, unless a majority of the trustees elects to maintain the administration of the trust in the state whose law is specified in the governing instrument to govern; or

(5) a majority of the trustees are not qualified persons and a majority of the trustees, including at least one trustee who is a qualified person, executes an acknowledged instrument that this state shall be the primary place of administration for the trust.

(h) The trustee shall make the election in (g)(2) - (4) of this section by an instrument that is acknowledged and filed in a court of the state whose law is specified in the governing instrument to govern.

* **Sec. 2.** AS 13 is amended by adding a new chapter to read:

Chapter 48. Uniform Real Property Transfer on Death Act.

Sec. 13.48.010. 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.

Sec. 13.48.020. Transfer on death deed revocable. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

Sec. 13.48.030. Transfer on death deed nontestamentary. A transfer on death deed is nontestamentary.

Sec. 13.48.040. 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.

Sec. 13.48.045. When certain deeds void; challenges to deed. (a) A transfer on death deed or an instrument revoking a transfer on death deed is void if it is obtained by fraud, duress, or undue influence.

(b) A proceeding must be commenced within 12 months after the transferor's death to

(1) contest the capacity of the transferor; or

(2) determine whether a transfer on death deed or an instrument revoking a transfer on death deed is void because it was obtained by fraud, duress, or undue influence.

Sec. 13.48.050. Requirements. A transfer on death deed

(1) except as otherwise provided in (2) and (3) of this section, 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;

(3) may not use a beneficiary designation that only identifies beneficiaries as members of a class; a transfer on death deed that uses a beneficiary designation that only identifies beneficiaries as members of a class is void; and

(4) must be recorded before the transferor's death in the public records in the office of the recorder in the recording district where the property is located.

Sec. 13.48.060. 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.

Sec. 13.48.070. Revocation by instrument authorized; revocation by act not permitted. (a) Subject to (b) of this section, 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;

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

(D) to the extent of the interest transferred by the inter vivos deed, an inter vivos deed that transfers an interest in property that is the subject of a transfer on death 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 recording district 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.

(e) If a recorded power of attorney or the transfer on death deed expressly grants a designated agent of the transferor the power to revoke a transfer on death deed, the designated agent may revoke the transfer on death deed as provided in this section.

Sec. 13.48.080. 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.

Sec. 13.48.090. Effect of transfer on death deed at transferor's death. (a) Except as otherwise provided in the transfer on death deed, in this section, or in AS 13.12.203, 13.12.702, 13.12.803, or 13.12.804, 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 (2) of this subsection, the interest in the property is transferred to the designated beneficiary under 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 (4) and (5) of this subsection, 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 and if the transferor has not named an alternate designated beneficiary under (5) of this subsection for the share of a designated beneficiary that lapses or fails for any reason, the lapsing or failing share is transferred to the other remaining designated beneficiaries in proportion to the interest of each remaining beneficiary in the remaining part of the property held concurrently;

(5) the transferor may identify one or more alternate designated

beneficiaries to take the share of a designated beneficiary that lapses or fails for any reason.

(b) Subject to AS 40.17, 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 AS 40.17, the recording of the transfer on death deed is considered 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.

Sec. 13.48.100. Disclaimer. A beneficiary may disclaim all or part of the beneficiary's interest as provided by AS 13.70 (Uniform Disclaimer of Property Interests Act).

Sec. 13.48.110. Liability for creditor claims and statutory allowances. (a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate, the costs of administration of 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 (a) of this section 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 12 months after the transferor's death. A proceeding to enforce the liability under (a) of this section may not be commenced unless the personal representative of the transferor's estate has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent.

Sec. 13.48.120. Optional form of transfer on death deed. The following form may be used to create a transfer on death deed. The provisions of this chapter 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. **Transferring real property by using a transfer on death deed may have important legal consequences in addition to designating who will receive the real property on the transferor's death. These consequences may include, but are not limited to, (1) affecting the beneficiary's eligibility for public assistance; and (2) affecting creditors' rights. If you have any questions, you should consult an attorney.**

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

_____

Marital status

_____ _____

Printed name Mailing address

_____

Marital status

Legal description of the property:

_____

PRIMARY BENEFICIARY/BENEFICIARIES

(Please list one or more primary beneficiaries. You may want to

obtain legal advice before listing more than one primary beneficiary. There is more than one way to transfer property to several persons.)

I designate the following beneficiary if the beneficiary survives me:

_____ _____

Printed name Mailing address, if available

_____

Marital status

ALTERNATE BENEFICIARY/BENEFICIARIES - Optional

(You may list one or more alternate beneficiaries. You may want to obtain legal advice before listing more than one alternate beneficiary. There is more than one way to transfer property to several persons.)

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

_____

Marital status

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.

AUTHORITY OF DESIGNATED AGENT TO REVOKE THIS DEED

I authorize the following designated agent to revoke this deed before my death:

_____ _____

Printed name Mailing address

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(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 recording district 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 recorder in the recording district 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 recorder in the recording district where the property is located. Follow the instructions given by the recorder to make the form part of the official property records. If the property is in more than one recording district, you should record the deed in each recording district.

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. Except for a court, 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 recording district where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each recording district 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.

Sec. 13.48.130. Optional form of revocation. The following form may be used to create an instrument of revocation under this chapter. The provisions of this chapter 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 Making This Revocation:

_____ _____

Printed name Mailing address

_____

Marital status

_____ _____

Printed name Mailing address

_____

Marital status

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 Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(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 recorder in each recording district 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 recorder in the recording district 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 recorder in the recording district where the property is located. Follow the instructions given by the

recorder to make the form part of the official property records. If the property is located in more than one recording district, you should record the form in each of those recording districts.

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.

Sec. 13.48.140. Nonexclusivity. The provisions of this chapter do not affect any method of transferring property otherwise permitted under the law of this state.

Sec. 13.48.150. Uniformity of application and construction. In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Sec. 13.48.160. Relationship to Electronic Signatures in Global and National Commerce Act. The provisions of this chapter modify, limit, and supersede 15 U.S.C. 7001 - 7031 (Electronic Signatures in Global and National Commerce Act), but do not modify, limit, or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b).

Sec. 13.48.190. Definitions. In this chapter,

(1) "beneficiary" means a person who 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 is a tenant by the entirety, who is an owner of community property with a right of survivorship, or who otherwise owns property concurrently with one or more other individuals with a right of survivorship, but does not include an individual who is a tenant in common or other owner of community property without a right of survivorship or who is a joint tenant, other than an individual who is a tenant by the entirety;

(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 chapter;

(7) "transferor" means an individual who makes a transfer on death deed.

Sec. 13.48.195. Short title. This chapter may be cited as the Uniform Real Property Transfer on Death Act.

*** Sec. 3.** AS 13.70.100(e) is amended to read:

(e) In the case of an interest created by a beneficiary designation **that is disclaimed** [MADE] before [THE TIME] the designation becomes irrevocable, **the** [A] disclaimer shall be delivered to the person making the beneficiary designation.

*** Sec. 4.** AS 13.70.100(f) is amended to read:

(f) In the case of an interest created by a beneficiary designation **that is disclaimed** [MADE] after [THE TIME] the designation becomes irrevocable, **the** [A] disclaimer **of an interest in**

(1) personal property shall be delivered to the person obligated to distribute the interest**; and**

(2) real property shall be recorded in the office of the recorder in the recording district where the real property that is the subject of the disclaimer is located.

*** Sec. 5.** AS 13.70.130 is amended to read:

Sec. 13.70.130. 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 filed, recorded, or registered as required or permitted by law. **Except as otherwise provided in AS 13.70.100(f)(2), failure** [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.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 2 - 5 of this Act apply to a transfer on death deed made on or after the effective date of this Act. In this section, "transfer on death deed" has the meaning given in AS 13.48.190, enacted by sec. 2 of this Act.

(b) AS 13.70.100(e), as amended by sec. 3 of this Act, AS 13.70.100(f), as amended by sec. 4 of this Act, and AS 13.70.130, as amended by sec. 5 of this Act, apply to a disclaimer that is made under AS 13.70 on or after the effective date of this Act.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 7, 2014

SUBJECT: Sectional summary of CSHB 60( ) relating to the Uniform Real Property Transfer on Death Act, the law governing certain trusts, and disclaimers of property interests
(Work Order No. 28-LS0265\Y)

TO: Representative Max Gruenberg
Attn: Nicoli Bailey

FROM: Terry Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Bill section 1. Indicates that, unless certain circumstances are met, the laws of this state govern the administration of a trust and that the courts of this state have exclusive jurisdiction over the trust and its trustees while the trust is administered in this state.

Bill section 2. Adopts the Uniform Real Property Transfer on Death Act as AS 13.48.

Sec. 13.48.010. Authorizes an individual (Transferor) to use a transfer on death deed (TOD deed) to transfer property to another person (Beneficiary) when the individual dies.

Sec. 13.48.020. Allows a TOD deed to be revoked.

Sec. 13.48.030. States that a TOD deed is not testamentary.

Sec. 13.48.040. Establishes what capacity a Transferor must have to make or revoke a TOD deed. It is the same as for a will.

Sec. 13.48.045. Indicates that a TOD deed and an instrument revoking a TOD deed are void if obtained by fraud, duress, or undue influence. Requires that a proceeding must be brought within 12 months to contest the capacity of the transferor or to determine that a TOD deed or an instrument revoking a TOD deed is void because obtained by fraud, duress, or undue influence.

Sec. 13.48.050. Requires a TOD deed to (1) have the elements and formalities of a recordable inter vivos deed, (2) contain a statement that the transfer will occur when the Transferor dies, and (3) to be recorded before the Transferor's death. Prohibits using a beneficiary designation that only identifies a class of people.

Sec. 13.48.060. States that a TOD deed is effective without consideration, and without notice to, delivery to, or acceptance by the Beneficiary during the Transferor's life.

Sec. 13.48.070. In (a), describes what types of instruments will revoke a recorded TOD deed. In (b), addresses revocation when there is more than one Transferor. In (c), prohibits revocation of a recorded TOD deed by a revocatory act on the deed. In (d), states that the section does not limit the effect of an inter vivos transfer of property. In (e), allows an agent expressly given the power in a TOD deed or in a power of attorney to revoke a TOD deed.

Sec. 13.48.080. Lists the effects that a TOD deed does not have during a Transferor's life. Does not affect an interest or right of the Transferor, another owner, or a transferee. Does not affect the interests or rights of the Transferor's creditors. Does not affect eligibility for public assistance. Does not create legal or equitable interests for the Beneficiary. Does not subject the property to the claims of the Beneficiary's creditors.

Sec. 13.48.090. Describes the effects of a TOD deed on the property when the Transferor dies still owning the property. States that the property is transferred to the Beneficiary, subject to the Beneficiary surviving the Transferor. States that the Beneficiary's interest is contingent on surviving the Transferor. States how concurrent and joint interests are transferred. Allows the Transferor to identify alternate Beneficiaries. States that, subject to AS 40.17 (the recording chapter), a Beneficiary takes the property subject to all conveyances and other interests to which the property is subject at the Transferor's death. States that a TOD deed transfers property without covenant or warranty of title.

Sec. 13.48.100. Allows a Beneficiary to disclaim the Beneficiary's interest in a TOD deed as provided by the Uniform Disclaimer of Property Interests Act in AS 13.70.

Sec. 13.48.110. Indicates when the property transferred under a TOD deed is liable for testamentary estate claims, estate administration costs, spousal allowances, and children's allowances when the Transferor dies. Provides for apportionment of the liabilities among properties if there are multiple properties or TOD deeds. Requires a person to start a proceeding to enforce the liability within 12 months after the Transferor dies. Requires that the personal representative receive a written demand from the spouse, creditor, or child before the proceeding may be started to enforce liability under this section.

Sec. 13.48.120. Sets out an optional form that may be used to create a TOD deed. Contains notices about the use and possible consequences of using a TOD deed. Contains answers to common questions about TOD deeds.

Sec. 13.48.130. Sets out an optional form that may be used to revoke a TOD deed. Contains answers to common questions about using the form.

Sec. 13.48.140. States that this chapter does not affect other ways of transferring property.

Sec. 13.48.150. Directs the chapter to be applied and interpreted to give consideration to the need for uniformity.

Sec. 13.48.160. Indicates how this chapter interacts with the federal Electronic Signatures in Global and National Commerce Act.

Sec. 13.48.190. Defines terms for the chapter.

Sec. 13.48.195. Gives the chapter a short title.

Bill section 3. Amends AS 13.70.100(e) of the state's Uniform Disclaimer of Property Interests Act (AS 13.70). Improves the language and adapts it for use under the Uniform Real Property Transfer on Death Act.

Bill section 4. Amends AS 13.70.100(f) of the state's Uniform Disclaimer of Property Interests Act (AS 13.70). Improves the language and adapts it for use under the Uniform Real Property Transfer on Death Act. Requires that the disclaimer of a real property interest created by a beneficiary designation be recorded if the disclaimer is made after the designation becomes irrevocable.

Bill section 5. Amends AS 13.70.130 of the state's Uniform Disclaimer of Property Interests Act (AS 13.70). Adds a cross-reference to AS 13.70.100(f)'s recording requirements for real property disclaimers.

Bill section 6. Provides applicability provisions for the bill.

If I may be of further assistance, please advise.

TLB:med
14-040.med

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 7, 2014

SUBJECT: CSHB 60( ) relating to the Uniform Real Property Transfer on Death Act, the law governing certain trusts, and disclaimers of property interests (Work Order No. 28-LS0265\Y)

TO: Representative Max Gruenberg
Attn: Nicoli Bailey

FROM: Terry Bannister
Legislative Counsel

This memo describes the changes between CSHB 60( ) (Version Y) and CSHB 60(L&C) (Version P). Please note the comments and questions in the paragraph on the title changes.

1. Title. First, the title in Version Y reflects the addition of the material in bill section 1. The new title material reads "relating to establishing the law governing certain trusts." Second, the title in this version reflects the removal of the material relating to the repeal of AS 34.15.130. AS 34.15.130 currently abolishes the use of joint tenancy for real property transfers.

2. Bill section 1. This bill section adds new subsections (sec. 13.36.035(f) and (g)) to the statutory section dealing with choice of law and court jurisdiction over trusts. Indicates that, unless certain circumstances are met, the laws of this state govern the administration of a trust and that the courts of this state have exclusive jurisdiction over the trust and its trustees while the trust is administered in this state.

3. Sec. 13.48.045. This is a new section. It indicates that a TOD deed and an instrument revoking a TOD deed are void if obtained by fraud, duress, or undue influence. Requires that a proceeding must be brought within 12 months to contest the capacity of the transferor or to determine that a TOD deed or an instrument revoking a TOD deed is void because obtained by fraud, duress, or undue influence.

4. Sec. 13.48.050. Sec. 13.48.050(3) is new and prohibits using a beneficiary designation that only identifies beneficiaries as members of a class. It also states that a TOD deed is void if a class designation is used. Former sec. 13.48.050(3) became (4).

5. Sec. 13.48.070. Adds (D) to subsection (a)(1) to describe another type of instrument that revokes a TOD deed. Removes former (b) that provided a rebuttable presumption of

revocation for certain inter vivos deeds. As a result, removes "and (b)" from the beginning of (a) and reletters the rest of the subsections. Also adds (e), which allows a transferor's agent to revoke a TOD deed, if the agent is expressly granted the power in a recorded power of attorney or in the TOD deed .

6. Sec. 13.48.090. Removes a reference to AS 13.12.706 and 13.12.707 from (a).

7. Sec. 13.48.110. Adds a new sentence in (c). This language requires that the personal representative receive a written demand from the spouse, creditor, or child before the proceeding may be started to establish a liability under the section.

8. Sec. 13.48.120. In the TOD deed form, adds lines for identifying the marital status of the transferor(s) and the primary and alternate beneficiaries. As a practical matter, an indication of marital status is required for recording.

9. Sec. 13.48.130. In the TOD revocation form, adds lines for identifying the marital status of the owner(s) revoking the TOD deed. As a practical matter, an indication of marital status is required for recording.

10. Sec. 13.48.190. In the definition of "joint owner," makes conforming changes to reflect that the repealer of AS 34.15.130 has been removed and, therefore, that joint tenancy is still abolished in the state. Removes "who is a joint tenant" from the beginning of the definition, and inserts "or who is a joint tenant, other than an individual who is a tenant by the entirety" at the end of the definition.

11. Former bill section 5. This section was deleted. It repealed AS 34.15.130, which currently abolishes the use of joint tenancy for real property transfers.

12. Bill section 6. Former subsection (c) was deleted. It addressed the applicability of the former section that repealed AS 34.15.130.

If I may be of further assistance, please advise.

TLB:lnd
14-171.lnd

Alaska State Legislature

House of Representatives

Member:

Judiciary
Rules
Legislative Council
Military & Veterans Affairs

Representative Max F. Gruenberg, Jr.
House District 14
Anchorage (Russian Jack, College Gate, Nunaka Valley)
House Democratic Whip

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Email:
Rep.Max.Gruenberg@akleg.gov

CS House Bill 60 (28-LS0265\C) - Uniform Real Property Transfer on Death Act

"An Act adopting and relating to the Uniform Real Property Transfer on Death Act"

Sponsor Statement

The proposed CS merges two bills, HB 60 and HB 61, into CS HB 60 ( ).

I. The Uniform Real Property Transfer on Death Act (HB 60)
(Sections 1-4, 6(a) and (h) of the bill)

HB 60, the Uniform Real Property Transfer on Death Act (URPTODA), provides a simple, effective and affordable option for persons wishing to transfer real property upon their death. It will avoid the potentially lengthy and expensive process of probate. It was suggested by a retired constituent, who supported it as an important alternative that should be permitted in Alaska.

Currently, 21 states plus the District of Columbia have adopted the Act, or had enacted similar legislation before URPTODA was promulgated, to allow "Transfer on Death (TOD)" deeds.[1] Four other states are currently considering such bills.[2] Non-probate death transfers of personal property, known as "will substitutes" or TODs, are now permitted in most states, including Alaska.

Under HB 60, real property can pass at death by a TOD deed. The deed is recorded before death with the district recorder, but is not effective until death. Upon the transferor's death, the deed automatically becomes effective. A TOD deed is revocable until the transferor's death. It is ineffective if the transferor disposes of the property during his or her lifetime and the transfer is recorded. The beneficiary can also disclaim the transferred property. Before the transferor's death when the deed becomes effective, it does not affect the beneficiary's eligibility for public assistance or subject the property to the beneficiary's creditors. It allows a stepped-up basis (favorable tax treatment) upon the transferor's death. HB 60 will provide a valuable option to

[1] Arizona, Arkansas, Colorado, Hawaii, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Virginia, Wisconsin, Wyoming, and the District of Columbia.
[2] Alaska, Maryland, Washington, and West Virginia have the Uniform Real Property Transfer on Death Act pending.

Alaskans who may not need or cannot afford a trust or require probate to pass property upon death. And the bill does not prohibit any other method of passing the property (e.g. gifts, wills, trusts, etc.); it simply provides another cheaper and more efficient way of transferring real property upon death.

II. Joint Tenancy in Real Property with the Right of Survivorship
(Section 5 and 6(c) of the bill)

AS 34.15.130 prohibits "joint ownership in real property with the right of survivorship" (JTWROS). In Alaska, jointly held real property, unless owned by a husband and wife (tenancy by the entirety), cannot automatically pass to the surviving co-owner(s) upon the death of one co-owner. It may only do so through probate, either by a will or intestacy, or through a trust . Only spouses can own real property jointly with the right of survivorship and avoid probate or trust. Otherwise co-owners must hold real estate as "tenants in common," each passing their interest through their estate, often tying up the property for months in probate proceedings, or holding it in trust agreements.

On the other hand, personal property (all property except real property) can be owned as either joint tenancy or a tenancy in common.

The statutory prohibition is contained in AS 34.15.130, which reads:

> Joint tenancy, with the exception of interests in personalty and tenancy by the entirety, is abolished. Except as provided in AS 34.15.110(b) and AS 34.77.100, persons having an undivided interest in real property are considered tenants in common.

This statute is enclosed in the bill packet. It came from Oregon during territorial days. As originally drafted the statute provided that a conveyance to husband and wife could create a tenancy by the entirety only if the deed said so. Later the state legislature reversed the presumption and amended the statute to provide that a deed to the couple would be presumed to be a tenancy by the entirety, unless the deed expressly said it would create a tenancy in common.

Under this bill, which repeals the prohibition against joint tenancy, people will no longer be prevented from owning property by JTWROS. To accomplish this, the deed will have to specify that it creates a joint tenancy; if it is silent ("to John and Jane") a tenancy in common will be presumed.

Under the common law, until the latter part of the twentieth century, joint tenancy was disallowed because of an ancient doctrine called the "four unities," which were "severed" by joint tenancies. Many legal scholars have urged that this doctrine be discarded as obsolete. Courts have largely done so and permitted joint tenancies, where joint tenancies are not prohibited by

statute. Because AS 34.15.130 prohibits joint tenancies (except tenancies by the entirety), the statute must be repealed to allow joint tenancy.

Transfer on death deeds and joint tenancy will provide two additional attractive alternatives for people engaged in estate planning.

If you have any questions, please contact Representative Gruenberg's legislative aide, Nicoli Bailey, at 465-4940.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 19, 2014

SUBJECT: Sectional summary of CSHB 60( ) relating to the Uniform Real Property Transfer on Death Act, the joint ownership of real property, and disclaimers of property interests
(Work Order No. 28-LS0265\C)

TO: Representative Max Gruenberg
Attn: Nicoli Bailey

FROM: Terry Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Bill section 1. Adopts the Uniform Real Property Transfer on Death Act as AS 13.48.

Sec. 13.48.010. Authorizes an individual (Transferor) to use a transfer on death deed (TOD deed) to transfer property to another person (Beneficiary) when the individual dies.

Sec. 13.48.020. Allows a TOD deed to be revoked.

Sec. 13.48.030. States that a TOD deed is not testamentary.

Sec. 13.48.040. Establishes what capacity a Transferor must have to make or revoke a TOD deed. It is the same as for a will.

Sec. 13.48.050. Requires a TOD deed to (1) have the elements and formalities of a recordable inter vivos deed, (2) contain a statement that the transfer will occur when the Transferor dies, and (3) to be recorded before the Transferor's death.

Sec. 13.48.060. States that a TOD deed is effective without consideration, and without notice to, delivery to, or acceptance by the Beneficiary during the Transferor's life.

Sec. 13.48.070. In (a), describes what types of instruments will revoke a recorded TOD deed. In (b), states that an inter vivos deed that does not expressly revoke a TOD deed creates a rebuttable presumption of revocation. In (c), addresses revocation when there is more than one Transferor. In (d), prohibits revocation of a recorded TOD deed by a

revocatory act on the deed. In (e), states that the section does not limit the effect of an inter vivos transfer of property.

Sec. 13.48.080. Lists the effects that a TOD deed does not have during a Transferor's life. Does not affect an interest or right of the Transferor, another owner, or a transferee. Does not affect the interests or rights of the Transferor's creditors. Does not affect eligibility for public assistance. Does not create legal or equitable interests for the Beneficiary. Does not subject the property to the claims of the Beneficiary's creditors.

Sec. 13.48.090. Describes the effects of a TOD deed on the property when the Transferor dies still owning the property. States that the property is transferred to the Beneficiary, subject to the Beneficiary surviving the Transferor. States that the Beneficiary's interest is contingent on surviving the Transferor. States how concurrent and joint interests are transferred. Allows the Transferor to identify alternate Beneficiaries. States that, subject to AS 40.17 (the recording chapter), a Beneficiary takes the property subject to all conveyances and other interests to which the property is subject at the Transferor's death. States that a TOD deed transfers property without covenant or warranty of title.

Sec. 13.48.100. Allows a Beneficiary to disclaim the Beneficiary's interest in a TOD deed as provided by the Uniform Disclaimer of Property Interests Act in AS 13.70.

Sec. 13.48.110. Indicates when the property transferred under a TOD deed is liable for testamentary estate claims, estate administration costs, spousal allowances, and children's allowances when the Transferor dies. Provides for apportionment of the liabilities among properties if there are multiple properties or TOD deeds. Requires a person to start a proceeding to enforce the liability within 12 months after the Transferor dies.

Sec. 13.48.120. Sets out an optional form that may be used to create a TOD deed. Contains notices about the use and possible consequences of using a TOD deed. Contains answers to common questions about TOD deeds.

Sec. 13.48.130. Sets out an optional form that may be used to revoke a TOD deed. Contains answers to common questions about using the form.

Sec. 13.48.140. States that this chapter does not affect other ways of transferring property.

Sec. 13.48.150. Directs the chapter to be applied and interpreted to give consideration to the need for uniformity.

Sec. 13.48.160. Indicates how this chapter interacts with the federal Electronic Signatures in Global and National Commerce Act.

Sec. 13.48.190. Defines terms for the chapter.

Sec. 13.48.195. Gives the chapter a short title.

Bill section 2. Amends AS 13.70.100(e) of the state's Uniform Disclaimer of Property Interests Act (AS 13.70). Improves the language and adapts it for use under the Uniform Real Property Transfer on Death Act.

Bill section 3. Amends AS 13.70.100(f) of the state's Uniform Disclaimer of Property Interests Act (AS 13.70). Improves the language and adapts it for use under the Uniform Real Property Transfer on Death Act. Requires that the disclaimer of a real property interest created by a beneficiary designation be recorded if the disclaimer is made after the designation becomes irrevocable.

Bill section 4. Amends AS 13.70.130 of the state's Uniform Disclaimer of Property Interests Act (AS 13.70). Adds a cross-reference to AS 13.70.100(f)'s recording requirements for real property disclaimers.

Bill section 5. Repeals AS 34.15.130. AS 34.15.130 currently abolishes the use of joint tenancy for real property transfers.

Bill section 6. Provides applicability provisions for the bill.

If I may be of further assistance, please advise.

TLB:lem
14-147.lem

LEGAL SERVICES

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MEMORANDUM March 18, 2014

SUBJECT: CSHB 60( ) relating to property interests
(Work Order No. 28-LS0265\C)

TO: Representative Max Gruenberg
Attn: Nicoli Bailey

FROM: Terry Bannister
Legislative Counsel

This memo accompanies the bill described above. This memo describes the changes between this bill (Version C) and the original HB 60 Version A.

1. Overview of changes. This version incorporates the contents of HB 61, which repeals AS 34.15.130. AS 34.15.130 abolishes the use of joint tenancy for real property. This version also makes some changes in sec. 13.48.070, which relates to revocation of transfer on death deeds.

2. Changes to title. The title in this version reflects the addition of HB 61 (joint ownership of real property). This version also adds language disclosing that the bill addresses disclaimers of property interests. This adjustment is not caused by the addition of HB 61 and is an adjustment to correct the title of HB 60 (Version A). Although the disclaimer sections (bill secs. 2 - 4) were inserted to improve the language in response to the adoption of the Uniform Real Property Transfer on Death Act (URPTODA), the changes in bill secs. 2 and 3 apply to more than the URPTODA.

As a result, the bill's single subject is essentially "property interests." This is a very broad single subject, but, due to the court's past liberal interpretation of this requirement and the logical connection among the bill sections, it appears to satisfy the single subject rule.

3. Changes to sec. 13.48.070. Former sec. 13.48.070 listed four situations when an instrument is effective to revoke all (or part) of a recorded transfer on a death deed (TOD deed). This version rewrites the fourth listed situation (non-express inter vivos deed) to make it a rebuttable presumption (rather than a conclusion) that the inter-vivos deed revokes the TOD deed. To accomplish this change, former sec. 13.48.070(a)(1)(D) has been deleted and placed in a new sec. 13.48.070(b). And, as a result, the lettering of the following subsections is changed. In addition, a reference to the new subsec. (b) is added at the beginning of sec. 13.48.070(a).

4. Change to definition of "joint owner" in sec. 13.48.190. Because joint tenancies will no longer be abolished, the definition of "joint owner" in the bill has been changed to expressly include a person who is a joint tenant and to delete the exclusion of joint tenants.

5. Addition of repealer. The repeal of AS 34.15.130 (the section that currently abolishes joint tenancy) has been added at bill sec. 5.

6. Applicability provision for the uniform act. The applicability provision (bill sec. 6(a)) for the uniform act in HB 60 has been changed to apply the new URPTODA deed provisions to deeds made on or after the effective date of the Act. Before this, the applicability section covered deeds made before the effective date of the Act for persons dying on or after the effective date. The reason for deleting the retroactivity is to avoid applying the repeal of the joint tenancy provision to deeds that were made before the HB 61 repealer takes effect.

7. Applicability provision for the disclaimer sections. Bill sec. 6(b) has been added to provide an applicability provision for bill secs. 2 - 4 because they cover more than the URPTODA deeds.

8. Applicability provision for the added HB 61 material. The applicability section from HB 61 has been added to the bill as bill sec. 6(c).

If I may be of further assistance, please advise.

TLB:lem
14-145.lem

Enclosure

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: CSHB 60(L&C)
Fiscal Note Number: 1
(H) Publish Date: 3/31/14

Identifier: HB060-DNR-REC-3-14-14
Title: UNIFORM REAL PROPERTY TRANSFERS ON DEATH
Sponsor: GRUENBERG
Requester: House Labor & Commerce

Department: Department of Natural Resources
Appropriation: Administration & Support Services
Allocation: Recorder's Office/Uniform Commercial Code
OMB Component Number: 802

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2015**	**FY 2015**	**FY 2016**	**FY 2017**	**FY 2018**	**FY 2019**	**FY 2020**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Fund Source (Operating Only)							
None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Positions							
Full-time							
Part-time							
Temporary							
Change in Revenues							

Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed? N/A

Why this fiscal note differs from previous version:

Initial Version

Prepared By: Vicky Backus, State Recorder — Phone: (907)269-8882
Division: Support Services — Date: 03/14/2014 12:00 PM
Approved By: Joe Balash, Commissioner — Date: 03/14/14
Agency: Department of Natural Resources

FISCAL NOTE ANALYSIS #1

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. CSHB 60(L&C)

Analysis

This bill establishes Chapter 48 relating to the Uniform Real Property Transfer on Death Act in Alaska Statute 13.

Section 1 adds AS 13.48.120, which describes a form that can be used to create a transfer on death deed. The bill also adds AS 13.48.130, which describes a "Revocation of Transfer on Death Deed" form. Both forms must be recorded in each recording district where any part of the property is located in order to be considered.

The implementation of this bill will have no fiscal impact to the Recorders/UCC Section.

Sec. 34.15.130. Joint tenancy abolished.

Joint tenancy, with the exception of interests in personalty and tenancy by the entirety, is abolished. Except as provided in AS 34.15.110(b) and AS 34.77.100, persons having an undivided interest in real property are considered tenants in common.

History -

(Sec. 22-1-6 ACLA 1949; am Sec. 2 ch 211 SLA 1970; am Sec. 10 ch 42 SLA 1998)

Revisors Notes -

The reference to "AS 34.77.100" was substituted for "AS 34.75.100" in 1998 to reflect the 1998 renumbering of the section.

Amendment Notes -

The 1998 amendment, effective May 23, 1998, inserted a section reference in the second sentence.

Decisions -

History of section. - See Carver v. Gilbert, 387 P.2d 928 (Alaska 1963).

This section appears to have been drawn from the Oregon law. Pilip v. United States, 186 F. Supp. 397 (D. Alaska 1960). See Binswanger v. Henninger, 1 Alaska 509 (1902).

Personal property which a husband and wife jointly possess and use is presumed to be held in tenancy by the entirety. Faulk v. Estate of Haskins, 714 P.2d 354 (Alaska 1986).

Effect of section. - This section abolishes joint tenancies in land for persons who are not married. It does not abolish joint tenancies in personal property, nor does it abolish tenancies by the entirety in real or personal property. Faulk v. Estate of Haskins, 714 P.2d 354 (Alaska 1986).

Findings of proportionate share of joint venture. - Native corporations were entitled to recover a proportionate share of an Exxon claim from a joint venture created to obtain land from the federal government; if the Exxon claim arose before the corporations withdrew from the venture, the claim was a venture asset subject to distribution under the withdrawal agreement, and if the Exxon claim accrued after the corporations withdrew, then the parties held the assets as tenants in common under this section until the partition. Afognak Joint Venture v. Old Harbor Native Corp., 151 P.3d 451 (Alaska 2007).

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Commission on Law and Aging
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Phone: 202-662-8690
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E-mail: abaaging@abanet.org
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January 14, 2010

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

Dear Mr. Stein:

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

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

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

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

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

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

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

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

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

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

Sincerely,

Jeffrey J. Snell, Chair

A C R E L

March 31, 2010

National Conference of Commissioners on Uniform State Laws
Attention: Robert A. Stein, President
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

Re: **Uniform Real Property Transfer on Death Act**

Dear Bob:

I am pleased to inform you that the Board of Governors of the American College of Real Estate Lawyers voted unanimously at its meeting earlier this month to endorse the Uniform Real Property Transfer on Death Act for enactment by the States of the United States. We encourage NCCUSL in its efforts to secure such enactments. Our delegates to the Joint Editorial Board for Uniform Real Property Acts ("JEBURPA"), Ira Waldman and Ann Burkhart, are available through the JEBURPA to assist in the enactment process.

Please let me know if you have any questions or comments on this matter.

Very truly yours,

Kevin L. Shepherd
President

cc: Ira Waldman (via e-mail)
Ann M. Burkhart (via e-mail)
Board of Governors (via e-mail)

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March 20, 2014

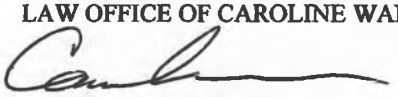
Rep. Max F. Gruenberg
State Capitol, Room 110
Juneau, AK 99801

Dear Representative Gruenberg:

I understand that the Legislature is considering HB60 relating to the Uniform Real Property Transfer on Death Act. I believe that a revocable beneficiary designation on real property, as provided for under the Act, would be a very useful and efficient estate planning tool.

Very truly yours,

LAW OFFICE OF CAROLINE WANAMAKER



Caroline P. Wanamaker

Alaska State Legislature

House of Representatives

Member:

Judiciary
Rules
Legislative Council
Military & Veterans Affairs

Representative Max F. Gruenberg, Jr.
House District 14
Anchorage (Russian Jack, College Gate, Nunaka Valley)
House Democratic Whip

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Email:
Rep.Max.Gruenberg@akleg.gov

To: Committee Members

From: Representative Max Gruenberg

Date: January 31, 2014

RE: List of U.S. States with enacted legislation regarding Transfer on Death (TOD) deeds

As of today's date twenty jurisdictions have enacted legislation authorizing Transfer on Death deeds;

- Arizona
- Arkansas
- Colorado
- District of Columbia
- Hawaii
- Illinois
- Indiana
- Kansas
- Minnesota
- Missouri
- Montana
- Nebraska
- Nevada
- New Mexico
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Virginia
- Wisconsin

The following jurisdictions, in addition to Alaska, currently have active legislation pending regarding Transfer on Death deeds;

- Maryland
- South Dakota

- Washington
- West Virginia

Please contact my Legislative Aide, Nicoli Bailey, at 465-4940 with any questions.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

Benjamin Orzeske
Legislative Counsel
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Written Testimony of Ben Orzeske
Legislative Counsel for the Uniform Law Commission
on House Bill 60 to adopt the
UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT
before the House Labor and Commerce Committee at a public hearing on March 21, 2014.

Chairman Olson, Vice Chair Reinbold and Members of the Committee:

Thank you for the opportunity to testify on behalf of House Bill 60, which would enact the Uniform Real Property Transfer-on-Death Act in Alaska.

Asset-specific mechanisms for the non-probate transfer of personal property at death have become common over the last thirty years. The beneficiary designation on an IRA account, securities registered in transfer-on-death (TOD) form, and funds held in payable-on-death (POD) bank accounts, are all examples of non-probate transfers. Alaska residents routinely take advantage of this modern legal trend to pass money and *personal* property to a named beneficiary outside of probate. House Bill 60 would allow Alaska residents to similarly transfer *real* property to a named beneficiary at the time of the owner's death.

In 1989, Missouri became the first state to allow non-probate transfers of real property. By 2002, five states allowed such transfers at death, and the Uniform Law Commission (ULC) began to study the issue. The Uniform Real Property Transfer-on-Death Act (URPTODA) was completed by the ULC and recommended to the states in 2009. Today, twenty-one states and the District of Columbia permit TOD deeds, and more states are expected to follow suit. So far four states, including Alaska, have URPTODA bills under consideration for the 2014 legislative session.

URPTODA is sometimes referred to as the average person's alternative to expensive estate planning. For many families, a home is their single most valuable asset. URPTODA allows the owner of real estate to name a beneficiary on a TOD deed to receive the property at the owner's death simply, directly, and without probate. The owner retains full control of the property while living, and may sell the property, name a new beneficiary, or revoke the TOD deed at any time. Filing a TOD deed does not create any property interest in the beneficiary, and has no effect on any creditor's interest in the property. Finally, TOD deeds must contain

the same information as any other recordable deed, including a legally sufficient description of the property to be conveyed and an acknowledgment by an authorized notary.

URPTODA is not a substitute for estate planning, and with very large or complex estates, it may not be the best solution. However, for many estates, and especially for those in which a home is the largest asset to be transferred at death, a TOD deed is a simple, effective tool that can be easily used by estate planning attorneys and other advisors. Let me use an example to illustrate how a TOD deed works.

Mary owns a residential property in Alaska worth $100,000, and she has only one child, David, to whom she would like to leave the property with as little bother and expense as possible. She has very few other assets to deal with, and no creditors. Under present law, Mary has these options:

1. Leave the house to David in a Last Will and Testament. This will require a full probate proceeding to transfer the title.

2. Transfer the house to a living trust and name David as the successor trustee and/or beneficiary. This is a flexible and effective solution and will avoid probate, but it is unnecessarily complex and expensive for simple estates.

3. Deed the house to David while she lives. This accomplishes the transfer but Mary loses control of a major asset. If Mary later wants to sell the house to help pay for an assisted living facility, David must agree to the terms of the sale. The house is also exposed to David's creditors, one of whom could force a sale and force Mary out of the house.

If you enact House Bill 60, Mary will have a fourth, and much better option. Mary can execute a TOD deed naming David as the beneficiary. The deed must be recorded in public land records before Mary's death to be valid. While she is alive, Mary retains 100% ownership of her house, with full power to sell or mortgage the property, to name a new beneficiary, or to cancel the TOD deed. If Mary dies and the deed is still in effect, the property is automatically transferred to David without a probate hearing.

URPTODA was developed with the assistance of the estate planning, real property, title insurance, banking, and senior legal communities. The act has strong support nationally from the American Bar Association's Real Property Trust and Estate Section (ABA-RPTE), the ABA

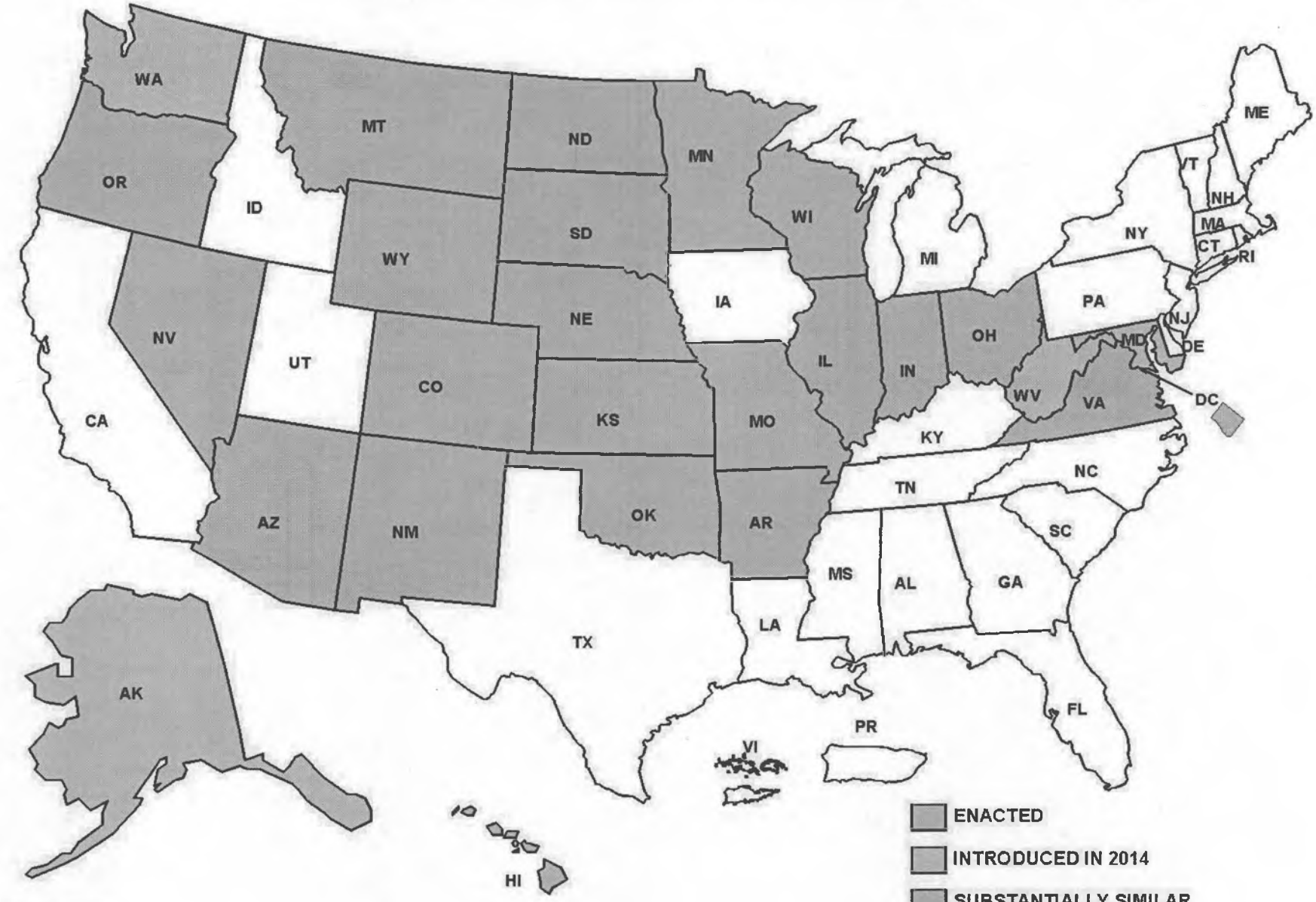
Commission on Law and Aging, the American College of Real Estate Lawyers (ACREL), and AARP. In the states that have enacted URPTODA, the questions I hear most often are "what took you so long" and "why didn't we have this available earlier?" Those are good questions.

In summary, HB 60 provides a simple and effective new method to transfer real property at death – the TOD deed. This bill would not prevent estate planners from using any of the other methods now available when appropriate, but it would provide a new, affordable, and highly flexible tool, and thus potentially save Alaska residents hundreds of thousands of dollars in legal fees and probate expenses.

I urge you to recommend enactment of the Uniform Real Property Transfer-on-Death Act, and I thank you for your consideration.

Key Provisions of HB 60 **The Uniform Real Property Transfer on Death Act**
Non-probate transfer: The TOD deed is not subject to the statute of wills and instead passes title to real property directly to the named beneficiary without probate.
A familiar recording procedure: The TOD deed must contain all of the essential elements and formalities of a properly recordable deed, including a legally sufficient description of the property to be transferred. The TOD deed must state that the transfer to the beneficiary occurs on the transferor's death and must be properly recorded during the transferor's lifetime in the office of the recorder of deeds where the property is located.
Almost anyone can have a TOD deed: The capacity required to execute a TOD deed is the same as the capacity to make a will.
The transferor can change his or her mind: A TOD deed does not operate until the transferor's death and remains revocable until then. The transferor may revoke the deed by recording a new instrument such as a direct revocation of the TOD deed, or a subsequent TOD deed that names a different beneficiary.
No effect on property rights until the transferor dies: Until the transferor's death, a recorded TOD deed has no effect — it does not affect any right or interest of the transferor or any other person in the property. The transferor retains full power to sell or mortgage the property or to revoke the deed. The beneficiary has no legal or equitable interest that could be subject to creditor's claims. The deed does not affect either the transferor's or the beneficiary's eligibility for public assistance and it does not trigger mortgage acceleration clauses or property tax reassessments.
Creditors of the transferor are protected: If the transferor's probate estate is insufficient to satisfy all claims, the estate may enforce the liability against any property transferred using a TOD deed. The property transferred remains part of the transferor's taxable estate.
No obligation for the beneficiary: A designated beneficiary may disclaim all or part of the transferred interest in the same manner as any other inherited property.

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT (2009)



March 2014

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

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.

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UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

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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 intial 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 gratuitious, 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,* ~~a~~ 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) ~~a~~ 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), ~~F~~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 stautory 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

_____ [(SEAL)]_____

Signature Date

_____ [(SEAL)]_____

Signature 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 ....

Uniform Law Commission
The National Conference of Commissioners on Uniform State Laws
Contact Us: 312.450.6600

Real Property Transfer on Death Act Summary

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

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

Key elements of URPTODA include:

- The TOD deed is not subject to the statute of wills and passes title directly to the named beneficiary without probate.
- The TOD deed must contain all of the essential elements and formalities of a properly recordable *inter vivos* deed. The TOD deed must state that the transfer to the beneficiary occurs on the transferor's death and must be properly recorded during the transferor's lifetime in the office of the recorder of deeds where the property is located.
- The capacity required to create a TOD deed is the same as the capacity to make a will.
- A TOD deed does not operate until the transferor's death and remains revocable until then. The transferor may revoke the deed by recording a revocatory instrument such as a direct revocation of the TOD deed or a subsequent TOD deed that names a different beneficiary. If the transferor disposes of the property during lifetime, the TOD deed is ineffective.
- Until the transferor's death, a recorded TOD deed has no effect — it does not affect any right or interest of the transferor or any other person in the property. The TOD deed creates no legal or equitable interest in the designated beneficiary; it does not affect the designated beneficiary's eligibility for public assistance; it does not subject the property to the designated beneficiary's creditors.
- Assuming the transferor dies owning the property and has not revoked the TOD deed and assuming that the designated beneficiary survives the transferor, the TOD deed passes the property to the designated beneficiary on the transferor's death.
- Liability of the beneficiary and property for claims against the transferor's estate is limited to cases where the estate is insolvent.
- A designated beneficiary may disclaim all or part of the transferred interest.

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

THE STATE of ALASKA
GOVERNOR SEAN PARNELL

Department of Health and Social Services
ALASKA COMMISSION ON AGING

P.O Box 110693
Juneau, Alaska 99811-0693
Main: 907.465.3250
Fax: 907.465 1398

March 27, 2014

Representative Max Gruenberg
Alaska Capitol, Room 110
Juneau, Alaska 99801-1182

Regarding: Support CSHB 60, Uniform Real Property Transfer on Death

Dear Representative Gruenberg:

The Alaska Commission on Aging is pleased to express our support for CSHB 60, as authored by you and co-sponsored by Representatives Cathy Muñoz and Sam Kito III, to provide older Alaskans and other citizens with a simple and inexpensive means to transfer title of real property to a beneficiary on the owner's death without probate. While non-probate transfers of personal property to beneficiaries is possible for liquid assets such as bank accounts and life insurance policies through existing statute, current law does not allow for the transfer of real property directly to a beneficiary. Oftentimes, a senior's home is their major asset to pass on to love ones. Based on our understanding, CSHB 60 would build on existing state statute and provide the mechanism to execute a recorded transfer on death (TOD) deed to transfer real property to a beneficiary after the owner's death without probate.

CSHB 60 has many benefits to be considered. First, CSHB 60 incorporates provisions from the model Uniform Power of Attorney Act used by most states which help to eliminate problems when the older adult and beneficiary live in different states. Second, the process is simple, straight forward and provides a standardized method to transfer real property. Most importantly, this bill may help prevent elder financial exploitation by encouraging older Alaskans to get their affairs in order early before a guardian is needed. While alive, the owner retains full power over the property including the ability to revoke the TOD deed. The beneficiary only assumes ownership of the TOD property upon the death of the owner.

The Commission supports CSHB 60 because it provides an important tool in estate planning. Twenty-one states have adopted the TOD deed as a means to transfer property without a will or probate. This method is a low-cost, effective method that minimizes the stress of settling one's affairs for older Alaskans and other adults. Thank you for your leadership on CSHB 60.

Sincerely,

Mary E. Shields
Chair, Alaska Commission on Aging

Sincerely,

Denise Daniello
ACoA Executive Director

Cc: Representative Cathy Muñoz
Representative Sam Kito III

Alaska Bankers Association

P.O. Box 241489 • Anchorage, Alaska 99524-1489 • T: 907-261-3525 • F: 907-562-1758

April 9, 2014

The Honorable Wes Keller, Chair
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

RE: Support for HB 60 (28-LS0265\Y)

Dear Representatives Keller:

The Alaska Bankers Association wishes to extend its support for HB 60. In addition to providing a more simple means of transferring title of real property to a beneficiary on an owner's death without probate, HB 60 would help maintain Alaska's position as one of the most favorable trust jurisdictions in the country.

Leading U.S. trust jurisdictions have been experiencing growth in recent years from both the creation of new trusts and the migration of existing trusts to take advantage of more favorable administrative laws. It has become common to optimize planning through careful jurisdiction selection, migrating existing trusts to advantageous jurisdictions such as Alaska.

HB 60 clarifies when Alaska law governs the administration of trusts migrating to Alaska, the Alaska court's jurisdiction and its role with respect to trust modifications, instructions and other matters.

The ABA supports efforts to help keep Alaska competitive in the trust industry.

Sincerely,

Joe Everhart, Chair

Same-Sex Marriage, Real Estate and the Law

by

Published June 19, 2013 | Bankrate.com

Same-sex couples often jump through legal hoops when dealing with their joint finances -- and owning real estate is no exception. If the Supreme Court strikes down the law that defines marriage as the legal union between a man and a woman, some, but not all, of these obstacles may be removed.

When it comes to owning a house together, gay married couples can expect to see a few changes if the Supreme Court rules that a part of the Defense of Marriage Act, or DOMA, is unconstitutional. Those changes will affect the mortgage interest tax deduction and Veterans Affairs home loans.

A Supreme Court ruling could have a harder-to-define effect in the 50 states and District of Columbia. Each jurisdiction has its own laws regarding the treatment of same-sex couples, as well as its own laws governing ownership of real estate.

This article first describes what could happen federally with the mortgage interest tax deduction and VA loans. Then, a clickable map summarizes how same-sex homeownership is governed in the states.

Same-sex marriage and the mortgage tax deduction

Married gay couples who have a mortgage together will be able to claim the mortgage tax deduction jointly if DOMA is struck down. That's because without DOMA's federal definition of marriage, they will be allowed to file federal tax returns jointly.

Currently, same-sex couples married in states that allow gay marriage have to file their federal income taxes separately because DOMA prevents the federal government from recognizing their marriages.

"If the federal government doesn't recognize your marriage and you cannot file jointly -- even if, for state purposes, you do file jointly -- then one person is usually claiming the (mortgage) tax deduction even though in reality two people are paying for the mortgage," says Gideon Alper, an attorney in Orlando, Fla. "Right now, I am taking the mortgage interest deduction on my property, and my partner is not, even though we are both contributing to the mortgage payment."

Two unmarried people who have a joint mortgage can split the mortgage interest tax deduction, as co-borrowers. Say they have $5,000 in interest to deduct. Each co-borrower could claim $2,500. But splitting the deduction and filing separately doesn't always make financial sense to a couple. For example, the deduction might not be higher than the standard deduction when it is split in two.

Same-sex marriage and Veterans Affairs loans

Currently, a service member or veteran married to a person of the same sex who wants to get a Veterans Affairs loan can't include his or her partner as a spouse on the loan. According to federal rules, the definition for spouse requires the individual to be a "person of the opposite sex."

They could get a VA loan with a joint loan, but unless both partners are veterans, the VA would guarantee only the portion of the loan allocable to the veteran. For example, if the two partners apply for a joint VA loan of $200,000, the VA guaranty would apply to $100,000. Eliminating DOMA's definition of marriage would be the first step to allow the same-sex spouse of a veteran to get the same rights as opposite-sex married couples.

Colorado
Hawaii
Illinois

New Jersey
Delaware (until July 1, 2013)
Rhode Island (until Aug. 1, 2013)
A civil union is a legal status that provides legal protection to same-sex couples in the applicable states only. Civil unions typically are not recognized outside the couples' state of legal residency.

In these states, same-sex couples can own a home with similar rights to married couples. As partners in a civil union, they can hold title through tenancy by the entirety, which is a right that used to be available only to "husband and wife."

With tenancy by entirety, the parties own an undivided part of the property, which means a spouse can't sell his or her interest in the property without the other spouse's signature. Another benefit to this method is that, when one spouse dies, the property automatically reverts to the survivor without going through probate. Tenancy by entirety also protects spouses from creditors because a creditor is not allowed to take away the home to satisfy the debt of one spouse.

Colorado does not have tenancy by entirety. Instead, the state has marital property rules, meaning that any property acquired by a spouse during the marriage belongs to both parties. Partners in a civil union in Colorado have these marital property rights.

Still, couples in these states could remain at a disadvantage with regards to the mortgage tax deduction and other federal benefits. That's because even if the federal government recognizes gay marriage, it remains unclear whether civil unions would be treated as marriages on a federal level.

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States that recognize domestic partnerships:

Nevada
Oregon
Wisconsin
A domestic partnership is a state-sanctioned legal status that allows unmarried couples, heterosexual and same-sex, to formalize their relationships and which extends some state rights to those couples.

These states allow domestic partnerships, but not all grant the same spousal rights to domestic partners when it comes to owning real estate as a couple. In Nevada and Oregon, partners in a domestic partnership have the same title rights as married couples.

In Wisconsin, partners can inherit property without a will. As long as the deed lists them as domestic partners, the property can be transferred automatically if one partner dies. But when partners separate, they don't have the same marital benefits for the division of property.

Washington is a special case: As of 2014, the state will allow domestic partnerships only to couples who are 62 years of age of older. Domestic partners don't have any of the community property rights that married couples have.

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State that recognizes domestic partnerships, complicated by Proposition 8:

Pennsylvania
South Carolina
South Dakota
Tennessee
Texas
Utah
Virginia
West Virginia
Wyoming

Same-sex couples in these states don't have the benefits and protections that married couples get. They are not allowed to hold title with tenancy by entirety in states where this right is available to opposite-sex couples. With tenancy by entirety, the parties own an undivided part of the property, so a spouse can't sell his or her interest on the property without permission from the other. When one spouse dies, the property automatically reverts to the survivor without having to go through probate. Tenancy by entirety also protects spouses from creditors as creditors are not allowed to foreclose on the home to satisfy the debt of one of the spouses.

In states with community property laws -- which say that property acquired after the marriage belongs to both spouses regardless of who paid for it -- the rights are reserved solely for opposite-sex couples.

Generally, same-sex couples in these states own property as tenants in common or as joint tenants with rights of survivorship. These methods are often used by business partners or relatives who own property together. While they grant the homeowners similar rights of joint ownership, they don't offer the full protection that married couples get. The rules in these states won't change with the DOMA ruling, unless the court requires states to recognize same-sex marriages performed in other states.

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The Washington Post

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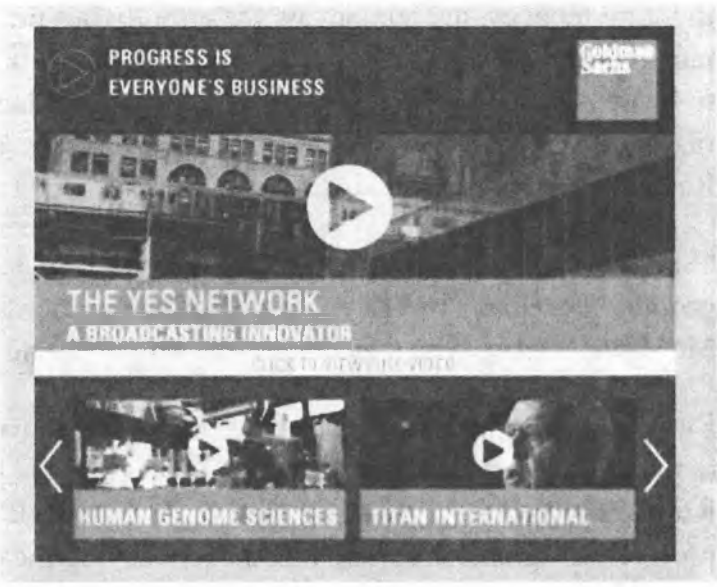
Same-sex marriages create new questions in property laws



By House Lawyer, Published: January 4, 2013

On Jan. 1, residents in Maryland joined those in the District, Massachusetts, Connecticut, Iowa, Vermont, New Hampshire and New York in the ability to have same-sex marriages. While laws in the District and those states may have settled the big question on who can get married, they raise a number of practical real estate questions.

One question arises from the manner in which co-owners hold title to their property. Traditionally, they can own their property as tenants in common or as joint tenants with rights of survivorship . Married couples have the additional advantage of being able to own real property as tenants by the entirety. Now, same-sex couples can own real property as tenants by the entirety. What does this mean and why is it relevant?

Tenants in common each share their percentage interest in the real property. Business partners typically use tenancy in common as their preferred way to hold title. Each co-owner can sell and/or borrow against his percentage interest in the property. One main attribute is that each co-owner can bequeath his interest in his will. Each co-owner's creditors can attach that co-owner's percentage interest in the real property to satisfy their claim.

Joint tenants with rights of survivorship are each deemed to own their pro rata interest in the real property. If there are two joint tenants, then each is deemed to own a 50 percent interest. A joint tenant cannot sell or borrow against his interest. Any attempt to do so will convert the joint tenancy into a tenancy in common. A joint tenant also cannot bequeath his interest. By definition, when one joint tenant dies, his interest automatically gets transferred to the surviving joint tenant.

Many same-sex couples use the joint tenancy to ensure that upon death, their partner becomes the

lender to declare the loan to be in default and accelerate the entire unpaid principal balance?

These issues are far from clear. As with most radically new laws, it will take many years for the regulations and court cases to clarify just how the new laws will apply to the various real world scenarios.

Regulators and jurists may use this opportunity to rethink whether marital status is relevant at all when determining private property rights.

Harvey S. Jacobs *is a real estate lawyer in the Rockville office of Joseph, Greenwald & Laake. He is an active real estate investor, developer, landlord settlement attorney and lender. This column is not legal advice and should not be acted upon without obtaining legal counsel. Jacobs can be reached at hjacobs@jgllaw.com.*

Case Nos. 13-4178, 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, individually, et al., Plaintiffs-Appellees, v. GARY R. HERBERT, in his official capacity as Governor of Utah, et al., Defendants-Appellants.	Appeal from the United States District Court for the District of tah, Civil Case No. 2:13-CV-00217-RJS
MARY BISHOP, et al., Plaintiffs-Appellees, and SUSAN G. BARTON, et al., Plaintiffs-Appellees/Cross-Appellants, v. SALLY HOWE SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma, Defendant-Appellant/Cross-Appellee.	Appeal from the United States District Court for the Northern District of Oklahoma, Civil Case No. 04-CV-848-TCK-TLW

BRIEF OF THE STATE OF INDIANA, ALABAMA, ALASKA, ARIZONA, COLORADO, IDAHO, MONTANA, NEBRASKA, OKLAHOMA AND SOUTH CAROLINA AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF THE *AMICI* STATES[1]

The amici States file this brief in support of the Governor and Attorney General of Utah, and Sally Howe Smith, Court Clerk for Tulsa County, Oklahoma, as a matter of right pursuant to Fed. R. App. P. 29(a).

The majority of States—thirty-three in all—limit marriage to the union of one man and one woman, consistent with the historical definition of marriage.[2] As the Supreme Court affirmed just last term, "[b]y history and tradition the definition and regulation of marriage . . . [is] within the authority and realm of the separate States." *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013). Indeed, the Court has long recognized that authority over the institution of marriage lies with the states. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . . .") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)). Primary state authority over family law is confirmed by definite limitations on federal power, as even the broadest conception of the commerce power forbids any possibility that Congress could regulate marriage. *See United States v. Lopez*, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (agreeing with

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[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed with consent of all parties; thus no motion for leave to file is required. See Fed. R. App. P. 29(a).

[2] *See* Br. of Appellants, Addendum 2, at 175-78.

majority that commerce power cannot extend to "regulate marriage, divorce, and child custody") (quotations omitted).

Nor can federal judicial power do what Congress cannot. In finding a lack of federal habeas jurisdiction to resolve a custody dispute, the Supreme Court long ago identified the axiom of state sovereignty that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). The Court has recognized that "the domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

Particularly in view of traditional, exclusive state prerogatives over marriage, the *amici* states have an interest in protecting state power to adhere to the traditional definition of marriage.

SUMMARY OF THE ARGUMENT

Even aside from *Baker v. Nelson*, 409 U.S. 810 (1972), which the district courts erroneously failed to respect as controlling authority, traditional marriage definitions implicate no fundamental rights or suspect classes, and are therefore subject only to rational-basis scrutiny. Traditional marriage is too deeply imbedded in our laws, history, and traditions for a court to hold that more recent state constitutional enactment of that definition is illegitimate or irrational.

As an institution, marriage always and everywhere in our civilization has enjoyed the protection of the law. For the Founding generation and those who enacted and ratified the Fourteenth Amendment, the institution of marriage was a given—antecedent to the state in fact and theory. Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). Consequently, it is implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that states long-ago invented marriage as a tool of invidious discrimination against homosexuals. *See, e.g.*, *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006); *Hernandez*, 855 N.E.2d at 8; *Conaway v. Deane*, 932 A.2d 571, 627-28 (Md. 2007).

The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill,* 125 U.S. 190, 205, 211 (1888). The right "to marry, establish a home and bring up children" is a central component of liberty protected by the Due Process Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "fundamental to the

very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate the traditional definition of marriage. That definition, in turn, arises not from a fundamental impulse of animus, but from a cultural determination that children are best reared by their biological parents. The theory of traditional civil marriage turns on the unique qualities of the male-female couple for procreating and rearing children under optimal circumstances. It not only reflects and maintains deep-rooted traditions of our Nation, but also furthers the public policy of encouraging biological parents to stay together for the sake of the children produced by their sexual union.

The district courts' redefinition of marriage as nothing more than societal validation of personal bonds of affection leads not to the courageous elimination of irrational, invidious treatment, but instead to the tragic deconstruction of civil marriage and its subsequent reconstruction as a glorification of the adult self. And unlike the goal of encouraging responsible procreation that underlies traditional marriage, the mere objective of self-validation that inspires same-sex marriage lacks principled limits. If public affirmation of anyone and everyone's personal love and commitment is the single purpose of civil marriage, a limitless number of rights claims could be set up that evacuate the term "marriage" of any meaning.

The decisions below deny traditional marriage's long-recognized underpinnings, but identify no alternative public interests or principled limits to define marriage. Once the natural limits that inhere in the relationship between a man and a woman can no longer sustain the definition of marriage, it follows that any grouping of adults would have an equal claim to marriage. This theory of constitutional law risks eliminating marriage as government recognition of a limited set of relationships and should be rejected.

ARGUMENT

I. No Fundamental Rights or Suspect Classes are Implicated

A. Same-sex marriage has no roots in the Nation's history and traditions

Fundamental rights are those that are "objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). A "'careful description' of the asserted fundamental liberty interest" is required, and courts must "'exercise the utmost care whenever [they] are asked to break new ground in this field . . . .'" *Id.* at 720, 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) and *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

"Marriage" is a foundational and ancient social institution that predates the formation of our Nation and has been thought of "as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). Until recently, its meaning was internationally and universally understood as limited to the union of a man and a woman. *See id.* at 2715 (Alito, J., dissenting) (noting that the Netherlands first extended marriage to same-sex couples in 2000). Indeed, the word and concept, as historically understood, presuppose an exclusive union between one man and one woman. The plaintiffs cannot assert a fundamental right to "marriage" because they, as same-sex couples, plainly fall outside the scope of the right itself.

They also cannot assert a fundamental right to "same-sex marriage," as this concept is not "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U.S. at 720-21. Barely a decade ago, in 2003, Massachusetts became the first State to extend the definition of marriage to same-sex couples. It did so through a 4-3 court decision, without a majority opinion, by interpreting its state constitution. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Other state supreme courts followed suit, *see Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008), *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009), but so far only

twelve States and the District of Columbia have extended marriage to same-sex unions legislatively, the first not occurring until 2009.[3]

The Oklahoma court expressly declined to address whether the plaintiffs could assert a fundamental right to marriage, *see Bishop* Slip op. at 48-49, n. 33, but the Utah court divined "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Kitchen* Slip op. at 28. While such a definition might sound "deeply rooted in the nation's history," it plainly fails to meet the *Glucksberg* requirement that a "careful description of the asserted fundamental liberty interest" be made. 520 U.S. at 720-21. The Utah court left out the only part of plaintiffs' asserted right that matters: that they seek this right as a same-sex couple.

Glucksberg defined the asserted liberty interest from the specifically banned statutory conduct—there, assisting another in committing suicide. *Id.* at 722. While the lower courts and Glucksberg had defined the interest as the "right to die"

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[3] *See* Conn. Gen. Stat. § 46b-20, -20a; 15 V.S.A. § 8; N.H. Rev. Stat. Ann. § 457:46; N.Y. Dom. Rel. § 10-A; Wash. Rev. Code § 26.04.010; Me. Rev. Stat. § 650-A; Del. Code tit. 13, § 129; Haw. Rev. Stat. § 572-1.8; 750 Ill. Comp. Stat. 5/201; Md. Code Ann., Fam. Law § 2-201; Minn. Stat. § 517.01-.02; R.I. Gen. Laws § 15-1-1; D.C. Code § 46-401 (2010). Even at that, not all have stuck. In 2009, Maine voters repealed a 2009 statute enacted by its legislature that extended marriage to same-sex couples. Bureau of Corporations, Elections and Commissions, Department of the Maine Secretary of State, November 3, 2009 General Election Tabulations, http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html (last visited February 7, 2014).

the Court limited this to include the distinction that mattered—"the right to commit suicide and . . . assistance in doing so." *Id.* Plaintiffs' asserted interest, properly defined, is the right to state-sanctioned marriage for a same-sex couple—not the right to "marriage" the Utah court defines by *fiat*. Same-sex marriage is not a fundamental right—as the Supreme Court itself indicated in *Windsor*, 133 S. Ct. at 2689—and a state's refusal to provide it is therefore not subject to any form of heightened scrutiny.

B. Adhering to traditional marriage implicates no suspect classes

1. Traditional marriage is not sex discrimination

While the Oklahoma court properly held that traditional marriage does not establish sex discrimination, the Utah court improperly relied on *Loving v. Virginia*, 388 U.S. 1 (1967), to hold the opposite and to trigger heightened scrutiny. *Kitchen* Slip op. at 35-36.

The discriminatory racial classification in *Loving* was fundamentally different because it departed from the usual definition of marriage and was drawn as an overt means of discrimination. Virginia's anti-miscegenation law was not only "designed to maintain White Supremacy," *Loving*, 388 U.S. at 11; *see also Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012), but also, unlike Utah's traditional definition of marriage, *contravened* common law and marriage tradition in Western society. The entire phenomenon of banning interracial

marriages originated in the American colonies: "[T]here was no ban on miscegenation at common law or by statute in England at the time of the establishment of the American Colonies." Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 Geo. L.J. 49, 50 (1964).

There is no parallel in this circumstance. The traditional definition of marriage existed at the very origin of the institution and predates by millennia the current political controversy over same-sex marriage. It neither targets, nor disparately impacts, either sex. And in contrast with inter-racial marriages, same-sex relationships were never thought to be marriages—or to further the purposes of marriage—until recently (in some jurisdictions). Accordingly, there is no basis for inferring that group animus underlies traditional marriage, and no basis for subjecting traditional marriage definitions to heightened scrutiny.

2. Traditional marriage does not discriminate on the basis of sexual orientation, and such a classification would not elicit heightened scrutiny in any event

Traditional marriage laws in no way target homosexuals as such, and both courts below erred in assuming the contrary. With traditional marriage, "the distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry . . . but like heterosexual persons, they may not marry members of the same sex." *Sevcik*, 911 F. Supp. 2d at 1004. While traditional marriage laws *impact* heterosexuals and homosexuals differently, they

do not create classifications based on sexuality, particularly considering the benign history of traditional marriage laws generally. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose). Further, deducing any such discriminatory intent (unaccompanied by any actual statutory classification) is highly anachronistic. There is no plausible argument that the traditional definition of marriage was invented as a way to discriminate against homosexuals or to maintain the "superiority" of heterosexuals vis-à-vis homosexuals.

Even if the traditional marriage definition does discriminate based on sexual orientation, the Supreme Court has never held that homosexuality constitutes a suspect class, and the law in this circuit—as both courts conceded—is that homosexual persons do not constitute a suspect class. *See Kitchen* Slip op. at 36; *Bishop* Slip op. at 50-51 (quoting *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14, 1113 n.9 (10th Cir. 2008)). The same holds true in other circuits. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Lofton v. Secretary of*

the Dept' of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (applying rational basis scrutiny to classification based on sexual orientation). *But see SmithKline Beecham Corp. v. Abbott Labs.*, Nos. 11-17357, 11-17373, 2014 WL 211807 (9th Cir. Jan. 21, 2014) (applying heightened scrutiny to *Batson* challenges based on sexual orientation).

Furthermore, neither *United States v. Windsor*, 133 S. Ct. 2675 (2013), nor *Lawrence v. Texas,* 539 U.S. 558 (2003), nor *Romer* supports heightened scrutiny for legislation governing marriage. The Utah court's suggestions to the contrary, *see Kitchen* Slip op. at 36-41, do not accurately reflect the standards used in these cases. *Romer* expressly applied rational basis scrutiny, 517 U.S. at 631-32, while *Lawrence* and *Windsor* implied the same. 539 U.S. at 578; 133 S. Ct. at 2696. In *Windsor* the Court invalidated Section 3 of DOMA as an "unusual deviation from the usual tradition of *recognizing and accepting state definitions of marriage*," 133 S. Ct. at 2693, which required analyzing whether DOMA was motivated by improper animus. It further found that "no legitimate purpose" saved the law—a hallmark of rational basis review. 133 S. Ct. at 2696.

There is nothing unusual about adhering to the traditional definition of marriage, which has prevailed since statehood for both Utah and Oklahoma. *See*

1907-1908 Okla. Sess. Laws p. 553; Utah Code § 68-3-1 (adopting English common law); *Hyde v. Hyde*, [L.R.] 1 P. & D. 130, 130 (1866) (defining marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others."). Until the past decade, every State in the Union adhered to this same traditional definition of marriage.

In 2004, to be sure, voters in both states affirmed that definition through constitutional amendments, but recent political affirmation of longstanding law and tradition does not invite heightened scrutiny that would not otherwise apply. Plaintiffs in the Oklahoma case challenge only Article 2, Section 35 of the Oklahoma Constitution, not the pre-existing, longstanding statutory definition of marriage in Oklahoma. They likely prefer to litigate the motivations behind the amendment specifically, rather than the purpose of traditional marriage generally. But even aside from the justiciability problems this strategy creates (*i.e.*, even if they win, plaintiffs will not be entitled to marriage recognition in Oklahoma), the more fundamental problem for Plaintiffs is that because traditional marriage is historically legitimate, a recent legislative or popular choice to reaffirm that definition via constitutional amendment cannot be illegitimate. Again, the Supreme Court in *Windsor* examined the motivations behind Section 3 of DOMA not because it adhered to traditional marriage, but because it was an "unusual

deviation from the usual tradition" of deferring to state marriage definitions. 133 S. Ct. at 2693.

Given the benign purposes of traditional marriage and the lack of any "unusual deviations" at work, the motivations behind any particular recent perpetuation of the status quo are irrelevant (contrary to the analysis of the Oklahoma court, *see Bishop* Slip op. at 42-47, 53-55). Otherwise states adhering to traditional marriage could face different litigation outcomes depending on the record of recent public debate. The meaning of the Constitution surely does not vary from one state to another. The legitimate basis for traditional marriage is what matters, not recent debates over whether to adhere to it.

II. Traditional Marriage, Embodied in the Laws of Oklahoma, Utah and Thirty-One Other States, Satisfies Rational-Basis Review

Because traditional marriage laws do not impinge a fundamental right or burden a suspect class, they benefit from a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). The laws must be upheld "if there is any reasonably conceivable set of facts that could provide a rational basis for the classification" between opposite-sex couples and same-sex couples. *See id.* at 320 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). The exclusive capacity and tendency of heterosexual intercourse to produce children, and the State's need to ensure that those children are cared for, provides that rational basis.

A. The definition of marriage is too deeply imbedded in our laws, history and traditions for a court to hold that adherence to that definition is illegitimate

As an institution, marriage has always and everywhere in our civilization enjoyed the protection of the law. Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill,* 125 U.S. 190, 205, 211 (1888). The Court recognized the right "to marry, establish a home and bring up children" as a central component of liberty protected by the Due Process Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and in *Skinner v. Oklahoma*, marriage was described as "fundamental to the very existence and survival of the race." 316 U.S. 535, 541 (1942).

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate and confirm the validity of the historic definition of marriage. Consequently, it is utterly implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that States long-ago

invented marriage as a tool of invidious discrimination based on sex or same-sex love interest. Another rationale for state recognition of traditional marriage must exist, and it is the one implied by *Maynard, Meyer and Skinner*: to encourage potentially procreative couples to raise children produced by their sexual union together.

B. States recognize marriages between members of the opposite sex in order to encourage responsible procreation, and this rationale does not apply to same-sex couples

Civil marriage recognition arises from the need to protect the only procreative sexual relationship that exists, and in particular to make it more likely unintended children, among the weakest members of society, will be cared for. Rejecting this fundamental rationale for marriage undermines the existence of *any* legitimate state interest in recognizing marriages.

1. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

Civil recognition of marriage historically has not been based on state interest in adult relationships in the abstract. Marriage was not born of animus against homosexuals but is predicated instead on the positive, important and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental to the very

existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

Traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates a norm where sexual activity that *can* beget children should occur in a long-term, cohabitive relationship. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677, (Tex. App. 2010) ("The state has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple.").

States have a strong interest in supporting and encouraging this norm. Social science research shows that children raised by both biological parents in low-conflict intact marriages are at significantly less risk for a variety of negative problems and behaviors than children reared in other family settings. "[C]hildren living with single mothers are five times more likely to be poor than children in two-parent households." Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 333 (New York: Crown Publishers 2006). Children who grow up outside of intact marriages also have higher rates of juvenile

delinquency and crime, child abuse, emotional and psychological problems, suicide, and poor academic performance and behavioral problems at school. *See, e.g.*, Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 783-87 (2002); Lynn D. Wardle, *The Fall of Marital Family Stability & The Rise of Juvenile Delinquency*, 10 J. L. & Fam. Stud. 83, 89-100 (2007).

Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Gallagher, *supra*, at 781-82. Traditional marriage provides the opportunity for children born within it to have a biological relationship to those having original *legal* responsibility for their well-being, and accordingly is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget.

The fact that non-procreating opposite-sex couples may marry does not undermine this norm or invalidate state interests in traditional marriage. *See Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (confirming marriage "as a protected legal institution primarily because of societal values associated with the propagation of the human race" "even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married"). Even

childless opposite-sex couples reinforce and exist in accord with the traditional marriage norm. "By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 602 (1999). Besides, it would obviously be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether they intended to or could procreate. States are not required to go to such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

Nor does the ideal of combining the biological with the legal disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. "Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role." Gallagher, *supra*, at 788. The State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents, and establish civil marriage to encourage that result. *See Hernandez*, 855 N.E.2d at 7.

Moreover, the sexual activity of same-sex couples implies no consequences similar to that of opposite-sex couples, *i.e.,* same-sex couples can never become parents unintentionally through sexual activity. Whether through surrogacy or

reproductive technology, same-sex couples can become biological parents only by deliberately choosing to do so, requiring a serious investment of time, attention, and resources. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) (lead opinion). Consequently, same-sex couples do not present the same potential for unintended children, and the state does not necessarily have the same need to provide such parents with the incentives of marriage. *Id.* at 25; *see also In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677 ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage.").

In brief, the mere existence of children in households headed by same-sex couples does not put such couples on the same footing vis-à-vis the State as opposite-sex couples, whose general ability to procreate, even unintentionally, legitimately gives rise to state policies encouraging the legal union of such sexual partners. The State may rationally reserve marriage to one man and one woman to enable the married persons—in the ideal—to beget children who have a natural and legal relationship to each parent and serve as role models of both sexes for their children.

2. Courts have long recognized the responsible procreation purpose of marriage

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex relationships with opposite-sex relationships. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

"[A]t least one of the reasons the government [grants benefits to marital partners] is to encourage responsible procreation by opposite-sex couples." *Morrison*, 821 N.E.2d at 29 (lead opinion). This analysis is dominant in our legal system. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 818-19 (11th Cir. 2004); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 477 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Standhardt v.*

Superior Court, 77 P.3d 451, 463-65 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Anderson v. King County,* 138 P.3d 963, 982-83 (Wash. 2006).

Accordingly, state and federal courts have also rejected the theory that restricting marriage to opposite-sex couples evinces unconstitutional animus toward homosexuals as a group. *Standhardt*, 77 P.3d at 463-65 ("Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 680 (rejecting argument that Texas laws limiting marriage and divorce to opposite-sex couples "are explicable only by class-based animus"). The plurality in *Hernandez*, 855 N.E.2d at 8, observed that "the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind." As those judges explained, "[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who

held this belief was irrational, ignorant or bigoted." *Id.*

In contrast to the widespread judicial acceptance of this theory, the only lead appellate opinion to say that a state's refusal to recognize same-sex marriage constitutes *irrational* discrimination came in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003) (opinion of Marshall, C.J., joined by Ireland and Cowin, JJ.).[4] That opinion rejected the responsible procreation theory as overbroad (for including the childless) and underinclusive (for excluding same-sex parents).[5] *Id.* at 961-62. This, of course, is irrelevant to the rational basis analysis as it is ordinarily applied. And *Goodridge* never identified an alternative plausible, coherent state justification for marriage of any type. It merely declared

[4] The Ninth Circuit held in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), that in passing Proposition 8 California voters unconstitutionally "withdrew" the label of marriage from same-sex couples after it had already been granted. *Id.* at 1086-95. The court explicitly avoided discussion of the constitutionality of marriage definitions in the first instance. *Id.* at 1064. In any case, this decision was vacated by *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

[5] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Id.* at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, Iowa, New Mexico, and Vermont invalidated their states' statutes limiting marriage to the traditional definition, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health,* 957 A.2d 407, 476-81 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896, 904 (Iowa 2009); *Griego v. Oliver*, No. 34,306, 2013 WL 6670704, at *12-18 (N.M. Dec. 19, 2013); *Baker v. State*, 744 A.2d 864, 880-86 (Vt. 1999). The New Jersey Supreme Court held in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), that same-sex domestic partners were entitled to all the same benefits as married couples, but that court was never asked to consider the validity of the responsible procreation theory as a justification for traditional marriage.

same-sex couples equal to opposite-sex couples because "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Id.* at 961. Having identified mutual dedication as one of the central *incidents* of marriage, however, the opinion did not explain why the state should care about that commitment in a sexual context any more than it cares about other voluntary relationships.

III. The District Courts Failed to Address the Proper Rational Basis Issue and Offered no Definition or Principle of Marriage Limiting What Relationships Can Make Claims on the State

The district courts' arguments against the traditional marriage definition suffer from at least two incurable vulnerabilities. First, they insist that the State explain how excluding same-sex couples from marriage advances legitimate state interests. *E.g.*, *Bishop* Slip op. at 63 ("[the State] has not explained . . . how exclusion of same-sex couples from marriage makes it more likely that opposite-sex marriages will stay in tact"). This formulation of the issue, however, improperly presupposes a right to marriage recognition. With no fundamental right as the starting point, there is no "exclusion" that requires explaining. Second, neither the district courts nor Plaintiffs ever explain why secular civil society has any interest in recognizing marriage as a special status or offer defensible definitions of marriage as a finite set of relationships.

A. The courts' formalistic focus on Oklahoma's and Utah's "exclusion" of same-sex couples from a predetermined set of marriage benefits defies the rational-basis standard

The Utah court acknowledged that "[n]o one disputes that marriage benefits serve not just legitimate, but compelling governmental interests[.]" *Kitchen* Slip op. at 42. Rather than recognize that these compelling interests—namely, to encourage potentially procreative couples to stay together for the sake of offspring produced by their sexual union—simply do not extend to same-sex couples (which would have ended the constitutional discussion) the court imposed a different test. The Utah court, that is, "focus[ed] . . . not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest" but on whether it was permissible "to disallow same-sex couples from gaining access to these benefits." *Id.* Such a "focus" was necessary, the court said, because "the challenged statute does not grant marriage benefits to opposite-sex couples." *Id.* The Oklahoma court similarly asked whether "excluding same-sex couples" from marriage is permissible. *See Bishop* Slip op. at 58, 60-63.

This is pure formalism, and it equates with heightened scrutiny, not rational basis. Because no fundamental right to same-sex marriage exists (*see supra* at Part I.A), the constitutional question can have nothing whatever to do with "disallow[ing] access" to marriage and its benefits, which inherently *presupposes* the existence of a right to such "access." Shorn of any pre-existing right to marital

recognition, the plaintiffs' "substantive" due process argument is reduced to nothing more than a general right to claim government benefits. It is no more rigorous than asking whether a State has a legitimate interest in not recognizing *any* group, including carpools, garden clubs, bike-to-work groups, or any other associations whose existence might incidentally benefit the state, but whom the state may nonetheless choose not to recognize.

For purposes of equal protection, the lack of a fundamental right (or suspect class) requires a court to address whether there is a legitimate reason for treating two classes (same-sex couples and opposite-sex couples) differently. Again, the Utah court said it was unconcerned with the rationale for traditional marriage because the "challenged statute does not grant marriage benefits to opposite-sex couples." *Kitchen* Slip op. at 42. But of course the whole point of the equal protection claim is that other State statutes *do* grant recognition and benefits to traditional marriages. It is therefore critical to understand, in the first instance, *why* a State grants marriage recognition to opposite-sex couples before evaluating the comparative legitimacy of doing so without also granting the same recognition and benefits to anyone else, including same-sex couples. And when the core reason for recognizing traditional marriage (*i.e.*, ameliorating the frequent consequences of heterosexual intercourse, namely the unintended issuance of children) has no

application to same-sex couples, there is a legitimate reason for government to recognize and regulate opposite-sex relationships but not same-sex relationships.

The rational-basis test requires that courts examine the issue from the State's perspective, not the challenger's perspective. *Cf. Johnson v. Robinson*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). The courts below formalistically demanded a reason to "disallow access" to a predetermined set of benefits. But this inquiry asks why the State may deprive a citizen of an *a priori* entitlement, and it accordingly amounts to a rejection of rational-basis review, not an application of it.

B. Plaintiffs' and the district courts' new definitions of marriage contains no principle limiting the relationships that can make claims on the state

In light of the inability of same-sex couples to procreate, one would expect those rejecting the traditional definition of marriage to propose a new rationale for civil marriage that justifies extending it to same-sex couples. Unfortunately—but also unsurprisingly—neither plaintiffs nor the courts below have offered any meaningful alternative rationale or definition of state-recognized marriage. The Utah plaintiffs could only define marriage in circular terms, *i.e.*, as the "right to marry the person of [one's] choice." *Kitchen* Pls.' Mot. Summ. J. at 1-2, 6. The

Oklahoma plaintiffs came with something equally infinite: "an expression of public commitment, unity and fulfillment that confers substantial private and social benefits." *Bishop* Pls.' Mot. Summ. J. at 17. The Oklahoma court made no attempt to delimit marriage or explain the state's interest in it, and the Utah court declared that it would broadly recognize any "public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Kitchen* Slip op. at 28.

These proposals for redefinition, however, in no way explain why secular civil society has any interest in recognizing or regulating marriage. Nothing in them inherently requires a sexual, much less procreative, component to the relationship. The Utah court speaks of "an intimate and sustaining emotional bond," but never says why that—or exclusivity—matters to the state. If the desire for social recognition and validation of self-defined "intimate" relationships are the bases for civil marriage, no adult relationships can be excluded *a priori* from making claims upon the government for recognition. A variety of platonic relationships—even those that if sexual in nature could plainly be prohibited, such as incestuous or kinship relationships—could qualify on equal terms with sexual relationships. A brother and sister, a father and daughter, an aunt and nephew, business partners, or simply two friends could decide to live with each other and form a "family" based on their "intimate and sustaining emotional bond," even if

not sexual in nature—indeed *especially* if not sexual in nature—and demand recognition as a "marriage."

For that matter, while the Utah court mentions a preference for "exclusivity," it offers no justification for excluding groups of three or more, whether they include sexual intercourse or not. Such groups could equally form "families" with "intimate and sustaining emotional bond[s]." The implication of the Utah court's reasoning (if not its unjustified criterion of "exclusivity") is that States would be required as a matter of federal constitutional law to recognize all such relationships as "marriages" if the parties so desired. Once the link between marriage and responsible procreation is severed and the commonsense idea that children are optimally raised in traditional intact families rejected, there is no fundamental reason for government to prefer couples to groups of three or more.

It is no response to say that the state *also* has an interest in encouraging those who acquire parental rights without procreating (together) to maintain long-term, committed relationships for the sake of their children. Such an interest is not the same as the interest that justifies marriage as a special status for sexual partners *as such*. Responsible *parenting* is not a theory supporting marriage for same-sex couples because it cannot answer two critical questions: Why two people? Why a sexual relationship?

Marriage is not a device government generally uses to acknowledge acceptable sexuality, living arrangements, or *de facto* parenting structures. It is a means to encourage and preserve something far more compelling and precise: the relationship between a man and a woman in their natural capacity to have children. It attracts and then regulates couples whose sexual conduct may potentially create children, which ameliorates the burdens society ultimately bears when unintended children are not properly cared for. Neither same-sex couples nor any other social grouping presents the same need for government involvement, so there is no similar rationale for recognizing such relationships.

CONCLUSION

The Court should reverse the judgment of the district courts.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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I hereby certify that on February 10, 2014, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

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