

MEMORANDUM

To: ABA-RPTE Symposium, Spring 2008, Washington, D.C.

From: Thomas P. Gallanis
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Reporter, Uniform Real Property Transfer on Death Act

Date: March 27, 2008

Re: Uniform Real Property Transfer on Death Act

This memorandum introduces the Uniform Real Property Transfer on Death Act, currently in progress.

One of the main innovations in the property law of the twentieth century has been the development of 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 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. The National Conference of Commissioners on Uniform State Laws has been a leader in the promulgation of laws authorizing such nonprobate transfers and in harmonizing the substantive rules governing deathtime transfers whether in or out of probate.

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 provides: "*A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary*" (emphasis supplied).

A small but emerging number of jurisdictions have given fuller effect to the principle of UPC §6-101 by enacting statutes expressly authorizing the nonprobate transfer of land. This is

done by permitting owners of interests in real property to execute and record transfer on death (TOD) deeds. By these deeds, 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.

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

Our drafting committee welcomes comments and suggestions on all sections of the draft act, and in particular on the forms in Article 3. These are designed for readability. Please send comments to me at <gallanis@umn.edu>.

After each section of the act, a Reporter's Note discusses the drafting of the section. These notes should be read in conjunction with the proposed statutory text.

D R A F T

FOR DISCUSSION ONLY

**REAL PROPERTY
TRANSFER ON DEATH ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Draft of March 27, 2008
For discussion at the ABA-RPTE symposium in Washington, D.C.

WITH PREFATORY AND REPORTER'S NOTES

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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

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REAL PROPERTY TRANSFER ON DEATH ACT

TABLE OF CONTENTS

Reporter’s General Prefatory Note..... 1

**[ARTICLE] 1
GENERAL PROVISIONS**

SECTION 101. SHORT TITLE. 2
SECTION 102. DEFINITIONS. 2
SECTION 103. APPLICABILITY. 3
SECTION 104. NONEXCLUSIVITY. 3

**[ARTICLE] 2
TRANSFER ON DEATH DEED**

SECTION 201. TRANSFER ON DEATH DEED AUTHORIZED..... 5
SECTION 202. TRANSFER ON DEATH DEED NONTESTAMENTARY. 5
SECTION 203. CAPACITY OF TRANSFEROR. 6
SECTION 204. REQUIREMENTS. 6
SECTION 205. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION
NOT REQUIRED. 7
SECTION 206. REVOCATION..... 8
SECTION 207. EFFECT OF DEED DURING TRANSFEROR’S LIFETIME..... 9
SECTION 208. EFFECT OF DEED AT TRANSFEROR’S DEATH..... 10
SECTION 209. DISCLAIMER..... 12
SECTION 210. NO COVENANTS OR WARRANTIES. 14
SECTION 211. PROTECTION OF BONA FIDE PURCHASERS OR
ENCUMBRANCERS. 14
SECTION 212. PROOF OF DEATH..... 15
SECTION 213. PROCEEDING TO CONTEST TRANSFER ON DEATH DEED. 15
SECTION 214. LIABILITY OF BENEFICIARIES FOR CREDITOR CLAIMS AND
STATUTORY ALLOWANCES..... 16

**[ARTICLE] 3
FORMS**

SECTION 301. FORM OF TRANSFER ON DEATH DEED..... 18
SECTION 302. FORM OF REVOCATION. 22

[ARTICLE] 4
MISCELLANEOUS PROVISIONS

SECTION 401. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	25
SECTION 402. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.	25
SECTION 403. REPEALS.....	25
SECTION 404. EFFECTIVE DATE.	26

REAL PROPERTY TRANSFER ON DEATH ACT

Reporter's General Prefatory Note

This draft is for discussion at the Spring 2008 meeting of the ABA Section on Real Property, Trust and Estate Law in Washington, D.C. The draft is divided into four articles. Article 1 contains general provisions. Article 2 authorizes transfer on death deeds and addresses the formal and substantive issues concerning such deeds. Article 3 contains suggested statutory forms. These forms are drafts, and suggestions for improvement are encouraged. Article 4 contains miscellaneous provisions.

After each section, a Reporter's Note discusses the drafting of the section. These notes should be read in conjunction with the proposed statutory text.

1 **Reporter’s Note**

2
3 The definition in Paragraph (1) links the term “beneficiary” to the standard NCCUSL
4 definition of “person.” The Comment will explain that the definition includes the trustee of a
5 trust even if the trust is revocable, a rule that accords with the current transfer on death deed
6 statutes that address the issue. For example, Ark. Code §18-12-608(c)(2) provides: “A
7 beneficiary deed may be used to transfer an interest in real property to a trust estate even if the
8 trust is revocable.”
9

10 Paragraph (2) provides a definition of owners who hold concurrent interests with a right
11 of survivorship.
12

13 Paragraph (3) is a standard NCCUSL definition.
14

15 The effect of Paragraph (4) is that the Act applies to all interests in real property that are
16 transferable at the death of the owner.
17

18 Paragraph (6) limits the use of a transfer on death deed to a transferor who is an
19 individual. The term “transferor” does not include a corporation, business trust, estate, trust,
20 partnership, limited liability company, association, joint venture, public corporation, government
21 or governmental subdivision, agency, or instrumentality, or any legal or commercial entity other
22 than an individual. The Comment will explain that the term also does not include an agent. The
23 power of an agent to create or revoke a transfer on death deed is determined by other law, as
24 indicated in the Comments to Sections 204 and 206.
25

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

29 **Reporter’s Note**

30
31 This section essentially tracks Uniform Probate Code §6-311, which provides that the Act
32 “applies to registrations of securities in beneficiary form made before or after the effective date,
33 by decedents dying on or after the effective date.”
34
35

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

Reporter's Note

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6

This section tracks the essence of the first part of Ark. Code §18-12-608(g)(1): “This section does not prohibit [the committee preferred “affect”] other methods of conveying property that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner.”

1 [ARTICLE] 2

2 TRANSFER ON DEATH DEED

3
4 SECTION 201. TRANSFER ON DEATH DEED AUTHORIZED. An individual

5 may transfer property to one or more beneficiaries effective at the transferor’s death by a transfer
6 on death deed.

7 Reporter’s Note

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

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

22
23 SECTION 202. TRANSFER ON DEATH DEED NONTESTAMENTARY. A

24 transfer on death deed is nontestamentary.

25 Reporter’s Note

26
27 This section is based on Uniform Probate Code §6-101(a), which provides: “A provision
28 for a nonprobate transfer on death in an insurance policy, contract of employment, bond,
29 mortgage, promissory note, certificated or uncertificated security, account agreement, custodial
30 agreement, deposit agreement, compensation plan, pension plan, individual retirement plan,
31 employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other
32 written instrument of a similar nature is nontestamentary.”
33

34 As the Comment to UPC §6-101 explains, because the mode of transfer is declared to be

1 nontestamentary, the instrument of transfer does not have to be executed in compliance with the
2 formalities for wills, nor does the instrument need to be probated, nor does the decedent’s
3 personal representative have any power or duty with respect to the asset.
4

5 **SECTION 203. CAPACITY OF TRANSFEROR.** The capacity required to make or
6 revoke a transfer on death deed is the same as the capacity required to make a will.

7 **Reporter’s Note**
8

9 This section is drawn from Uniform Trust Code §601: “The capacity required to create,
10 amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a
11 revocable trust, is the same as that required to make a will.” The rule is consistent with the
12 Restatement (Third) of Property: Wills and Other Donative Transfers §8.1(b), which applies the
13 standard of testamentary capacity, and not the higher standard of capacity for inter vivos gifts, to
14 revocable will substitutes: “If the donative transfer is in the form of a will, a revocable will
15 substitute, or a revocable gift, the testator or donor must be capable of knowing and
16 understanding in a general way the nature and extent of his or her property, the natural objects of
17 his or her bounty, and the disposition that he or she is making of that property, and must also be
18 capable of relating these elements to one another and forming an orderly desire regarding the
19 disposition of the property.”
20

21 **SECTION 204. REQUIREMENTS.** A transfer on death deed must:

22 (1) contain the essential elements of an inter vivos deed, except as otherwise
23 provided in paragraph (2);

24 (2) state that the transfer is to occur at the transferor’s death;

25 (3) be acknowledged by the transferor before a notary public or other individual
26 authorized to take acknowledgments; and

27 (4) be recorded before the transferor’s death in the [county] where the property is
28 located.

29 **Reporter’s Note**
30

31 Paragraph (1): The Act requires the same essential elements of a deed, other than a

1 present intention to convey, as are required for inter vivos deeds under state law. In most
2 jurisdictions, these elements are: identification of the parties, description of the property, and the
3 transferor's signature.

4
5 Paragraph (2): This requirement emphasizes the fundamental distinction between an inter
6 vivos deed and a transfer on death deed. An inter vivos deed evidences a present intention to
7 convey. A transfer on death deed evidences an intention that the transfer occur at the transferor's
8 death. Under no circumstances should a defective transfer on death deed be given effect as an
9 inter vivos deed; to do so would violate the transferor's intention that the transfer occur at the
10 transferor's death.

11
12 Paragraph (3): The requirement of acknowledgment fulfills at least four functions. First, it
13 cautions a transferor that he or she is performing an act with legal consequences. Such caution is
14 important where, as here, the transferor does not experience the wrench of delivery because the
15 transfer occurs at death. Second, acknowledgment helps to prevent fraud. Third,
16 acknowledgment facilitates the recording of the deed. Fourth, acknowledgment is important in
17 order to implement the rule in Section 206(a)(1) that a later acknowledged deed prevails over an
18 earlier acknowledged deed.

19
20 Paragraph (4): The rule requiring recordation before the transferor's death is consistent
21 with the transfer on death deed statutes that address the issue. The Comment will explain that, if
22 the property described in the deed is in more than one county, the deed is effective only with
23 respect to the property in the county or counties where the deed is recorded. A NCCUSL drafting
24 committee is recommending the amendment of Uniform Probate Code §2-502 to validate a
25 signed and notarized will without the need for attesting witnesses. If the amendment is approved,
26 an unrecorded transfer on death deed satisfying Paragraphs (1), (2), and (3) could be given effect
27 as a will.

28
29 The Act does not define, but instead relies on other law to determine, the authority of an
30 agent. An individual's agent may execute a transfer on death deed on the individual's behalf to
31 the extent permitted by other law, such as the Uniform Power of Attorney Act.

32
33 **SECTION 205. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT**
34 **REQUIRED.** A transfer on death deed is effective without:

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

36 or

37 (2) consideration.

1 **Reporter’s Note**

2
3 These rules are consistent with the transfer on death deed statutes that address the issues.

4
5
6 **SECTION 206. REVOCATION.**

7 (a) A transfer on death deed is revoked by the recording, before the transferor’s death, in
8 the [county] where the property is located, of:

9 (1) a subsequently acknowledged transfer on death deed that revokes the deed
10 expressly or by inconsistency; or

11 (2) a subsequently acknowledged revocation form that revokes the previously
12 acknowledged deed either by description of the property or by reference to the recording
13 information of the deed.

14 (b) A transferor may revoke a transfer on death deed as to the interest of that transferor,
15 but the revocation does not affect the deed as to the interest of another transferor.

16 (c) A transfer on death deed made by joint owners is not revoked unless it is revoked by
17 all of the surviving joint owners.

18 (d) After a transfer on death deed is recorded, it may not be revoked by a physical act
19 performed on the deed.

20 (e) A transfer on death deed may not be revoked or modified by will.

21 **Reporter’s Note**

22 Subsections (a)(1) and (a)(2) provide that a transfer on death deed deed can be revoked by
23 executing, acknowledging, and recording a subsequent instrument. The Comment will explain
24 that, if the property described in the deed is in more than one county, the revocation is effective
25 only with respect to the property in the county or counties where the revocation is recorded. The
26 Comment will also explain, with examples, the principle of revocation by inconsistency, drawing
27 on the well-established law of revocation by inconsistency of wills.

1 Subsection (b) is based on §5662(b) of the California draft statute: “A coowner may
2 revoke the transfer on death deed as to the interest of that coowner. The revocation does not
3 affect the transfer on death deed as to the interest of another coowner.”
4

5 Subsection (c) is based on the third sentence of Ariz. Stat. §33-405(F): “If the property is
6 owned as joint tenants with right of survivorship or community property with right of
7 survivorship and if the revocation is not executed by all the owners, the revocation is not
8 effective unless executed by the last surviving owner.”
9

10 Subsection (d): A Comment will explain that a physical act includes burning, tearing,
11 canceling, obliterating, or destroying the deed or any part of it.
12

13 Subsection (e) is consistent with the transfer on death deed statutes that address the issue,
14 and with Uniform Probate Code §6-213(b) on multiple-party bank accounts.
15

16 The Act does not define, but instead looks to other law to determine, the authority of an
17 agent. An individual’s agent may revoke a transfer on death deed on the individual’s behalf to the
18 extent permitted by other law, such as the Uniform Power of Attorney Act.
19

20 The Comment will mention ademption by extinction as the practical equivalent of
21 revocation.
22
23

24 **SECTION 207. EFFECT OF DEED DURING TRANSFEROR’S LIFETIME.**

25 During the transferor’s lifetime, a transfer on death deed does not:

- 26 (1) affect the rights of the transferor or other owners in the property;
27 (2) affect the rights of creditors in the property;
28 (3) affect the transferor’s or a beneficiary’s eligibility for any form of public assistance;
29 (4) create a legal or equitable right to the property in favor of the beneficiary; or
30 (5) make the property subject to process of the beneficiary’s creditors.

31 **Reporter’s Note**

32 The fundamental feature of a transfer on death deed is that it does not operate until the
33 transferor’s death. During the transferor’s lifetime, the deed is both revocable and ambulatory,
34 just as is a will. A transfer on death deed has no more effect during the transferor’s lifetime than
35 a will. Thus, a transfer on death deed, during the transferor’s lifetime, does not sever a joint

1 tenancy (Paragraph (1)). It does not affect the rights of creditors, whether secured or unsecured
2 (Paragraph (2)). It does not affect the transferor's or beneficiary's eligibility for any form of
3 public assistance, including Medicaid (Paragraph (3)). On this point, the committee specifically
4 disapproves of the contrary approach of Colo. Rev. Stat. §15-15-403. A transfer on death deed
5 does not create any legal or equitable right in the beneficiary (Paragraph (4)), nor does it make
6 the property subject to process of the beneficiary's creditors (Paragraph (5)).
7
8

9 **SECTION 208. EFFECT OF DEED AT TRANSFEROR'S DEATH.**

10 (a) Except as otherwise provided in this section [and in [cite state statute on antilapse, if
11 applicable to nonprobate transfers]], on the death of the transferor, the following rules apply to
12 property that is the subject of a transfer on death deed:

13 (1) The property owned by the transferor at death is transferred to the beneficiaries
14 who survive the transferor in accordance with the deed.

15 (2) Unless the deed provides otherwise, concurrent beneficiaries receive equal and
16 undivided interests in the property with no right of survivorship among them [unless two of the
17 beneficiaries are husband and wife, in which event they receive their interests in the property as
18 [joint tenants][tenants by the entirety][owners of community property with right of
19 survivorship]].

20 (3) If no beneficiary survives the transferor, the transfer on death deed is void.

21 (b) On the death of a transferor who is a joint owner, the property belongs to the surviving
22 joint owner or owners, and the right of survivorship continues between or among the surviving
23 joint owners. A transfer on death deed is effective at the death of the last surviving joint owner if
24 that owner is a transferor on the deed.

25 (c) A beneficiary receives a transferor's interest at the transferor's death subject to all:

26 (1) conveyances made during the transferor's lifetime; and

1 (2) encumbrances, assignments, contracts, mortgages, liens, and other interests
2 affecting the property, whether or not recorded and whether created before or after the recording
3 of the transfer on death deed, to which the property is subject at the the transferor’s death.

4 **Reporter’s Note**

5 Subsection (a)(2) is modeled on Uniform Probate Code §6-212 governing multiple-party
6 accounts. There will be a Legislative Note explaining that states without tenancy by the entirety
7 or community property with right of survivorship should delete these references in brackets.
8 States preferring no right of survivorship between beneficiaries who are husband and wife should
9 delete the entire bracketed material.

10
11 Subsection (b) is consistent with the majority rule, namely that the survivorship right
12 trumps the transfer on death deed.

13
14 Subsection (c) is modeled on Colo. Rev. Stat. §15-15-407(2): “A grantee-beneficiary of a
15 beneficiary deed takes title to the owner’s interest in the real property conveyed by the
16 beneficiary deed at the death of the owner subject to all conveyances, encumbrances,
17 assignments, contracts, mortgages, liens, and other interests, affecting title to the property,
18 whether created before or after the recording of the beneficiary deed, or to which the owner was
19 subject during the owner’s lifetime including, but not limited to, any executory contract of sale,
20 option to purchase, lease, license, easement, mortgage, deed of trust, or other lien. The grantee-
21 beneficiary also takes title subject to any interest in the property of which the grantee-beneficiary
22 has either actual or constructive notice.” The committee rejected the requirement of California
23 draft §5652(c) that the limitation must be “of record,” because the beneficiary should merely step
24 into the transferor’s shoes; the beneficiary should not be in a better position (i.e. free of
25 limitations not of record) than the transferor.

26
27 The Comment will refer approvingly to *In re Estate of Roloff*, 143 P.3d 406 (Kan. Ct.
28 App. 2006) (holding that crops should be transferred with the land under a transfer on death deed
29 because this result would be reached on the same facts with any other deed).

30
31 The Comment will also address the following fact-pattern. H and W are married and own
32 property as tenants by the entirety. H executes, acknowledges and records a transfer on death
33 deed in favor of X. W later dies, at which point H owns the property in fee simple absolute.
34 Under the law of some states, there may be a question whether the transfer on death deed is valid,
35 given that H executed it when the property was owned, not by H and W, but by the marital entity.
36 The correct answer is yes. The transfer on death deed is effective at H’s death because the
37 property is owned by H at H’s death (recall the first sentence of subsection (a): “...and owned by
38 the transferor at death”).
39

1 **SECTION 209. DISCLAIMER.**

2 **Alternative 1**

3 A beneficiary under a transfer on death deed may disclaim all or part of the beneficiary’s
4 interest as provided by [cite state statute or the Uniform Disclaimer of Property Interests Act].

5 **Alternative 2**

6 Subject to the law of this state limiting the right to disclaim property, a beneficiary under
7 a transfer on death deed may disclaim all or part of the beneficiary’s interest by recording a
8 disclaimer in the [county] where the property that is the subject of the disclaimer is located.

9 **Reporter’s Note**

10
11 There will be a Legislative Note explaining that Alternative 1 is for a state with a
12 disclaimer statute, such as the Uniform Disclaimer of Property Interests Act, providing a
13 mechanism for disclaiming interests created in a transfer on death deed. The statute need not
14 have contemplated the transfer on death deed specifically, but the statutory scheme applies, or
15 can be readily amended to apply, to such deeds. In most cases, the only necessary amendment
16 would be to replace the usual requirement that the disclaimer be delivered (for here, after the
17 transferor’s death, there is no obvious individual to whom delivery can be made) with a
18 requirement that the disclaimer be recorded in the county where the property that is the subject of
19 the disclaimer is located. Along these lines, the committee recommends the following technical
20 amendments to Sections 12 and 15 of the Uniform Disclaimer of Property Interests Act:

21
22 **SECTION 12. DELIVERY OR FILING.**

23 (a) In this section, “beneficiary designation” means an instrument, other than an
24 instrument creating a trust, naming the beneficiary of:

- 25 (1) an annuity or insurance policy;
26 (2) an account with a designation for payment on death;
27 (3) a security registered in beneficiary form;
28 (4) a pension, profit-sharing, retirement, or other employment-related benefit

29 plan; or

- 30 (5) any other nonprobate transfer at death.

31 (b) Subject to subsections (c) through (l), delivery of a disclaimer may be
32 effected by personal delivery, first-class mail, or any other method likely to result in its
33 receipt.

34 (c) In the case of an interest created under the law of intestate succession or an
35 interest created by will, other than an interest in a testamentary trust:

- 36 (1) a disclaimer must be delivered to the personal representative of the
37 decedent’s estate; or

1 (2) if no personal representative is then serving, it must be filed with a court
2 having jurisdiction to appoint the personal representative.

3 (d) In the case of an interest in a testamentary trust:

4 (1) a disclaimer must be delivered to the trustee then serving, or if no trustee
5 is then serving, to the personal representative of the decedent's estate; or

6 (2) if no personal representative is then serving, it must be filed with a court
7 having jurisdiction to enforce the trust.

8 (e) In the case of an interest in an inter vivos trust :

9 (1) a disclaimer must be delivered to the trustee then serving;

10 (2) if no trustee is then serving, it must be filed with a court having
11 jurisdiction to enforce the trust; or

12 (3) if the disclaimer is made before the time the instrument creating the trust
13 becomes irrevocable, it must be delivered to the settlor of a revocable trust or the
14 transferor of the interest.

15 (f) In the case of a disclaimer of an interest created by a beneficiary designation
16 made before ~~the time~~ the designation becomes irrevocable, a the disclaimer must be
17 delivered to the person making the beneficiary designation.

18 (g) In the case of a disclaimer of an interest created by a beneficiary designation
19 made after ~~the time~~ the designation becomes irrevocable;:

20 (1) a disclaimer of an interest in personal property must be delivered to
21 the person obligated to distribute the interest;:

22 (2) a disclaimer of an interest in real property must be recorded in the
23 [county] where the real property that is the subject of the disclaimer is located.

24 (h) In the case of a disclaimer by a surviving holder of jointly held property, the
25 disclaimer must be delivered to the person to whom the disclaimed interest passes.

26 (i) In the case of a disclaimer by an object or taker in default of exercise of a
27 power of appointment at any time after the power was created:

28 (1) the disclaimer must be delivered to the holder of the power or to the
29 fiduciary acting under the instrument that created the power; or

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

32 (j) In the case of a disclaimer by an appointee of a nonfiduciary power of
33 appointment:

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

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

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

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

43 **Comment**

44 The rules set forth in Section 12 are designed ~~so that anyone who has the duty to~~
45 ~~distribute the disclaimed interest will be notified to provide notice~~ of the disclaimer. For
46 example, a disclaimer of an interest in a decedent's estate must be delivered to the
47 personal representative of the estate. A disclaimer is required to be filed in court only

1 ~~when there is no one person or entity to whom delivery can be made~~ in very limited
2 circumstances.
3

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

11 **Comment**

12 This section permits the recordation of a disclaimer of an interest in property
13 ownership of or title to which is the subject of a recording system. This section expands
14 on the corresponding provision of previous Uniform Acts which ~~only~~ referred to
15 permissive recording of a disclaimer of an interest in real property. While local practice
16 may vary, disclaimants should realize that in order to establish the chain of title to real
17 property, and to ward off creditors and bona fide purchasers, the disclaimer may have to
18 be recorded. This section does not change the law of the state governing notice. The
19 reference to Section 12(g)(2) concerns the disclaimer of an interest in real property
20 created by a “beneficiary designation” as that term is defined in Section 12(a). Such a
21 disclaimer must be recorded.
22

23 Alternative 2 is for a state without a disclaimer statute that can be readily amended to
24 apply to transfer on death deeds.
25

26 The Comment will mention the state-law doctrine of “relation back”: an effective
27 disclaimer typically relates back to the time of the initial transfer (here, the transferor’s death).
28

29 **SECTION 210. NO COVENANTS OR WARRANTIES.** A transfer on death deed
30 transfers property without covenant or warranty of title even if there is a contrary provision in the
31 deed.

32 **Reporter’s Note**

33 This provision is based on §5652(d) of the California draft statute: “Notwithstanding a
34 contrary provision in the deed, a revocable transfer on death deed transfers the property without
35 covenant or warranty of title.” This rule is mandatory, not a default as in Colo. Rev. Stat. §15-15-
36 404(2) [“Unless the owner designates otherwise ...”], in order to prevent mishaps from
37 uninformed grantors.
38

39 **SECTION 211. PROTECTION OF BONA FIDE PURCHASERS OR**
40

1 **ENCUMBRANCERS.** A bona fide purchaser or encumbrancer to whom a beneficiary transfers
2 an interest in the property received under a transfer on death deed has the same rights and
3 protections as if the transfer had been made by a grantee of an inter vivos deed.

4 **Reporter’s Note**

5 The committee observed that it is hard to articulate a substantive rule on bona fide
6 purchasers or encumbrancers (BFPs), because some jurisdictions are notice jurisdictions
7 (protecting BFPs regardless of when the BFP files), some are race-notice jurisdictions (protecting
8 only BFPs who file first), and a few are race jurisdictions (protecting anyone who files first).
9 Instead, the committee decided to articulate the rule that a BFP from the beneficiary of a transfer
10 on death deed is in the same position as a BFP in the standard inter vivos transaction.

11
12
13 **SECTION 212. PROOF OF DEATH.** Proof of the death of a transferor or a
14 beneficiary of a transfer on death deed must be established in the same manner as proof of the
15 death of a joint tenant [under [cite state statute]].

16 **Reporter’s Note**

17 The committee was initially uncertain whether a Uniform Act should spell out a
18 procedure for the proof of death. The Uniform Probate Code, for example, refers in §6-223 and
19 §6-307 to “proof of death” without elaboration.

20
21 The committee decided to incorporate the state’s existing procedures for proving the
22 death of a joint tenant, essentially tracking Colo. Rev. Stat. §15-15-413: “Proof of the death of
23 the owner or a grantee beneficiary shall be established in the same manner as for proving the
24 death of a joint tenant.”

25
26
27 **SECTION 213. PROCEEDING TO CONTEST TRANSFER ON DEATH DEED.**

28 (a) After the transferor’s death, the transferor’s personal representative or an interested
29 person may contest the validity of a transfer on death deed on the basis of fraud, undue influence,
30 duress, mistake, or other invalidating cause.

31 (b) A contest proceeding under this section must be brought in the [] court in the

1 [county] where [the administration of the transferor’s estate would be proper][the property that is
2 the subject of the transfer on death deed is located].

3 (c) A contest proceeding under this section must be commenced within the earlier of:

4 (1) [three years] after the transferor’s death; or

5 (2) [one year] after the beneficiary establishes the transferor’s death.

6 [(d) Upon initiation of a contest proceeding, the contestant may record a notice of lis
7 pendens in the [county] where the transfer on death deed is recorded.]

8 **Reporter’s Note**

9
10 The grounds of contest in subsection (a) are drawn from §5696 of the California draft
11 statute: “Nothing in this chapter limits the application of principles of fraud, undue influence,
12 duress, mistake, or other invalidating cause to a transfer of property by a revocable transfer on
13 death deed.”

14
15 Subsection (b) will be accompanied by a Legislative Note explaining that the blank in
16 brackets should be filled in, as appropriate, by each enacting state.

17
18 Subsection (c) is drawn from §§5690(c) and 5692(b) of the California draft statute.
19 Section 5690(c) provides: “On commencement of a contest proceeding, the contestant may
20 record a lis pendens in the county in which the revocable transfer on death deed is recorded.”
21 Section 5692(b) provides: “A contest proceeding shall be commenced within the earlier of the
22 following times: (1) Three years after the transferor’s death. (2) One year after the beneficiary
23 establishes the fact of the transferor’s death....”

24
25 Subsection (d): A Legislative Note will explain that subsection (d) is in brackets so that it
26 can be deleted by states not using, or not wishing to refer to, the notice of lis pendens.

27
28 The Comment will emphasize that the limitations period for commencement of the
29 contest should be the same as for other nonprobate transfer contests (if state law already provides
30 a limitations period for such contests) or (if not) for will contests.

31
32 The Comment will also cross-reference the rule governing bona fide purchasers or
33 encumbrancers in Section 211 and the provision on proof of death in Section 212.

34 **SECTION 214. LIABILITY OF A BENEFICIARY FOR CREDITOR CLAIMS**

1 **AND STATUTORY ALLOWANCES.** A beneficiary of a transfer on death deed is liable for
2 allowed claims against the transferor’s probate estate and statutory allowances to the extent
3 provided in [cite state statute or Section 6-102 of the Uniform Probate Code].

4 **Reporter’s Note**

5 This section defers to other law, such as Uniform Probate Code §6-102, to establish the
6 liability of a beneficiary of a transfer on death deed for creditor claims and statutory allowances.
7 For these purposes, a state should treat a beneficiary of a transfer on death deed the same as a
8 beneficiary of any other nonprobate transfer outside of trust, for example a beneficiary of a “pay
9 on death” bank account. The state’s approach to such beneficiaries should be consistent.

1 [ARTICLE] 3

2 FORMS

3
4 **Reporter’s Prefatory Note**

5
6 These forms are drafts, designed to provide a basis for discussion. Suggestions for
7 improving the forms are encouraged.

8
9 *Legislative Note: An enacting jurisdiction should review its statutory requirements for deeds
10 and for acknowledgments and amend the statutory forms provided in Sections 301 and 302
11 where necessary for conformity with those requirements.*

12
13
14 **SECTION 301. FORM OF TRANSFER ON DEATH DEED.** A document

15 substantially in the following form satisfies the requirements for a transfer on death deed under

16 this [act]:

17 [front of form]

18 TRANSFER ON DEATH DEED

19
20 **Notice to Owner**

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

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

24 **Identifying Information**

25 Owner(s) Making This Deed:

26 _____

27 (name)

(mailing address)

28 _____

1 (name) (mailing address)
2 _____

3 (name) (mailing address)

4 **Legal Description of the Property:**
5 _____
6 _____
7 _____
8 _____

9 **Beneficiary or Beneficiaries**

10 I revoke all my previous transfer on death deeds affecting the described property, and
11 designate the following beneficiary(ies) who survive me to receive the property (in equal and
12 undivided shares with no right of survivorship between them, unless I say otherwise in this
13 deed):

14 **Primary Beneficiary(ies)** – *include mailing addresses if available*
15 _____
16 _____
17 _____

18 **Alternate Beneficiary(ies) – Optional**

19 If no above beneficiary survives me, I designate the following alternate beneficiary(ies)
20 who survive me to receive the property (in equal and undivided shares with no right of
21 survivorship between them, unless I say otherwise in this deed):

22 Alternate Beneficiary(ies) – *include mailing addresses if available*

1 _____
2 _____
3 _____

4 **Transfer on Death**

5 I transfer my interest in the described property to the beneficiary(ies) on my death.

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

7 **Signature(s) of Owner(s) Making This Deed:**

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

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

12 **Acknowledgment**

13 [insert acknowledgment here]

14 [back of form]

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

16 *What does the Transfer on Death (TOD) deed do?* When you die, the beneficiaries will
17 become owners of the property described in the TOD deed, subject to any debts or liens or
18 mortgages (or other encumbrances) you have put on the property during your lifetime. Probate is
19 not required. The TOD deed has no effect until you die. You can revoke it at any time. If you
20 transfer the property to someone else during your lifetime, the beneficiary under this deed will
21 not receive it.

22 *How do I make a TOD deed?* Complete this form. Have it notarized. Record the form in

1 each [county] where any part of the property is located. The form must be notarized and recorded
2 before your death or it has no effect.

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

7 *How do I “record” the TOD deed?* Take the completed and notarized form to the [county
8 recorder] for the [county] where the property is located. Follow the instructions given by the
9 [county recorder] to make the form part of the official property records. If the property is in more
10 than one [county], you must record the deed in each [county].

11 *Can I revoke the TOD deed if I change my mind?* Yes. The TOD deed is revocable. No
12 one, including the beneficiaries, can prevent you from revoking the deed.

13 *How do I revoke the TOD deed?* There are two ways to revoke a recorded TOD deed: (1)
14 Complete and notarize a revocation form, and record it in each [county] where the property is
15 located. (2) Complete and notarize a new TOD deed that disposes of the same property, and
16 record it in each [county] where the property is located. In addition, you can transfer the property
17 to someone else during your lifetime.

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

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

22 *What if I name more than one beneficiary?* You may name more than one beneficiary.

1 Unless you say otherwise in the deed, the primary beneficiaries who survive you (or if none
2 survives you, the alternate beneficiaries) will become co-owners in equal shares.

3 **Reporter's Note**

4 These forms are based on the California proposed form, with modifications.
5

6
7 **SECTION 302. FORM OF REVOCATION.**

8 A document substantially in the following form satisfies the requirements for a form of
9 revocation under this [act].

10 [front of form]

11 **REVOCATION OF TRANSFER ON DEATH DEED**

12 **Notice to Owner**

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

15 **Identifying Information**

16 Owner(s) of Property Making This Revocation

17 _____

18 (name)

(mailing address)

19 _____

20 (name)

(mailing address)

21 _____

22 (name)

(mailing address)

23 **Legal Description of the Property:**

1 _____
2 _____
3 _____

4 **Revocation**

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

6 **Signature(s) of Owner(s) Making This Revocation**

7 _____ [(SEAL)] _____

8 (signature)

(date)

9 _____ [(SEAL)] _____

10 (signature)

(date)

11 **Acknowledgment**

12 [insert acknowledgment here]

13 [back of form]

14 COMMON QUESTIONS ABOUT THE USE OF THIS FORM

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

16 Have it notarized. Record the form in each [county] where the property is located. The form must
17 be notarized and recorded before your death or it has no effect.

18 *How do I find the “legal description” of the property?* This information may be on the
19 TOD deed. It may also be available in the office of the [county recorder] for the [county] where
20 the property is located. If you are not absolutely sure, consult a lawyer.

21 *How do I “record” the form?* Take the completed and notarized form to the [county
22 recorder] for the [county] where the property is located. Follow the instructions given by the

1 [county recorder] to make the form part of the official property records. If the property is located
2 in more than one [county], you must record the deed in each of those [counties].

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

5 **Reporter's Note**

6
7 The form is based on the form in Section 301.

1 [ARTICLE] 4

2 MISCELLANEOUS PROVISIONS

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

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

8 Reporter’s Note

9 This provision is standard in all uniform acts.
10
11

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

18 Reporter’s Note

19 The NCCUSL Drafting Rules state: “If an act contains a provision requiring a notice or
20 other record *or a signature, whether electronic or written*, [this] section should be included”
21 (emphasis supplied).
22

23 A Legislative Note will explain that jurisdictions with the Uniform Electronic
24 Transactions Act do not need this section.
25
26

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

28 (1)

1 (2)

2 (3)

3 **Reporter’s Note**

4 There will be a Legislative Note, either here or at the beginning of the Act, drawing
5 states’ attention to the growing harmonization of the rules governing probate and nonprobate
6 transfers. The Legislative Note will encourage states enacting this Act to consider extending
7 probate rules to transfer on death deeds and other nonprobate transfers, with respect to the
8 following: (1) ademption of specific devises; (2) antilapse; (3) revocation by divorce; (4)
9 revocation by homicide (also known as the “slayer rule”); (5) survivorship; and (6) the surviving
10 spouse’s elective share.

11
12 **SECTION 404. EFFECTIVE DATE.** This [act] takes effect
13