

## Transfer on Death Deeds: It Is Time to Establish the Rules of the Game

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## TRANSFER ON DEATH DEEDS: IT IS TIME TO ESTABLISH THE RULES OF THE GAME

*Stephanie Emrick\**

### Abstract

A transfer on death deed is a form of deed that allows real property assets to pass at death outside of the probate process. Through the twentieth century, there has been a movement in the world of property law—dubbed “the nonprobate revolution”—that focuses on using will substitutes to transfer personal property assets at death without the typical probate process. This is important because the probate process can be quite lengthy and expensive. Until recently, the nonprobate option was not readily available where real property assets were a part of the estate. The transfer on death deed essentially evolved from the traditional life estate deed, but with an additional reservation of power by the transferor. Typically, the powers reserved are the power to grant, convey, sell, mortgage, or revoke. As the use of these life estate deeds with enhanced powers became more widely known, they grew in popularity. For the small- to moderate-sized estates, these deeds were the last piece to the nonprobate puzzle for estate planners.

Initially, transfer on death deeds—or some form thereof—were recognized under the common law of many states. In 1989, Missouri was the first state to enact legislation that provided for the use of transfer on death deeds. Through the years, many states followed suit by adopting their own legislation. However, there were a number of legal uncertainties and debates that surrounded the use of the transfer on death deed. Namely, because there was such fragmentation in the manner that states recognized and governed the use of the transfer on death deed. In 2007, the Uniform Law Commission formed a Drafting Committee to draft a uniform law that would address these concerns. In 2009, the Uniform Law Committee adopted the Uniform Real Property Transfer on Death Act. This Note explores the history of how the transfer on death deed has evolved into the estate planning tool that it is today. This Note proposes that each state, and particularly Florida, should adopt the Uniform Real Property Transfer on Death Act to resolve the legal

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\* J.D. 2017, University of Florida Levin College of Law. I dedicate this Note to my husband, Don, and my children, Walker, Trey, and Avery. This Note, and law school in general, would not have been possible without their unwavering love, patience, and sacrifices. Additionally, I want to express my heartfelt gratitude to my mother, Karen, and my grandparents, Joe and Joan, for their relentless support and encouragement; and to Norm and Janice Fugate for their endless generosity and always believing in me. Also, I want to thank Professor Jeffrey Dollinger for bringing my attention to this issue and for our invaluable discussions on the topic and Professor Danaya Wright for her assistance and input through the research and drafting process. Finally, I would like to recognize the editors and staff of the *Florida Law Review* for their tireless efforts throughout this writing and publishing process.

uncertainties that surround the transfer on death deed. To do so would restore the ability of real property owners and practitioners to utilize this essential tool without fear of unknown legal effects.

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INTRODUCTION

It has been said that “[d]eath is certain but probate is optional.”<sup>1</sup> In the twentieth century, one of the main innovations in property law was transferring certain forms of property at death, outside of probate,<sup>2</sup> through varying forms of will substitutes.<sup>3</sup> In his 1984 article, Professor John H. Langbein discussed the four main will substitutes of that time that constituted “the core of the nonprobate system: life insurance, pension accounts, joint [bank] accounts, and revocable trusts.”<sup>4</sup>

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1. Kent D. Schenkel, *The Trust-As-Will Portmanteau: Trill or Spork?*, 27 QUINNIPIAC PROB. L.J. 40, 40 (2013).

2. See discussion *infra* Section I.A.

3. Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 759 (2008) (discussing the era of large-scale probate avoidance that began in the mid-twentieth century); Memorandum from Thomas P. Gallanis to the Drafting Comm. for Uniform TOD Real Prop. Act (Feb. 14, 2007), [http://www.uniformlaws.org/shared/docs/real%20property%20tod/todrpa\\_gallanismemo\\_021407.pdf](http://www.uniformlaws.org/shared/docs/real%20property%20tod/todrpa_gallanismemo_021407.pdf).

4. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984).

Originally, the nonprobate revolution<sup>5</sup> largely involved assets of personal property that could be registered with a transfer on death or payable on death beneficiary designation,<sup>6</sup> also known as transfer on death accounts or TOD accounts.<sup>7</sup> The most alluring features of will substitutes or transfer on death accounts seem to be the ease and flexibility of creation,<sup>8</sup> the owner's unfettered control during life,<sup>9</sup> and the direct distribution to the beneficiaries upon death.<sup>10</sup> More recently, the nonprobate revolution has spilled over into real property assets.

Transfer on death deeds are the most recent “tool in the probate avoidance toolbox” to emerge from the nonprobate revolution.<sup>11</sup> This trend has fueled a frenzy of discussion, ranging from legal journals<sup>12</sup> and periodicals<sup>13</sup> to online blogs.<sup>14</sup> Before the transfer on death form of deed came on the scene, the legal community turned primarily to trusts,<sup>15</sup> joint tenancy,<sup>16</sup> and contracts<sup>17</sup> to avoid probate of real property assets. In the twenty-first century, widespread legislation has been introduced and enacted regarding transfer on death deeds, or a form thereof<sup>18</sup>—including the adoption of the Uniform Real Property Transfer on Death Act.<sup>19</sup>

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5. The term “nonprobate revolution” seems to have been originally coined by Professor John H. Langbein in his 1984 article entitled *The Nonprobate Revolution and the Future of the Law of Succession*, which has since been cited to hundreds of times. *Id.* at 1108.

6. *Id.* at 1109.

7. Julie Garber, *What is a Transfer on Death, or TOD, Account?*, BALANCE (Feb. 4, 2017), <https://www.thebalance.com/what-is-a-transfer-on-death-or-tod-account-3505253>.

8. Dennis M. Horn & Susan N. Gary, *Death Without Probate: TOD Deeds—The Latest Tool in the Toolbox*, 24 PROB. & PROP. 12, 12–13 (2010) (discussing the need for “flexible legal tools to allow individuals” to convey their real property at death).

9. *Id.* at 14 (“Because the TOD Deed creates no rights in the beneficiary until the owner dies, the owner can change his or her mind during life, and the beneficiary’s creditors cannot attach the beneficiary’s interest in the property during the owner’s life.”).

10. Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1194 (1993) (“Will substitutes flourish because they implement simple, routine deathtime transfers more promptly and efficiently than the probate system.”).

11. Horn & Gary, *supra* note 8, at 14.

12. *Id.*

13. Michael A. Kirtland & Catherine Anne Seal, *The Significance of the Transfer-on-Death Deed*, 21 PROB. & PROP. 42, 42–43 (2007) (“The concept of transfer-on-death deeds is directly comparable to the use of pay-on-death or transfer-on-death accounts at banks or with brokerage houses.”).

14. Julie Garber, *How to Use TOD or Beneficiary Deeds to Avoid Probate*, BALANCE (May 6, 2017), <https://www.thebalance.com/use-deeds-avoid-probate-3505250>.

15. Schenkel, *supra* note 1, at 40.

16. Kirtland & Seal, *supra* note 13, at 43.

17. Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 534 (2006).

18. *See infra* Part II.

19. UNIF. PROBATE CODE § 6-401 (amended 2010).

This Note explores how the nonprobate revolution has seeped into the world of real property from a broad view, and explains the intricacies and legal effects of transferring real property, as opposed to personal property, upon death. Further, this Note argues that enacting legislation to govern the issue resolves legal uncertainties that allow for more effective use. In Part I, this Note describes the typical probate process and explains why many seek to avoid it. Part I then discusses the intended function of transfer on death deeds in general terms, describes how it avoids probate in most cases, and highlights the situations where the transfer on death deed will be most applicable.<sup>20</sup>

Part II delves into the origin and legal history of the transfer on death deed. First, this Part explores the common law roots that serve as the basis for the transfer on death deeds that are in use today.<sup>21</sup> Specifically, this Part considers whether those roots emerged from property law, succession law, or are a unique hybrid of the two combined. Second, this Part discusses the legislative creations that states have enacted to allow for this type of real property transfer upon death and examines the interplay between the legislation and existing common law theories. In particular, this Part discusses the first forms of legislation enacted in the last century,<sup>22</sup> the Uniform Real Property Transfer on Death Act finalized by the Uniform Law Commission in 2009,<sup>23</sup> and more recent forms of legislation adopted.<sup>24</sup> Interestingly, despite uniform legislation, the states have adopted diverse methods of allowing such transfers of real property. These methods include varied versions of legislation, as well as the extension of common law forms. Despite the differences between the states' legislative acts, a core set of issues surrounds the general notion of transferring real property upon death to a designated beneficiary without a will or probate.<sup>25</sup> Finally, this Part discusses the states that do not recognize the transfer on death form of transfer for real property either through common law or legislation.<sup>26</sup>

In Part III, this Note discusses some of the major legal issues that continue to create uncertainty and debate in the legal field relating to this

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20. See *infra* Section I.B.

21. See *infra* Section I.A.

22. In 1989, Missouri was the first to enact legislation allowing for the transfer of real property upon death through the use of a beneficiary deed. See MO. REV. STAT. § 461.025 (1989). Eight years later, Kansas followed Missouri and became the second state to enact legislation that allowed real estate to be titled in transfer on death form by recording a deed designating a beneficiary. *Id.*; see KAN. STAT. ANN. § 59-3501 (1997).

23. UNIF. PROBATE CODE § 6-401 (amended 2010).

24. See *infra* Section II.B.

25. See *infra* Section II.B (exploring the legal roots of the transfer on death form of deed).

26. See *infra* Section II.C.

form of deed.<sup>27</sup> This Note explores cases from across the nation to identify the key legal issues that arise and how the results may have differed if the factual circumstances had occurred in a state with a different legal scheme. Because this legislation is new in a legal sense, there is limited case law on its application. Part III includes a discussion of how key issues and circumstances have different legal effects based upon the states' form of recognition.<sup>28</sup> Finally, this Part of the Note argues that every state should enact legislation to deal with nonprobate transfers of real property so that the uncertainty and debate surrounding the legal effects can be resolved, allowing clients in each state to plan with more confidence and practitioners to serve those clients more effectively. Additionally, this Part discusses how to best minimize the negative legal effects while maximizing the upside of legal efficiency, and why uniformity among the states would be ideal for effective application.

Finally, this Note concludes with a call to the Florida legislature to enact some form of the Uniform Real Property Transfer on Death Act, recognizing transfers of real property upon the death of a life tenant. Whether the legislature agrees with the suggestions or takes a different view, this Note asserts that any legislation clearly articulating how the transfer on death deed (commonly referred to in Florida as an enhanced life estate deed) operates will be great step toward clarity on the issues.

### I. WHAT EXACTLY IS A TRANSFER ON DEATH DEED?

Essentially, a transfer on death deed acts in the same way that a transfer on death account at a bank would work, but for real property.<sup>29</sup> Before the transfer on death form of deed, the nonprobate options for real property owners were limited to traditional deeds that transferred some property interest at the time of the transfer,<sup>30</sup> or to revocable trusts that allowed the property owner to maintain control during life, but were cost

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27. See *infra* Part III.

28. See *infra* Part III.

29. Many states allow for the use of pay-on-death and transfer-on-death accounts for bank and investment accounts, but most of these state statutes are based on the Uniform Nonprobate Transfers on Death Act which does not provide for use of the transfer-on-death designation on real property. See Kirtland & Seal, *supra* note 13, at 42–43.

30. If a property owner deeds the property as joint tenants with right of survivorship or tenancy by the entirety (if a married couple), an immediate property interest vests in both tenants. See 2 TIFFANY REAL PROP. § 418 (3d ed. 2016). A traditional life estate deed allows the property owner to retain possession of the property during life, but vests a remainderman interest in the beneficiary that is irrevocable. See 121 MICHELLE L. EVANS, AM. JUR. PROOF OF FACTS 3D 101 § 4 (2011). Thus, the property owner is still giving up some level of control of the property during life. See *id.*

prohibitive and in many cases unnecessarily complicated.<sup>31</sup> This forced real property owners to give up a certain level of ownership and control or incur significant legal costs if the owner wished to avoid probate.

The transfer on death deed is a mechanism for real property owners to designate a beneficiary, or beneficiaries, to directly receive ownership of a real property asset at the owner's death—without the probate process.<sup>32</sup> The hallmark of the transfer on death deed is that “[d]uring the owner's lifetime, the beneficiaries have no interest in the land, and the owner retains full power to revoke or amend the beneficiary designation.”<sup>33</sup> In other words, the execution of a transfer on death deed, or its equivalent, does not transfer a current interest in the property to the beneficiary.<sup>34</sup> Accordingly, the execution of a transfer on death deed by an owner of real property does not, in and of itself, constitute a completed gift for property or tax purposes.<sup>35</sup> Transfer on death deeds are widely viewed as cost-effective tools to avoid the probate system.<sup>36</sup>

#### A. *What Is Probate? And Why Do We Want to Avoid It?*

The term “probate” is commonly used to refer to the entire legal process of administering the decedent's estate—generally under a court's supervision.<sup>37</sup> Technically, however, the word “probate” derives from the Latin word meaning “proof.”<sup>38</sup> *Black's Law Dictionary* defines “probate” as “[t]he judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court.”<sup>39</sup> In other words, probate technically only refers to the legal process by which the validity of a will is established and accepted by the court.<sup>40</sup> When a decedent passes intestate—without a will—the court participates in proceedings to appoint a fiduciary for the administration

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31. A revocable trust allows the property owner to amend or revoke the beneficiary of the property during the owner's life, but the fees and costs associated with a trust are significant for a person with modest assets. See Gary, *supra* note 17, at 540.

32. Horn & Gary, *supra* note 8, at 14.

33. See Memorandum from Thomas P. Gallanis to the Drafting Comm. for Uniform TOD Real Prop. Act, *supra* note 3.

34. Gary, *supra* note 17, at 532.

35. *Id.*

36. David Major, Comment, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California's Trusts & Estates Attorneys Heading for the Hills*, 49 SANTA CLARA L. REV. 285, 285 (2009).

37. Thomas P. Gallanis, *Frontiers of Succession*, 43 REAL PROP. TR. & EST. L.J. 419, 428 (2008).

38. *Id.*

39. *Probate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

40. *Understanding Probate in Florida*, Practical Law Estate Planning (2017).

of the estate.<sup>41</sup> While these proceedings are not actually probate proceedings, they are often referred to as such.<sup>42</sup> In broad terms, “probate” is understood to refer to “the body of substantive and procedural rules that govern the devolution of decedents’ estates by will or intestacy.”<sup>43</sup> Indeed, probate is “the standard procedure at the heart of the law of succession.”<sup>44</sup> For purposes of this Note, “probate” refers broadly to all aspects of the administration of an estate and is not confined to the limited technical meaning of the proceeding of proving the will.<sup>45</sup>

It is no surprise that many seek to avoid probate. The process is “widely perceived as costly, slow, and cumbersome.”<sup>46</sup> Additionally, probate proceedings in most states are a matter of public record, while many seek to keep their financial and family matters private.<sup>47</sup> The costs in probate proceedings have been estimated to be between 5–10% of the value of the estate,<sup>48</sup> and generally involve the fees paid to the personal representatives and the attorneys as well as the court costs to initiate the proceedings.<sup>49</sup> The personal representative and attorney fees may be calculated based upon the state’s statutory fee schedule or negotiated privately between the parties.<sup>50</sup> Next, there is legitimacy to the perception that the probate process is slow.<sup>51</sup> Realistically, “regardless of how simple an estate appears to be or actually is, it is almost impossible to close an estate through the probate system in less than one year.”<sup>52</sup>

The mechanics of the probate process are “highly complex and intricate in every respect.”<sup>53</sup> As an initial matter of complexity and delay, the probate process is usually a judicial proceeding where the control lies with the local probate court.<sup>54</sup> Further, there are a multitude of issues that may arise during the proceeding that could dramatically increase the cost and time of the probate, including, but not limited to, out-of-state assets

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41. PLANNING AN ESTATE: A GUIDEBOOK OF PRIN. & TECH. § 6:1 (4th ed.).

42. *Id.*

43. McCouch, *supra* note 3, at 758.

44. Gallanis, *supra* note 37, at 428.

45. PLANNING AN ESTATE: A GUIDEBOOK OF PRIN. & TECH. § 6:1 (4th ed.).

46. McCouch, *supra* note 3, at 758.

47. Horn & Gary, *supra* note 8, at 12.

48. Regina L. Rathnau, *Estate Planning: Benjamin Franklin Said We Certainly Need It*, 47 GPSOLO 10, 11 (2013).

49. GEORGE M. TURNER, 1 REVOCABLE TRUSTS 5TH § 7:2 (2016).

50. *See id.* (analyzing the cost of probate and the controversies that arise).

51. *See* EDWARD F. KOREN, 2 EST. TAX & PERS. FIN. PLAN. § 19:15 (Mar. 2017) (discussing the length of time required to probate a typical estate and the potential delays that can prolong the process).

52. TURNER, *supra* note 49, § 7:4.

53. *Id.* § 7:7.

54. McCouch, *supra* note 3, at 758.



of the decedent that may require separate probate proceedings<sup>55</sup> or a contested will that must be resolved before the administration of the estate can continue.<sup>56</sup> A will contest often presents complex litigation issues of interpretation<sup>57</sup> and inter-family disputes regarding the wishes of the decedent,<sup>58</sup> in addition to the added time and expense to complete the probate process.<sup>59</sup> Finally, the publicity of the nature and the distribution of the decedent's assets "is the price a decedent pays for using 'court-regulated devices' such as wills or testamentary trusts."<sup>60</sup> Therefore, it is not surprising that the nonprobate revolution seeking complete probate avoidance has continued to develop and flourish in recent years.

### B. *Intended Function of the Transfer on Death Deed*

There are numerous options for nonprobate transfers of property upon death, but the options are much more limited when the asset is real property rather than personal property.<sup>61</sup> Before the common usage of transfer on death deeds, the nonprobate transfer options took

three basic forms: (1) a contract with a third party that directs the third party to distribute the asset to a designated beneficiary on the death of the owner; (2) a title that contains a right of survivorship and also gives the beneficiary current property rights when the owner adds the beneficiary to the title; and (3) a trust.<sup>62</sup>

The concept of transfer on death designations through contract is a familiar one in the world of personal property. The Uniform Probate Code includes an entire section entitled "Nonprobate Transfers on Death" that allows for the nonprobate transfer of *inter alia* insurance policies, securities, bank accounts, pensions, and individual retirement accounts.<sup>63</sup> Transfer on death designations of this type typically require legislative

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55. *Id.*

56. FRANCIS C. AMENDOLA ET AL., 95 C.J.S. *Wills* § 561 (2017).

57. See E. Gary Spitko, *The Will as an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49, 50 (2016).

58. See Lauren A. Kirkpatrick, *Treading on Sacred Ground: Denying the Appointment of a Testator's Nominated Personal Representative*, 63 FLA. L. REV. 1041, 1041 (2011).

59. See 96 AM. JUR. *Trials* 343 § 1 (2005) (discussing at length the preparation and trial of a case involving a will contest).

60. Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 559–63 (2008).

61. Gary, *supra* note 17, at 538.

62. *Id.* at 534.

63. UNIF. PROBATE CODE § 6-101 (amended 2010).

entitlement for recognition within a state's probate system.<sup>64</sup> Owners of real property can transfer or take title to the property in joint tenancy with the right of survivorship, which immediately vests an interest in the property to each of the joint tenants.<sup>65</sup> The interest held by a joint tenant vanishes upon the death of that joint tenant—effectively transferring the deceased tenant's interest to the remaining living joint tenants outside of probate.<sup>66</sup>

Trusts—both revocable and irrevocable—are another mechanism often used in estate planning to effectuate nonprobate transfers.<sup>67</sup> However, while many hoped that trusts would serve as “functional wills” and thus supplant the traditional will, this hope has not come to fruition.<sup>68</sup> Modern trusts tend to be complex and require the expertise of someone with a sophisticated understanding of the planning process.<sup>69</sup> The intricacies associated with these trusts generally lead to significant costs that make them unattainable by those with limited financial resources.<sup>70</sup>

For real property assets, transfer on death deeds act to combine elements of contract and joint tenancy to achieve a transfer mechanism that captures the best elements of each and eliminates many of the drawbacks.<sup>71</sup> The key advantages of this combination include retained control for the transferor, simplicity,<sup>72</sup> and revocability.<sup>73</sup> The hallmark of the transfer on death deed is that the owner or grantor retains control during their lifetime.<sup>74</sup> Like in contract, the transfer on death deed does not transfer any property interest to the beneficiary at the time that the transfer on death designation is made.<sup>75</sup> Because no property interest vests in the beneficiary until the transferor's death, the transferor retains complete control to amend, modify, or revoke the beneficiary designation during the transferor's lifetime.<sup>76</sup> Additional benefits are also derived from the interest transferring upon death rather than *inter vivos* at the time of the transfer. First, unlike taking title as joint tenants with right of

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64. Joan M. Burda, *Unmarried Couples and Real Estate*, 31 PRAC. REAL EST. LAW. 5, 9 (2015).

65. Gary, *supra* note 17, at 535.

66. *Id.*

67. Schenkel, *supra* note 1, at 40.

68. *Id.*

69. Major, *supra* note 36, at 294.

70. *Id.*

71. Gary, *supra* note 17, at 534.

72. Major, *supra* note 36, at 305. Major purports that the transfer on death deed provides “[s]implification for the many who are trying to plan their estates.” *Id.*

73. Gary, *supra* note 17, at 542–43.

74. *Id.* at 542.

75. *Id.*

76. *Id.*

survivorship, this form of transfer does not trigger the negative tax consequences of a completed gift during the owner's lifetime.<sup>77</sup> Next, the property is protected from the creditors of any of the beneficiaries until the time of the transferor's death.<sup>78</sup> The property is also protected from creditors as a non-probate asset, except to the extent that the property itself secures the underlying debt.<sup>79</sup> Finally, the transferor may continue to exercise the normal rights as a property owner, including the right to sell or mortgage the property and receive applicable tax exemptions.<sup>80</sup>

The cost of transferring real property assets through transfer on death deeds is much less expensive than the cost of transferring property through a trust or a will.<sup>81</sup> The cost of a probate proceeding is often substantial, and in most cases substantially exceeds the cost of having a transfer on death deed prepared.<sup>82</sup> While preparing a trust to avoid probate may in fact cost less than the probate proceeding itself, the preparation of the trust, along with the subsequent transfer of assets into the trust, will almost always exceed the costs associated with transfer on death deeds.<sup>83</sup> For an average person with few assets, "the overall cost of using a revocable trust to transfer those assets may be substantial in comparison with the value of the assets being transferred."<sup>84</sup>

Additionally, the transfer on death deed allows the transferor the ability to revoke the transfer at any time during the transferor's lifetime.<sup>85</sup> "Generally, all that is required is the filing of a revocation of the [transfer on death deed] prior to the grantor owner's death."<sup>86</sup> Because no property interest passes to the beneficiary until the death of the transferor, such revocation does not require the named beneficiary, or beneficiaries, to join.<sup>87</sup> If a transferor wishes to modify the beneficiaries to a particular piece of real property, the transferor can simply execute and record a subsequent transfer on death deed, which will supersede the previous

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77. *Id.*; see also Catherine Anne Seal & Michael A. Kirtland, *The Transfer-on-Death Deed in the Elder Law Setting*, 4 NAELA J. 71, 73–75 (2008) (discussing the tax concerns of transferring real property assets during life).

78. Gary, *supra* note 17, at 542.

79. Amanda Kreshover, *Transfer on Death Deed*, HOUSTON LAWYER, March/April 2016, at 40.

80. *Id.*

81. Gary, *supra* note 17, at 542.

82. *Id.*

83. *Id.* at 543.

84. *Id.*

85. Keriann L. Riehle, *TODDs: A Transfer on Death Dilemma? A Comprehensive Analysis of Minnesota's Transfer on Death Deed Statute—Minn. Stat. § 507.071*, 9 WM. MITCHELL J.L. & PRAC. 1, 2 (2015).

86. *Id.* at 2.

87. Gary, *supra* note 17, at 542.

transfer and become the effective deed.<sup>88</sup> When juxtaposed with the traditional joint tenancy, the revocability of the transfer on death deed provides a clear advantage to the transferors in modifying their estate plans during life.<sup>89</sup>

This transfer on death deed has been referred to by a multitude of terms through the years, but the most common term used in legislation seems to be transfer on death deed.<sup>90</sup> This term is often written as transfer-on-death deed, shortened to TOD deed,<sup>91</sup> or occasionally fully abbreviated to TODD.<sup>92</sup> However, the terms “beneficiary deed,”<sup>93</sup> revocable transfer on death (TOD) deed,<sup>94</sup> nontestamentary transfer,<sup>95</sup> and deed upon death<sup>96</sup> are frequently used as well with little or no distinction as to how the transfers operate.

From the common law perspective, this type of deed is generally an extension of the traditional life estate deed with an additional reservation of powers by the grantor.<sup>97</sup> Accordingly, this type of transfer is commonly referred to as an enhanced or modified life estate deed.<sup>98</sup> However, this form of transfer has garnered numerous nicknames, such as power of sale deeds or Italian deeds.<sup>99</sup> Of these nicknames, the most common by far is the Lady Bird deed.<sup>100</sup> There is a common misconception that the nickname Lady Bird deed originated when President Lyndon Johnson transferred property to his wife using this form of deed.<sup>101</sup> In actuality, the nickname originated with Florida attorney

88. 2 PATTON AND PALOMAR ON LAND TITLES § 333 (3d ed.) note 5.70 (2016) (“A subsequent beneficiary deed revokes all previous beneficiary designations in their entirety, even if the subsequent deed does not convey the owner’s entire interest in the property. At the owner’s death, the most recently executed beneficiary deed or revocation of all beneficiary deeds recorded before the owner’s death controls, regardless of the order of recording.”).

89. Riehle, *supra* note 85, at 2.

90. This is the term preferred by the NCCUSL in drafting the Uniform Real Property Transfer on Death Act. According to the Comment to Paragraph 6 “[t]he term ‘transfer on death deed’ is preferred, to be consistent with the transfer on death registration of securities.” UNIF. REAL PROP. TRANSFER ON DEATH ACT § 2 cmt. to para. 6 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2009).

91. See KAN. STAT. ANN. § 59-3501 (2016).

92. See *In re Estate of Carlson*, 367 P.3d 486, 489 (Okla. 2016).

93. See ARIZ. REV. STAT. ANN. § 33-405 (2016).

94. See CAL. PROB. CODE § 5642 (West 2016).

95. See WYO. STAT. ANN. § 2-18-101 (2016).

96. See NEV. REV. STAT. ANN. § 111.661 (West 2016).

97. Kary C. Frank, *Ladybird Deeds Purposes and Usefulness*, 95 MICH. B.J. 30, 30 (2016).

98. *Id.*

99. John A. Facey, III et al., “Top Ten” Pitfalls in Preparing Lady Bird Johnson Deeds, 34 VT. B.J. 42, 42 (Winter 2008/2009).

100. Frank, *supra* note 97, at 30.

101. See Opinion of the Michigan Probate Court, *In the Matter of the Estate of Dolores Ann Davis (Lady Bird Deed)*, 18 QUINNIPIAC PROB. L.J. 247, 248–49 (2005).

Jerome Ira Solkoff, who used a fictional cast of characters to illustrate the usefulness of the enhanced life estate form of transferring real property.<sup>102</sup> This form of transfer, however, can actually be traced back through common law of estates as a form of remainder.<sup>103</sup> There is debate surrounding the actual interest conveyed to the beneficiary at the time of the transfer which this Note will discuss in greater detail, but for now, understand that the legal roots are deep.<sup>104</sup>

Of course, there are also disadvantages to using the transfer on death deed. The primary concern associated with using transfer on death deeds is the possibility of legal mistakes.<sup>105</sup> Like most aspects of the law, this is a concern when a non-lawyer attempts to use a legal mechanism without consulting a lawyer.<sup>106</sup> In the realm of transfer on death deeds, however, there is heightened concern that legal practitioners are equally susceptible to creating unintended legal consequences, due to the novelty of the deed and the lack of established legal precedent.<sup>107</sup> Indeed, while there are known legal traps to watch for in using transfer on death deeds, the limited litigation and short history of the transfer on death deed create uncertainty of what unknown legal implications are lurking around the corner.

Chief among the negative implications of using the transfer on death deed is that the deed will not effectuate the true intent of the owner of the real property due to legal uncertainty.<sup>108</sup> This situation may arise where an owner fails to name a contingent beneficiary,<sup>109</sup> executes conflicting estate planning documents,<sup>110</sup> or unintentionally transfers a current interest in the real estate that becomes subject to the beneficiary's creditors<sup>111</sup> or results in unintended tax consequences.<sup>112</sup> Additionally, there is lack of certainty as to the effectiveness of the transfer on death deed when it is challenged after the owner's death. Further, there is concern that the fragmented nature of the legal mechanisms employed to

102. Kary C. Frank, *The Search for the Lady Bird Deed*, 34 MICH. PROB. & EST. PLAN. J. 25, 26 (2015) (presenting an intriguing historical perspective of how the Lady Bird deed came to be and garnered its nickname).

103. Frank, *supra* note 97, at 30.

104. *See infra* Section II.A (discussing the question of how the interest conveyed to the beneficiary fits within the future interest classifications, or if it fits at all).

105. Gary, *supra* note 17, at 543.

106. *Id.* at 545.

107. *Id.* at 543–46.

108. Major, *supra* note 36, at 299.

109. Gary, *supra* note 17, at 543.

110. Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 159 (2008).

111. Gary, *supra* note 17, at 544.

112. Seal & Kirtland, *supra* note 77, at 73–74 (discussing the tax implications of creating a completed gift during the owner's lifetime).

transfer differing asset types creates added complexity for the legal practitioner.<sup>113</sup> In turn, this added layer of planning could actually necessitate, rather than circumvent, additional time and expense.

Should a transfer on death deed fail to operate as a matter of law, the probate system serves as a standby to distribute the decedent's property.<sup>114</sup> Where a transfer does not necessarily fail, however, but merely creates an ambiguous transfer, the probate system will not save the day.<sup>115</sup>

## II. ORIGIN AND HISTORY OF THE TRANSFER ON DEATH DEED

This form of deed follows suit with the continuing nonprobate revolution—a relatively recent trend of seeking legal substitutes to the traditional will and probate system, commonly referred to as nonprobate transfers or will substitutes.<sup>116</sup> Today, the states handle transfer on death deeds in a myriad of ways. There are, however, three general categories: states that recognize them through common law, states that recognize them by statute, and states that do not recognize them at all.<sup>117</sup>

### A. Common Law Recognition

Florida estate planning and elder law attorney Jerome Ira Solkoff prepared the first “enhanced life estate type of transfer” in 1982.<sup>118</sup> While this is the first traceable deed in this form, the type of transfer is not a new phenomenon.<sup>119</sup> Indeed, the common law of estates allowed for this type of transfer by deed.<sup>120</sup> There is, however, question as to how the named beneficiary's interest created through this transfer type fits within the law of future interests, or if it even fits at all.<sup>121</sup> Commonly, the interest held by the life tenant in an enhanced life estate deed is

113. Schenkel, *supra* note 110, at 160 (discussing how nonprobate devices force an attorney engaging in estate planning to conduct a careful analysis of each individual asset and any nonprobate device previously utilized).

114. If a transfer on death deed is determined invalid, then the deed will be treated as void and the property will pass as an asset of the deceased's estate. *See Pippin v. Pippin*, 154 S.W.3d 376, 381 (Mo. Ct. App. 2004).

115. It could cause title clouds, interfamilial disagreements, or even litigation. *See* Brief for Appellant at 2, *Brock v. Willhoite*, No. 5D16-1925 (Fla. Dist. Ct. App. Sept. 29, 2016), 2016 WL 6403914.

116. Gary, *supra* note 17, at 542; Langbein, *supra* note 4, at 1109.

117. *See infra* Sections II.A–II.C (discussing how different states treat the transfer on death deed, or some form thereof).

118. Frank, *supra* note 102, at 26.

119. Frank, *supra* note 97, at 31.

120. *Id.*

121. The author is grateful to Professor Danaya Wright for the thought-provoking discussions and thorough analysis on this issue specifically and this topic in its entirety.

considered analogous to a devise to a life tenant with the power of appointment.<sup>122</sup> For over a century now, the issue with this type of devise or grant has been whether the enhanced powers to the life tenant—specifically, the reservation of the absolute power of disposition—operate to enlarge the traditional life estate interest of the life tenant to a fee interest.<sup>123</sup> In other words, if a life estate deed reserves to the life tenant the absolute right to transfer or encumber the property in fee, or to revoke the beneficiary designation completely, does the life tenant really only have the traditional life estate interest, or does he actually have something more? The next logical question then becomes exactly what interest does the remainderman have upon the execution of the enhanced life estate deed, and continuing for the duration of the life tenant’s lifetime? Because the traditional life estate deed has evolved by creative legal uses through common law to include the reservation of these added powers, the answers to these questions are not clear and often vary state by state, or case by case in some instances.<sup>124</sup>

As to the life tenant’s interest, the majority rule is where a life estate is coupled with an unlimited or absolute power to dispose of the fee interest of the property, the life estate interest is not enlarged or transformed into a fee or absolute interest.<sup>125</sup> Accordingly, the minority rule is that “where an absolute power of disposition, either express or implied, is added to a life estate in real property, the life estate is thereby enlarged to a fee.”<sup>126</sup> While the majority view that a life estate interest with the enhanced power to sell or transfer fee has been accused of being legally inconsistent, courts have determined otherwise.<sup>127</sup>

There are differing opinions as to what interest the remainderman or beneficiaries have when an enhanced life estate deed is executed and remains unrevoked through the duration of the life tenant’s lifetime. In

122. Patricia P. Jones, *Transfers into Trusts and Related Issues*, May 17, 2002, Broward Bar Lady Bird Deed Presentation, [https://www.browardbar.org/wp-content/uploads/staley-memorial/SpeakerLeonardEMondschein/Lady-Bird-Deed-Presentation\\_42-pages.pdf](https://www.browardbar.org/wp-content/uploads/staley-memorial/SpeakerLeonardEMondschein/Lady-Bird-Deed-Presentation_42-pages.pdf).

123. H. C. J., Annotation, *Absolute Power of Disposition in Life Tenant as Elevating Life Estate to Fee*, 36 A.L.R. 1177 (Originally published in 1925) (discussing case law prior to 1925 dealing with the issue of life estate deeds that reserve the absolute power of disposition of the fee interest to the life tenant).

124. *Id.* (“[I]n a few jurisdictions there are some cases which are apparently in conflict. This, however, is not due to any real inconsistency among the decisions of such jurisdictions, but to the well-known characteristic of will cases, viz., that each case is a law unto itself and is decided so as to give effect, if possible, to the testator’s intention as disclosed by the various provisions and expressions of the instrument and the circumstances of the parties.”).

125. 1 TIFFANY REAL PROP. § 56 (3d ed. 2016); *see also* H. C. J., *supra* note 123, at 13 (analyzing thoroughly the historical cases across numerous jurisdictions that have adopted the majority rule).

126. H. C. J., *supra* note 123, at pt. 2.

127. *Gaylord v. Goldblatt*, 423 So. 2d 203, 204 (Ala. 1982).

fact, historically there have been cases that hold that where a life estate is granted, reserving the absolute power of disposal in the life tenant, the gift over to the remainderman at the death of the life tenant is actually void.<sup>128</sup> However, all jurisdictions that previously held this view have since resolved that the remainder that follows is valid.<sup>129</sup> The beneficiary or remainder interest resulting from an enhanced life estate deed has been referred to as a vested remainder subject to total divestment,<sup>130</sup> but has also been categorized as a contingent remainder, or possibly just an expectancy interest. This Note does not seek to get into the future interest weeds, but merely to emphasize the distinction between whether that interest should be considered vested or contingent.<sup>131</sup> Regardless of what one labels the remainder interest, if the life tenant does not subsequently convey the fee title to the property during her lifetime, the fee title to the property will vest fully in the remainder beneficiary upon the life tenant's death.<sup>132</sup> However, the importance of the distinction between whether the interest is vested or contingent is in determining when the property interest actually passes—upon execution of the deed or upon death of the life tenant. In other words, the question is whether the remainder beneficiary has any interest in the property so long as the life tenant is alive. This distinction can be critical, especially in circumstances where the remainderman dies before the life tenant.<sup>133</sup>

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128. 3 SIMES AND SMITH, *THE LAW OF FUTURE INTERESTS* § 1488 (3d ed. 2016) (discussing how this position was the minority position and how the legislature has enacted legislation to seemingly bring their states in line with the majority position).

129. *Id.*

130. Frank, *supra* note 97, at 31 (referencing a definition provided by Gerry W. Beyer, Governor Preston E. Smith Regents, Professor of Law, Texas Tech University School of Law); see also Suzanne M. Barry, *Enhanced Life Estates Deed Growing in Popularity*, in *THE TITLE CORNER* (Old Republic Nat'l Title Ins. Co., Tampa, Fla.), Jan.–Mar. 2016, at 4, 4.

131. Stephen L. Mackey, *Fund Insures Enhanced Life Estates: Fund Insurability of Life Estate Deeds with Enhanced Powers in the Life Estate Holders Results in Better Tricks from an Old Dog!*, *FUND CONCEPT*, Aug. 1999, at 124, 124 (“A vested remainder and a vested remainder subject to divestment are actual estates in property. A remainder is vested if there is a present right to future possession even though that present right may be eliminated by some future event. When a present right may be eliminated by the occurrence of some future contingency, then that remainder is vested subject to divestment. Alternatively, a contingent remainder takes effect on the occurrence of an event that may or may not occur prior to the termination of the preceding estate. With a vested remainder there is uncertainty as to whether the estate will even be enjoyed in possession. With a contingent remainder, the right to the actual estate is uncertain.”).

132. See *supra* Section I.B.

133. If the remainder beneficiary's interest is considered vested at the time of the enhanced life estate deed, then the remainder beneficiary's interest will pass to the remainder beneficiary's heirs or devisees. See *In re Estate of Martin*, 110 So. 2d 421, 422 (Fla. Dist. Ct. App. 1959); However, if the remainder beneficiary's interest is considered contingent, then title will not pass to the remainder beneficiary's estate. See *In re Travis v. Ashton*, 23 So. 2d 725, 727 (Fla. 1945).



Additionally, because each state that recognizes the enhanced life estate deed through common law has shaped its law through historic (and some more recent) cases, the terminology and definitions have become quite diverse and inconsistent.<sup>134</sup>

### B. Legislative Recognition

As the popularity of enhanced life estate deeds continued to grow, states began to respond by enacting legislation to govern this form of deed. The first state to enact specific legislation was Missouri in 1989 as a part of the “Nonprobate Transfers Law of Missouri.”<sup>135</sup> Nearly a decade later, numerous other states eventually began to follow suit.<sup>136</sup> In 2007, the Uniform Law Commission formed a Drafting Committee with the goal of producing a Uniform Transfer on Death for Real Property Act.<sup>137</sup> While the Drafting Committee was working on producing the proposed uniform law, Montana,<sup>138</sup> Oklahoma,<sup>139</sup> Minnesota,<sup>140</sup> and Indiana<sup>141</sup> enacted their own form of legislation, bringing the total number of states with legislation to thirteen.

The Drafting Committee looked at the legislation each state had currently adopted carefully, in addition to the comprehensive study completed by the California Law Revision Commission, to identify the major issues and compare and contrast the relevant statutory language from each.<sup>142</sup> The Drafting Committee identified nine categories of issues that they wished to address in their final uniform act.<sup>143</sup> First, they addressed Operational Issues including, *inter alia*, execution formalities and the effect of co-ownership with right of survivorship.<sup>144</sup> Next, the

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134. See *supra* Section I.B. (discussing the multitude of terms used to refer to this form of deed).

135. See H.B. 145, 85th Gen. Assemb., Reg. Sess. (Mo. 1989) (codified as amended at MO. REV. STAT. §§ 461.003–.081 (2016)).

136. In 1997, Kansas adopted legislation, followed by Ohio in 2000, New Mexico in 2001, Arizona in 2002, Nevada in 2003, Colorado in 2004, Arkansas in 2005, and Wisconsin in 2006. See KAN. STAT. ANN. § 59-3501 (2016); OHIO REV. CODE ANN. § 5302.22 (LexisNexis 2016); N.M. STAT. ANN. § 45-6-401 (2016); ARIZ. REV. STAT. ANN. § 33-405 (2016); NEV. REV. STAT. § 111.109 (2010); COLO. REV. STAT. § 15-15-402 (2016); ARK. CODE ANN. § 18-12-608 (2016); WIS. STAT. § 705.15 (2016).

137. See Memorandum from Thomas P. Gallanis to the Drafting Comm. for Uniform TOD Real Prop. Act, *supra* note 3.

138. MONT. CODE ANN. § 76-6-121 (2016).

139. OKLA. STAT. tit. 58, § 1253 (2016).

140. MINN. STAT. § 507.071 (2016).

141. IND. CODE § 32-17-14-11 (2016).

142. See Memorandum from Thomas P. Gallanis to the Drafting Comm. for Uniform TOD Real Prop. Act, *supra* note 3.

143. *Id.*

144. *Id.* at 4–20.

Drafting Committee contemplated issues relating to the rights of the Transferor,<sup>145</sup> the Beneficiary,<sup>146</sup> Family Members,<sup>147</sup> Creditors,<sup>148</sup> and Third-Party Purchasers.<sup>149</sup> Finally, they also considered the issues of Taxation,<sup>150</sup> Medicaid Eligibility and Reimbursement,<sup>151</sup> and the Implementation of the Revocable TOD Deed.<sup>152</sup> The Drafting Committee held numerous meetings and consulted with a variety of experts in the field before finalizing the Uniform Real Property Transfer on Death Act (URPTODA) at the Uniform Law Commission's 2009 Annual Meeting.<sup>153</sup>

The final version of the URPTODA includes a Prefatory Note that makes clear that “[d]uring 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.”<sup>154</sup> The Prefatory Note concludes that “[t]he 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.”<sup>155</sup>

While there are too many intricacies in the URPTODA for this Note to discuss at length, there are a few important points to highlight. First, the URPTODA introduces clear definitions for the terminology used in connection with this form of transfer of real property.<sup>156</sup> Next, in a very concise statement in Section 5 of the URPTODA, the proposed law makes it explicitly clear that the transfer of property via a transfer on death deed is “effective at the transferor’s death,” thus making it clear that the transfer is not an inter vivos transfer.<sup>157</sup> Further, the URPTODA makes clear that “[a] transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.”<sup>158</sup> The Comment to Section 6 clarifies that even if the transferor includes a promise in the

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145. *Id.* at 20–30.

146. *Id.* at 31–49.

147. *Id.* at 50–51.

148. *Id.* at 52–53.

149. *Id.* at 56.

150. *Id.* at 57–58.

151. *Id.* at 58–59.

152. *Id.* at 59–66.

153. Links to the Drafting Committee’s Agendas, Memo, Drafts, etc. can be found at *Committees: Real Property Transfer on Death Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Committee.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act> (last visited Mar. 3, 2018).

154. UNIF. REAL PROP. TRANSFER ON DEATH ACT, PREFRATORY NOTE (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2009).

155. *Id.*

156. *Id.* § 2.

157. *Id.* § 5.

158. *Id.* § 6.

transfer on death deed that the deed will be irrevocable, the deed remains revocable, and recourse must be sought under other law.<sup>159</sup> Section 7 states clearly that a “transfer on death deed is nontestamentary,” which makes clear that a transfer on death deed does not have to be executed with the formalities of a will, nor does a transfer on death deed need to be probated.<sup>160</sup> Of important note, Section 12 resolves the question of who has what interest at what time. So long as the transferor is alive, a transfer on death deed does not affect the interest or right of any of the parties involved, nor does it affect eligibility for public assistance, and the designated beneficiary does not have any interest in the property—neither legal or equitable—so creditors of the designated beneficiary cannot attach to the property.<sup>161</sup>

As mentioned, these issues are just the tip of the iceberg, but the important takeaway idea is that the URPTODA makes the legal effect of the deed very clear. This allows clients and practitioners to plan estates more effectively and efficiently because the operation of the deed is understood. The clarity and certainty that the URPTODA brings to this murky area of the law is likely the reason why even states that previously recognized a form of the transfer on death deed have either introduced or enacted a form of the URPTODA legislation.<sup>162</sup>

It is also important to note that several states have enacted legislation that differs from the URPTODA.<sup>163</sup> California is an interesting example, since the Drafting Committee for the URPTODA included the materials from California’s Law Revision Commission in their introductory memorandum.<sup>164</sup> In 2009, Indiana adopted a comprehensive Transfer on Death Property Act which includes a section specifically dealing with Transfer on Death Deeds.<sup>165</sup> And in 2015, Massachusetts introduced legislation that differed from the URPTODA.<sup>166</sup> Interestingly, Mississippi introduced legislation in 2016 to adopt the URPTODA,<sup>167</sup> but also introduced legislation that differed from the URPTODA in 2016<sup>168</sup>

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159. *Id.* § 6 cmt.

160. *Id.* § 7.

161. *Id.* § 12.

162. In 2011, Nevada repealed previous legislation and enacted the URPTODA. NEV. REV. STAT. § 111.655 (2016).

163. See MINN. STAT. § 507.071; see also WYO. STAT. ANN. § 2-18-101 (2016); Riehle, *supra* note 85, at 2 (analyzing Minnesota’s current transfer on death deed statute).

164. Memorandum from Thomas P. Gallanis to the Drafting Comm. for Uniform TOD Real Prop. Act, *supra* note 33, at 3.

165. IND. CODE § 32-17-14-11 (2016).

166. H.B. 1565, 189th Gen. Ct. (Mass. 2015-2016).

167. S.B. 2736, Reg. Sess. (Miss. 2016).

168. S.B. 2068, Reg. Sess. (Miss. 2016).

and again in 2017.<sup>169</sup> Perhaps the most interesting legislation that differs from the URPTODA, however, is in Ohio, where the legislature amended the prior law to allow for the transfer of real property at death through an affidavit.<sup>170</sup>

### C. *Non-Recognition*

As of the date of this Note, it appears there are currently seventeen states that do not recognize a transfer on death deed through common law or enacted legislation.<sup>171</sup> That does not mean, however, that those states have not contemplated the idea. Since the adoption of URPTODA, several states that do not currently recognize the transfer on death deed—or some form thereof—have introduced a form of the legislation that has not been enacted, including Alabama,<sup>172</sup> Connecticut,<sup>173</sup> Maryland,<sup>174</sup> and Utah.<sup>175</sup> In an effort to simplify the estate planning process, there have been numerous calls from legislators and practitioners to adopt the use of transfer on death deeds through the URPTODA.<sup>176</sup>

The main takeaway is the vast array of ways that the different states treat the transfer-on-death form of deed. This level of diversity has created confusion and controversy in the functional and practical legal effect of using a transfer on death deed. Moreover, the terminology, technical requirements, revocability, and operation vary from state to state depending on their laws.<sup>177</sup> For the states that recognize the use of transfer on death deeds, they have become a common tool for practitioners to accomplish transfers of real property at death in the same manner previously only reserved for personal property assets. However, the lack of legal jurisprudence and consistency in statutory schemes leads to confusion and uncertainty for legal practitioners and their clients. For

169. H.B. 806, Reg. Sess. (Miss. 2017).

170. OHIO REV. CODE ANN. § 5302.22.

171. As of the date of this Note, the following states do recognize transfer on death deeds—or some form thereof—as a matter of law: Alabama, Connecticut, Delaware, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Vermont.

172. H.B. 406 (Ala. 2016).

173. S.B. 1162, Gen. Assemb., Jan. Sess. (Conn. 2013); S.B. 117, Gen. Assemb., Feb. Sess. (Conn. 2016).

174. H.B. 946 (Md. 2013); H.B. 59 (Md. 2014); H.B. 186 (Md. 2015).

175. H.B. 224, 2010 Gen. Sess. (Utah 2010); H.B. 199, 2016 Gen. Sess. (Utah 2016); H.B. 14, 2017 Gen. Sess. (Utah 2017).

176. See Michael A. Kirtland & Catherine Anne Seal, *Beneficiary Deeds and Estate Planning*, ALA. LAW., Mar. 2005, at 123; Tyler H. Gablenz, *Simplify the Process: Why Connecticut Should Adopt the Use of Transfer on Death Deeds*, 28 QUINNIPIAC PROB. L.J. 165, 166 (2015).

177. 2 PATTON AND PALOMAR ON LAND TITLES § 333 (3d ed.) (discussing generally the various ways that states handle the transfer on deed, or some form thereof).

the transfer on death deed to emerge in common usage as a successful estate planning tool, it is imperative that each state, including Florida, enact clear legislation that will define and establish the rules of the game.

### III. WHY CLARITY IS NECESSARY

The only thing that is clear regarding transfer on death deeds is that uncertainty abounds. This Note proposes that each state should enact a suggested form<sup>178</sup> of the URPTODA to resolve the uncertainty and confusion. While having some form of legislation would be a step in the right direction, the varied language of each state's statute makes it difficult for unified legal jurisprudence to form.<sup>179</sup> Thus, while many cases have come through the courts with similar salient facts, their holdings tend to be isolated to that particular state because they relate to the particular language used in that state's statute.<sup>180</sup> In addition, certainty of title is essential for real property.<sup>181</sup> In states like Florida, where there is no legislation, many title insurers are cautious when insuring real property that involves a transfer on death deed, or an enhanced life estate deed as they call it in Florida.<sup>182</sup> This Part discusses the uncertainties that surround the legal effects and drafting of the transfer on death deed, and why it is imperative that each state enact the URPTODA to relieve, or at least reduce, the level of these uncertainties. First, this Note analyzes circumstances where legal uncertainties have led to litigation and how the URPTODA would have mitigated the risk of that litigation. Second, this Note discusses the practical hurdles that practitioners face in estate planning and drafting effective transfer on death deeds.

#### A. Legal Uncertainties

The overarching reason for each state to enact the URPTODA is because the statutes are strictly construed as to the requirements of a

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178. The URPTODA has several parts that allow for states to select from bracketed alternative proposed language to fit within their state's current laws. *See, e.g.*, UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 2(3), 13(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2009).

179. Riehle, *supra* note 85, at 1 (analyzing how transfer on death deeds are utilized in other states, and as such a recent innovation, there is little jurisprudence on the issue).

180. *See* Delcour v. Rakestraw, 340 S.W.3d 320, 321–22 (Mo. Ct. App. 2011) (focusing on the language of the statute that was particular to that state).

181. *See* 63C AM. JUR. 2D Property § 25 (“[P]ublic policy favors certainty in title to real property . . .”).

182. Benjamin T. Jepson, *Insuring Title Out of Enhanced Life Estates*, THE FUND CONCEPT, Oct. 2016, at 97, 100 (discussing the risks involved with enhanced life estate deeds and indicating that “transaction specific underwriting authorization will depend largely on the facts of each transaction to be insured”) (on file with the author).

transfer on death deed.<sup>183</sup> Thus, clear legislation that establishes how the deed will operate and the legal effects of the conveyance will provide clarity and certainty for owners and practitioners alike to utilize the transfer on death deed without the unnecessary risk of litigation or unintended consequences. For example, there has been litigation involving the required formalities for transfer on death deeds, or some form thereof. Because the transfer on death deed is ultimately just another form of deed, there have been cases—similar to standard *inter vivos* deed cases—that contest the validity of the deed based on formalities such as notarization.<sup>184</sup> Another common factual issue that often arises is the formality of recording the transfer on death deed.<sup>185</sup> “The requirement that the [transfer on death] deed be recorded before death is the formality that takes the place of the delivery requirement.”<sup>186</sup> If a state has enacted the URPTODA, it is clear that a transfer on death deed “must contain the essential elements and formalities of a properly recordable *inter vivos* deed.”<sup>187</sup> Unlike a standard *inter vivos* deed, however, the transfer on death deed “must state that the transfer to the designated beneficiary is to occur at the transferor’s death and must be recorded before the transferor’s death in the public records.”<sup>188</sup> Thus, because the effectiveness of the transfer on death deed will be determined upon a strict interpretation of the requirements set out in the law, states should enact URPTODA and avoid the unnecessary uncertainty of the formalities required.

Another legal uncertainty that arises from the lack of clarity, and often leads to litigation, is who can be a grantor or a beneficiary for an effective transfer on death deed. The courts in Colorado have decided that a trust may not be a grantor—and thus execute an effective transfer on death deed—because the language of their state law implies that the owner must be a natural person.<sup>189</sup> The importance of the language used in the statute

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183. *Groh v. Ballard*, 965 S.W.2d 872, 873 (Mo. Ct. App. 1998) (“[T]he General Assembly has made clear that beneficiary deeds used to effect a nonprobate transfer of property are subject to requirements of [the Nonprobate Transfers Law].”).

184. *See, e.g., In re Estate of Frie*, 315 P.3d 278, 6 (Kan. Ct. App. 2014) (unpublished disposition) (discussing the validity of a transfer on death deed that allegedly was not properly acknowledged before a notary public at the time of execution).

185. *Estate of Dugger v. Dugger*, 110 S.W.3d 423, 428 (Mo. Ct. App. 2003) (holding that recordation was required prior to death for the transfer on death deed to be valid).

186. *Id.* at 428 (citing JACKSON & EICKHOFF, JR., II MO. TRUSTS, POWERS OF ATTORNEY, CUSTODIANSHIPS, AND NONPROBATE MATTERS § 13.37 (Mo. Bar 1998, 2001)).

187. UNIF. REAL PROP. TRANSFER ON DEATH ACT, § 9(1) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2009).

188. *Id.* §§ 9(2)–(3).

189. *Fischbach v. Holzberlein*, 215 P.3d 407, 409 (Colo. App. 2009) (holding that a beneficiary deed was invalid because the grantor was a trust and the statutory language required that the “owner” must be a natural person, not an entity).

was also central to the 2011 Missouri case, *Delcour v. Rakestraw*.<sup>190</sup> In that case, the court considered the language of the recently amended definition of “owner.”<sup>191</sup> Prior to the amendment, the court in *Pippin* invalidated a beneficiary deed executed by the owner to transfer upon the death of the owner and a non-owner to the beneficiaries.<sup>192</sup> In 2005, the legislature amended the definition to resolve the issue of who constituted an “owner.”<sup>193</sup> Even though the salient facts in both cases were nearly identical—namely, that the transfer was not to occur until the death of both an owner and a non-owner—the court held that “[t]he 2005 amendment does not affect *Pippin*’s application here or yield a different outcome.”<sup>194</sup> These two cases illustrate the complexity involved in drafting the language of the statute to achieve the desired result. Thus, each state, and particularly Florida, should enact the URPTODA to put in place a statutory scheme that establishes the rules of the game. Any state enacting legislation will bring clarity to the use of transfer on death deeds within that state. If the majority of the states across the nation enact—at least in substantial form—the URPTODA, however, there will be a heightened level of precedent that will be persuasive for other jurisdictions.

One of the most significant legal uncertainties—and likely the most litigated issue that arises on the subject of transfer on death deeds—is whether the life tenant with reserved additional powers retains the power to revoke the remainder interest and restore the full fee simple title to themselves or convey it to a third party, without the joinder of the remainder beneficiaries.<sup>195</sup> In *Bohr v. Nodway Valley Bank*,<sup>196</sup> the court found that the life tenant did not only possess a life estate, but “the express power to effectively restore her status as a fee owner in the [p]roperty by sale or other conveyance of the [p]roperty or by any other act deemed legally sufficient to revoke the remainder interest.”<sup>197</sup> This holding is similar to the landmark Florida case, *Oglesby v. Lee*,<sup>198</sup> which held that

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190. 340 S.W.3d 320, 322 (Mo. Ct. App. 2011).

191. *Id.* at 322–23 (“(8) ‘Owner,’ a person or persons having a right, exercisable alone or with others, regardless of the terminology used to refer to the owner in any written beneficiary designation, to designate the beneficiary of a nonprobate transfer, and includes joint owners. The provisions of this subdivision shall apply to all beneficiary deeds executed and filed at any time, including, but not limited to, those executed and filed on or before August 28, 2005.”).

192. *Pippin v. Pippin*, 154 S.W.3d 376, 381 (Mo. Ct. App. 2004).

193. *Delcour*, 340 S.W.3d at 322–23.

194. *Id.* at 321 (reversing and remanding the case to the lower court for findings in conformity with their opinion).

195. See Jepson, *supra* note 182 (discussing the “so called ‘fickle life tenant’ problem”).

196. 411 S.W.3d 352, 352 (Mo. Ct. App. 2013).

197. *Id.* at 359.

198. 73 So. 840, 840 (Fla. 1917)

where a father used a life estate deed with an enhanced reservation of power to give a remainder interest to his daughter, a subsequent deed by the father to a third party extinguished the daughter's remainder interest.<sup>199</sup> And in the 2014 case, *Jennings v. Atkinson*,<sup>200</sup> the Missouri Court of Appeals went so far as to hold that a deed from a husband and wife to just the wife was enough to extinguish the rights of the remainder beneficiaries under a prior beneficiary deed.<sup>201</sup>

Interestingly, there was a recent appellate case in Florida that seemed to straddle the issue of whether a life tenant can revoke the remainder beneficiary interest—or in other words use her power to convey the entire fee back to herself.<sup>202</sup> In this case, the grantors previously held the property at issue as joint tenants<sup>203</sup> with full rights of survivorship.<sup>204</sup> The grantors, an unmarried couple, executed a quit claim deed<sup>205</sup> to themselves for life, and upon the death of both grantors, the remainder to go one half to his trust and one half to her trust.<sup>206</sup> However, the grantors did not include in the deed the form of tenancy that they wished to hold the property for the remainder of their lifetime.<sup>207</sup> Following the first

199. *Id.* at 841.

200. 456 S.W.3d 461, 461 (Mo. Ct. App. 2014).

201. *Id.* at 467.

202. Brief for Appellant, *supra* note 115, at 2.

203. 7-51 POWELL ON REAL PROPERTY § 51.01 (2017 ed. Michael Wolf) (“The joint estate consists of a property interest held by two or more persons concurrently, with the survivor of them to take the entire interest.”).

204. Brief for Appellant, *supra* note 115, at 4.

205. DANAYA C. WRIGHT, *THE LAW OF ESTATES AND FUTURE INTERESTS*, 52 (Foundation Press 2015); 14-81A POWELL ON REAL PROPERTY § 81A.03(1)(c) (2017 ed. Michael Wolf).

206. The conveyance language of the quit claim deed stated:

“to the same LEROY TURNER, a single man... and NANCY S. BROCK, a single woman... for and during their lifetimes, without any liability for waste, and with full power and authority in said life tenants to sell, convey, mortgage, encumber, lease (including a lease for a term exceeding the life estate) or otherwise manage and dispose of the property described herein, in fee simple, with or without consideration, without joinder of the remainder person, and with full power and authority to retain any and all proceeds or rentals generated thereby, and upon the deaths of LEROY TURNER and NANCY S. BROCK, remainder in fee simple unto the acting Trustee of THE LEROY TURNER TRUST, dated June 22, 2011, as to an undivided one-half interest, and unto the acting Trustee of THE NANCY S. BROCK REVOCABLE LIVING TRUST, dated February 19, 2004, as to an undivided one-half interest, as Tenants-in-Common.”

Brief for Appellant, *supra* note 115, at 4.

207. Under Florida law, co-owners of real property are presumed to be tenants in common. Fla. Stat. § 689.15 (2017). The operative language of the statute states: “transfer or conveyance



grantor's death, the second grantor conveyed the full fee simple title of the property to herself, wholly divesting the remainder trusts of any interest.<sup>208</sup> The children of the deceased grantor—and the beneficiaries of the first grantor's trust and thus, half of the property—filed suit alleging that the second grantor did not have the right to convey the full fee simple title to the property wholly to herself because she only had a life estate interest in one half of the property.<sup>209</sup> Indeed, the complexities of this case do not solely arise based on the legal uncertainty of revocability or divestment of remainder interests, but those issues do create an additional layer of complex legal issues that must be sorted through.

The litigation that abounds on the issue of revocability and divestment of remainder interests could be avoided—or at least reduced—if each state adopted the URPTODA. The URPTODA makes clear provisions for what is required to revoke a transfer on death deed.<sup>210</sup> Additionally, it makes every transfer on death deed revocable, regardless of whether irrevocable language is included in the deed.<sup>211</sup> The clear provisions in the URPTODA allow grantors and beneficiaries to understand the extent of their rights. Importantly, this would also provide clarity and certainty to the attorneys representing or advising the grantors or beneficiaries as to their legal rights under a deed in this form. Thus, each state should adopt the URPTODA to avoid unnecessary litigation and interfamilial disagreements.

### B. *Effective Drafting and Planning*

Where there is uncertainty in the law, people are often hesitant to act because they want to know what the results of their plan or strategy will be before they implement it.<sup>212</sup> As noted, before the advent of the transfer on death deed—or some form thereof—“probate was still necessary to clear title when a decedent died owning real property.”<sup>213</sup> While attorneys are often cautious or slow to utilize new or novel instruments, the URPTODA's provisions are clear, easily understood, and include a

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heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship. . . .” *Id.*

208. Brief for Appellant, *supra* note 115, at 6.

209. *Id.* at 2, 6.

210. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 11 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2009).

211. *Id.* § 6.

212. Julie Ann Garber, *Estate Planning Strategies for Today's Clients*, in ESTATE PLANNING CLIENT STRATEGIES (2011) (discussing how people are hesitant to do any estate planning where there is uncertainty in the law due to estate tax laws).

213. John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 16 (2012).

helpful sample form of transfer on death deed for practitioners and owners of real property.<sup>214</sup> In states that have enacted the law, the motivation has been to provide individuals with a means to transfer one of their most important assets outside of probate while also avoiding “unintended adverse effects and complications.”<sup>215</sup> Avoiding unintended consequences and complications is precisely why each state should enact the URPTODA.

As previously discussed, there are a myriad of legal uncertainties that surround the use of transfer on death deeds, or some form thereof, in states that either do not have legislation or have legislation that differs from the URPTODA.<sup>216</sup> Trying to engage in effective estate planning, without certainty of the legal effects, is like playing a game without knowing the rules, or at least where the rules are subject to change at any moment. Accordingly, if a practitioner determines that the benefits of using the transfer on death deed outweigh the risk of the uncertainties, it is difficult for the practitioner to effectively draft the transfer on death deed—namely because the requirements and potential outcomes are unclear. Enacting the URPTODA provides the owners of real property and their attorneys with the clarity and understanding necessary to effectively formulate an estate plan and, if appropriate, draft a proper transfer on death deed. The URPTODA establishes the rules of the game; chiefly: (1) the formalities that are required for a valid transfer on death deed; (2) the effect of the execution of the transfer on death deed to the grantor and beneficiaries interest, both while the grantor is living and upon death; and (3) the revocability of, and process to revoke, a transfer on death deed.

The first major point of clarity provided by the URPTODA is the formalities required for the transfer on death deed to be effective. In a state that has enacted the URPTODA, a valid transfer on death deed differs in many ways from other *inter vivos* deeds. It is imperative that these formalities are both understood and satisfied because the statutes are strictly construed.<sup>217</sup> For example, a transfer on death deed requires the “essential elements and formalities” of a typical deed, but the clause

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214. Richard A. Crow & Richard L. Spencer, *Real Estate Law*, 78 TEX. B.J. 657, 658 (2015) (addressing the recently enacted Texas Real Property Transfer on Death Act, the requirements for the deed to be effective, and the important aspects of the deed’s revocability).

215. Jared N. Kawashima & Dwight K. Muraoka, *The Hawaii Uniform Real Property Transfer on Death Act — Another Tool in the Estate Planner’s Arsenal*, 16 HAW. B.J. 43, 43 (2013).

216. See *supra* Section III.A (discussing several legal uncertainties that have resulted in litigation).

217. See *Groh v. Ballard*, 965 S.W.2d 872, 873 (Mo. Ct. App. 1998) (holding that where the strict requirements of the Nonprobate Transfers Law were not adhered to, the resulting deed will be held invalid).

transferring title must state that the transfer does not occur until death.<sup>218</sup> Further, a transfer on death deed must be recorded prior to the transferor's death in order to be effective.<sup>219</sup> This varies slightly from states like Florida where the law "has always been that an unrecorded deed does not affect its validity as between the parties and their privies."<sup>220</sup> This is an important distinction for a practitioner to be aware of. Imagine a client that owns real property but does not wish to publicize her intended dispositions of property until death. Under these facts, in a state that has enacted the URPTODA, a transfer on death deed would no longer be a potential tool for this client to utilize. This is a prime example where a practitioner, unaware that the recording requirement differed from the standard *inter vivos* transfer, may provide improper advice to his client—who would be unaware that the deed would not execute as expected upon his death. A similar distinction lies in the formality of notice, delivery, and acceptance. The URPTODA clearly states that, unlike an *inter vivos* deed, the transfer on death deed is effective without notice, delivery, or acceptance during the transferor's lifetime.<sup>221</sup> Thus, states that enact the URPTODA will have clear guidelines as to the formalities that are the same as *inter vivos* deeds, and those that differ.

Another essential point of certainty that the URPTODA provides is the legal effect of a transfer on death deed at the time of execution. There has been a longstanding debate as to whether the transfer is testamentary or nontestamentary, whether the beneficiary receives an interest at the time of the deed's execution or only upon the transferor's death, and whether the grantor has transferred or relinquished any rights or powers by including the remainder beneficiaries.<sup>222</sup> These uncertainties lead to significant legal consequences, including whether creditor claims can attach to the property.<sup>223</sup> The URPTODA addresses these concerns head on and provides as follows:

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218. UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 9(2)–(3) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2009).

219. *Id.* § 9(3).

220. *Fryer v. Morgan*, 714 So.2d 542, 545 (Fla. Dist. Ct. App. 1998); Fla. Stat. § 695.01 (2016).

221. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 10 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2009).

222. See Ronald R. Volkmer, *Nebraska's Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 CREIGHTON L. REV. 499, 503 (2013) (discussing the "fundamental divide" between *inter vivos* and testamentary transfers; and how the URPTODA abolishes the "fundamental legal distinction" and legislatively creates the "legal fiction" of a nontestamentary transfer that does not occur until the transferor's death).

223. See *In re Estate of Carlson*, 367 P.3d 486, 495 (Okla. 2016) (discussing whether creditor claims of mortgagee should be paid from the estate when the secured property passes outside of probate via transfer on death deed).

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.<sup>224</sup>

This section of the URPTODA, along with Section 7 which clearly states that a transfer on death deed is nontestamentary, is essential to definitively answering a large number of the outstanding questions. It has been said that the URPTODA “is attempting to abridge a fundamental legal distinction that has been embedded in real property law for centuries. When it comes to real property, there has always been a fundamental divide between inter vivos and testamentary transfers.”<sup>225</sup> However, the URPTODA abolishes this fundamental legal distinction, or at least creates an exception to the rule, and clearly establishes that a transfer on death deed is a nontestamentary transfer that “does not operate until the transferor's death.”<sup>226</sup> While some “[t]raditionalists may cringe” at this idea, practitioners and real property owners alike should celebrate.<sup>227</sup> This is precisely the legal certainty that practitioners need to effectively plan the estates of their clients. In fact, this is the most compelling reason for states to enact the URPTODA, because without clear legislation, the potential for litigation and outright confusion regarding the legal uncertainties of these fundamental distinctions is quite high.

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224. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 12 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2009).

225. See Volkmer, *supra* note 222, at 502–03.

226. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 12 cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2009).

227. See Volkmer, *supra* note 222, at 503.

Revocability is another major issue with transfer on death deeds to which the URPTODA brings clarity. Section 6 states unequivocally that “[a] transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.”<sup>228</sup> The commentary following this section explains that the mandatory rule, that the transferor retains the power to revoke the deed, is a fundamental feature of the transfer on death deed.<sup>229</sup> The URPTODA further provides the exclusive methods of revoking an executed, recorded, and effective transfer on death deed.<sup>230</sup> Of note, the URPTODA allows for revocation of a transfer on death deed by subsequent deed or instrument of revocation, but does not allow for revocation by act or will.<sup>231</sup> This point is essential for estate planners to effectively plan for their clients. It is imperative that practitioners are aware that they will have the added responsibility of identifying any prior transfer on death deeds that have been recorded and making sure that those deeds are either aligned with their client’s current wishes or that that they are properly revoked.<sup>232</sup> Additionally, recall the discussion from the previous section on *Brock v. Willhoite*. This legislation may have given the practitioner in that case the legal certainty or awareness needed to have drafted the original and subsequent deeds effectively. Ideally, the practitioner in that case would have contemplated the language of subsections (b)(1)–(2), which provides the rules governing revocation when the transfer on death deed is made by multiple owners.<sup>233</sup> However, in that case, the practitioner did not have the luxury of legislation that clearly established how the interests would run and the requirements for effective revocation—as Florida has not enacted a transfer on death deed law. Thus, states should enact the URPTODA to effectively provide their practitioners with the rules that will govern transfers of real property via a transfer on death deed and place them in a position to effectively advise their clients with legal certainty.

### CONCLUSION

The use of transfer on death deeds—or some form thereof—has become a very popular tool for estate planners across much of the country. While the underlying concept and function of the transfer on

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228. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 6 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2009).

229. *Id.* § 6 cmt.

230. *Id.* § 11.

231. *Id.*

232. See Comment to Section 11 for discussion on how the URPTODA’s position differs from the Restatement (Third) of Property (Wills and Other Donative Transfers) on whether subsequent wills can revoke prior will substitutes like a transfer on death deed. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 11 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2009).

233. *Id.*

death deed is essentially the same, the means that each state uses to accomplish the nonprobate transfer goal is quite different. As previously discussed, this discontinuity creates legal uncertainties for both owners of real property and their attorneys. Potentially, these uncertainties preclude the use of the transfer on death deed where the transfer on death deed would have been an ideal instrument to achieve the owners' wishes. On the other hand, the legal uncertainties make using and drafting transfer on death deeds a malpractice landmine. Ineffective use and drafting leads to a multitude of problems, including unnecessary litigation and title issues. The bottom line is that transfer on death deeds are an essential tool for smaller estates looking to avoid probate, but those same estates cannot endure the uncertain legal effects that are currently associated with transfer on death deeds in states like Florida, which has not enacted legislation.

Each state, and particularly Florida, should adopt the URPTODA to establish the rules of the game with clarity and provide certainty of the legal effects associated with transfer on death deeds. Similar will substitutes have been available for other property assets for quite some time now. Real property assets should not be an exception but should continue along the same nonprobate revolution trajectory. It is true that real property is not as fungible as personal property in many cases, but the same real property protections remain in place for a transfer on death deed that are in place for *inter vivos* transfers or will formation. Thus, the focus should not be on the type of property owned, but rather the means by which the transferor wishes to transfer that property. Providing certainty of the legal effects will promote donative freedom to owners of real property and remove many of the hurdles that practitioners collide with in drafting this form of deed. Further, clear legislation such as the URPTODA will establish the rules necessary to utilize transfer on death deeds in a manner that preserves clear, insurable chains of title, consistent with other existing legislation aimed at preserving marketable title. At the end of the day, real property owners and attorneys should be able to know—with a high degree of certainty—what the legal effects on real property will be when they utilize a tool like a transfer on death deed. Adopting the URPTODA provides that level of certainty.

