



**STATE OF NEW JERSEY**

**NEW JERSEY LAW REVISION COMMISSION**

**DRAFT FINAL REPORT**

Relating to

**UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT**

May 9, 2011

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## Introduction

In July 2009, the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission or “ULC”) approved and recommended for enactment in all states the *Uniform Real Property Transfer on Death Act* (“URPTODA”). This uniform law provides a mechanism for the nonprobate transfer of real property, and is derived from the Uniform Probate Code (“UPC”), which allows for nonprobate transfer on death provisions in various instruments, including, *inter alia*, an insurance policy, contract of employment, mortgage, promissory note, deed of gift, marital property agreement or other written instrument of a similar nature. See UPC §6-101.<sup>1</sup>

As stated in URPTODA’s Prefatory Note, a growing number of jurisdictions have implemented real property transfers upon death by enacting statutes that provide “an asset-specific mechanism for the nonprobate transfer of land”. At the time of the Prefatory Note, thirteen states had enacted statutes that permitted an owner of an interest in real property to execute and record a deed by which the owner identifies the beneficiary or beneficiaries who will succeed to the property at the owner’s death.<sup>2</sup> 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 deed. The majority of states call the document a “transfer on death” (TOD) deed. Ohio uses a document called a “transfer on death designation affidavit” to achieve this purpose. Arizona, Arkansas, Colorado and Montana call the document a “beneficiary deed”.

URPTODA’s stated purpose is to bring uniformity and clarity to the use and operation of “this emerging form of nonprobate transfer”. Interestingly, as of the date of the Commission’s final report, only one state, North Dakota, has adopted URPTODA. In the 2011 legislative session, the uniform law has been introduced in five more states: Hawaii, Illinois, Nebraska, Nevada and Oregon.

## Summary of Key Provisions of URPTODA

The uniform act defines a handful of key terms. “Beneficiary” is defined as “a person that receives property under a transfer on death deed” and “property” is defined as

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<sup>1</sup> Section 6-101, part of what is now known as the *Uniform Nonprobate Transfers on Death Act* (1991), 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. This subsection includes a written provision that: (1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent’s death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later; (2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or (3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

<sup>2</sup> 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).

“an interest in real property located in this state which is transferable on the death of the owner.” A “transferor” means an individual who makes the TOD deed. The act expressly limits the ability to make the TOD deed to individuals and not corporations or other entities, although the TOD deed may be made by an agent on behalf of a principal, in which case the agent, and not the principal, is the “transferor”.

URPTODA states that it does not affect any method of transferring property otherwise permitted under state law. Thus, for example, it would not affect the current ability to transfer real property with a retained legal life estate interest. An example of this type of transfer is where A conveys Blackacre to B while reserving A’s right to remain in possession of the property until A’s death. Such a conveyance is an irrevocable transfer by A of a future interest to B. Without affecting the ability to make such a transfer, URPTODA would permit A to execute, acknowledge and record a TOD deed for Blackacre that names B as the designated beneficiary. The deed, if unrevoked, would transfer possession to B at A’s death only if B survives A, but would not grant B any interest in the property during A’s lifetime. Issues of revocability and the failure of a beneficiary to survive the grantor are of paramount importance as discussed below.

The uniform law clearly provides that the TOD deed is nontestamentary, meaning that the transfer contemplated by the deed occurs by operation of law and outside the probate process<sup>3</sup>. Although the TOD deed is not a will, the capacity required to make the TOD deed and a will are the same. A TOD deed is unaffected by the transferor’s subsequent loss of capacity.

A form of deed is provided in an optional section (see section 16)<sup>4</sup>. The requirements for the elements of the TOD deed are set out in Section 9. Basically the TOD deed must contain the same elements and formalities as are required for a properly recordable inter vivos deed under state law, except for the present intention to convey. The TOD deed must state that the transfer to the designated beneficiary is to occur at the transferor’s death.<sup>5</sup> Consideration for the transfer is not necessary, nor is acceptance by or notice to the designated beneficiary required during the transferor’s lifetime. Most important, however, the deed must be recorded before the transferor’s death or it is not valid.

As the legislative note to Section 9 states, because the TOD deed has no present effect and is revocable, the deed should be identified clearly as a TOD deed when it is indexed. One state uses a grantor-grantee index that is fully searchable online. How easily a county clerk’s or registrar’s office could adapt the indexing of these deeds into current recording and indexing systems obviously will differ from state to state.

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<sup>3</sup> URPTODA does not affect the fact, as in current law, that property that does not go through probate may still be included in the grantor’s taxable estate.

<sup>4</sup> The ULC’s comment mentions that ten of the thirteen states with transfer on death deed statutes provide a statutory form for the deed.

<sup>5</sup> Except, however, a distinction should be made if the transferor and the grantor are not the same person, in which case, it is the death of the grantor that effects the date that the TOD deed becomes effective.

A TOD deed may designate more than one beneficiary or contingent beneficiaries. (Section 5.) Section 13 more fully addresses the effect of the TOD deed at the transferor's death, covering a broad set of occurrences. Section 13 states that the interest of a designated beneficiary that fails to survive the transferor lapses and concurrent interests are transferred in equal and undivided shares with no right of survivorship. It also states that, subject to state law, a beneficiary takes the property subject to all conveyances, encumbrances and other liens to which the property is subject at the time of the transferor's death, including those that occur after the TOD deed. Moreover, it provides that a TOD deed transfers property without covenant or warranty of title, even if the deed contains a contrary provision.

Most statutes that address the issue provide that if the beneficiary predeceases the grantor, and no contingent beneficiary is named, then the transfers lapses. At least one state, Montana, allows successor beneficiaries, so long as the deed states the condition upon which the interest of the successor would vest, and permits a conveyance to become part of the estate of the grantee beneficiary if the beneficiary predeceases the owner. Wisconsin's statute mandates that if there is no beneficiary or no issue of a predeceased beneficiary who would take under the state intestacy laws, then the real property interest passes to the estate of the deceased sole owner or the estate of the last to die of the multiple owners. The death of the owner/grantor in many state statutes must be proved by affidavit or certificate of death. The uniform law does not address proof of the transferor's death.

As already stated, the TOD deed is revocable prior to the grantor's death, "even if the deed or another instrument contains a contrary provision." (Section 6). The Comment to this section explains that the transferor's power to revoke the deed is a fundamental feature of the deed under URPTODA and that this section is framed as a mandatory rule in order to prevent an off-record instrument from affecting the deed's revocability and to protect the transferor's later wish to revoke.

Section 11 provides the methods for revocation of the TOD deed, which include revocation by instrument and revocation by act. The deed may be revoked by an instrument of revocation that expressly revokes the deed, a subsequent TOD deed that expressly revokes the earlier TOD deed, or an inter vivos deed that expressly revokes the TOD deed, in whole or in part.<sup>6</sup>

A recorded TOD deed may not be revoked by a revocatory act performed on the deed such as burning, tearing or destroying the deed or any part of it. The Comment to

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<sup>6</sup> Notably, the ULC's commentary makes a distinction between revocation, which renders an instrument void, and ademption by extinction, which means that the transfer of the property cannot occur because the property is not owned by the transferor at death. Though the act does not provide for ademption, the ULC further notes that 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."

this section explains that revocation by a will is not recommended because certainty of title is essential and 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.” An individual’s agent may revoke a TOD deed to the extent permitted by other law, such as the *Uniform Power of Attorney Act*.

URPTODA’s mention of the effect of joint tenancies is tucked into one subsection of a larger section that addresses the effect of TOD deeds generally. See section 13(c). Some state TOD deed statutes better address the interaction of joint tenancies and the TOD deed than does URPTODA. For example, Minnesota’s TOD deed statute (Sec. 507.071(6)) is clearer, providing that if an interest in real property is owned by joint tenants, a TOD deed executed by all of the owners effectively transfers the interest conveyed only after the death of the last surviving grantor owner. However, if the last surviving joint owner does not execute the deed, the deed is void and ineffective to transfer the interest. It further provides that an estate in joint tenancy is not severed or affected by a subsequent TOD deed, but the right of a surviving joint tenant who does not execute the deed prevails over a grantee beneficiary named in the deed unless the deed specifically states that it severs the joint tenancy ownership.

Finally, section 14 permits the beneficiary to disclaim all or part of the interest conveyed by the TOD deed as provided by either state law or the *Uniform Disclaimer of Property Interests Act*. Additional sections pertain to liability for creditor claims and statutory allowances.

### **Current New Jersey Law**

Currently, an owner of real property in New Jersey may provide in the owner’s will for the conveyance of the property at the time of the owner’s death. See N.J.S. 3B:1-3. The property may be transferred to a real estate trust or a living trust. If an owner holds real property with a spouse as a tenant by the entirety or with a co-owner as a joint tenant with a right of survivorship, the property will be transferred by operation of law to the named survivor at the time of the death of the owner. Unlike some other states, New Jersey does not have a TOD deed statute and thus a key purpose of the uniform law – providing uniformity among state TOD deed statutes – is not at all relevant here. The probate process is relatively simple and efficient in New Jersey and as a result there is no reason to create a new mechanism to avoid that process.

### **Recommendation**

After deliberation, review of current New Jersey law and other state law, and consultation with New Jersey real property, trust and estate law attorneys, the Commission does not recommend adoption of URPTODA in New Jersey.

Although the TOD permits a relatively simple, straightforward nonprobate transfer that is cost effective and easy to accomplish, the prevailing view of those consulted in the course of drafting this report is that URPTODA does not permit anything

which cannot be accomplished easily by will. With URPTODA, the ULC seeks to bring uniformity to the many state TOD deed statutes. However, New Jersey has no TOD deed statute nor does there appear to be a need for the creation of a form of TOD deed here, uniform or otherwise.

In addition, key aspects of URPTODA pose concerns not easily resolved. For example, URPTODA, and TOD deed state statutes generally, require recording of the TOD deed before the grantor's death in order to make the deed valid. However, there is no requirement that a will be recorded in order to be valid under New Jersey law<sup>7</sup> (although wills may be recorded for specific purposes.) URPTODA also requires that the TOD deed be in recordable form, which requires that the deed be acknowledged. However, a last will and testament need not be acknowledged in New Jersey unless the testator wishes the will to be self-proving. Even holographic wills are permissible under the New Jersey probate code. Certainly, it would not be beneficial to introduce into New Jersey law a TOD deed that is more difficult to create and perfect than a will. Third parties also may be confused if clerks' offices and registrars are required to index TOD deeds that -- as URPTODA provides -- are capable of subsequent revocation. The process for revocation of the TOD deed is also complicated and therefore may pose additional problems.

In sum, the introduction of URPTODA in New Jersey is not necessary and likely would be more confusing than beneficial for those who wish to convey real property at the time of death.

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<sup>7</sup> However, see N.J.S. 46:2A-5(d), which provides that an unrecorded nontestamentary instrument containing a power of appointment where the property is not under the control of a fiduciary shall be acknowledged and recorded.