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Tearing Down the Wall: How Transfer-on-Death Real-Estate Deeds Challenge the Inter Vivos/Testamentary Divide

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**TEARING DOWN THE WALL: HOW TRANSFER-ON-DEATH
REAL-ESTATE DEEDS CHALLENGE THE INTER
VIVOS/TESTAMENTARY¹ DIVIDE**

DANAYA C. WRIGHT* & STEPHANIE L. EMRICK**

ABSTRACT

This Article will examine one of the most recent will substitutes, the transfer-on-death (“TOD”) real-estate deed. Nearly half of the states have recognized, through common-law forms or legislation, a mechanism to allow for the transfer of real property on death without using a will, without following the will formalities, and without necessitating probate. This new tool in the estate planner’s toolbox is invaluable: revocable trusts have proven too expensive for decedents of modest means, and wills continue to require formalities that can easily frustrate non-lawyer-drafted estate documents. But the variety of TOD deed rules and mechanisms that the different states have adopted has led to disparity and uncertainty in form and outcome, resulting in litigation and frustration of decedent’s intent.

We believe this uncertainty and frustration will continue as even more states adopt the Uniform Real Property Transfer on Death Act (“URPTODA”),² which purports to stabilize the law and facilitate testamentary intent. States grappling with this new form interpose significant differences, and lawyers and judges are not all on the same page as to the consequences. One source of confusion is the URPTODA’s provision that TOD deeds are

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1. ROLAND BARTHES, S/Z 107 (Richard Miller trans., Hill and Wang 1992) (1970) (“[I]t is the slash of censure, the surface of the mirror, the wall of hallucination, the verge of antithesis, the abstraction of limit, the obliquity of the signifier, the index of the paradigm, hence of meaning[!]”).

* Clarence J. TeSelle and University of Florida Term Professor of Law. I would like to thank the University of Florida, Levin College of Law for its support of my research, and especially Lee-ford Tritt, Michael Wolf, and Grayson McCouch for their invaluable conversations on the subject.

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2. UNIF. REAL PROP. TRANSFER ON DEATH ACT (UNIF. LAW COMM’N 2009).

*non-testamentary and, at the same time, the Uniform Act provides that the property rights do not transfer until death.*³

Although it is one thing to declare that TOD deeds are non-testamentary even though property rights don't transfer until death—which in itself goes against centuries of formal legal rules—it is quite another to get all the other legal consequences to fall into place accordingly. For instance, would a state's anti-lapse statute apply to save a beneficiary designation if the deed is deemed non-testamentary, even though the intent is to have the real property transfer upon death?

In our opinion, the TOD deed pushes the juridical binary of inter vivos and testamentary transfers beyond coherence and rationality. The law of will substitutes has already undermined the rationality of maintaining the divide, and in this Article, we will argue that the time has finally come to reject the division between inter vivos and testamentary transfers and seek a rational and holistic set of tools and formalities to gain the benefits of probate avoidance that will substitutes provide with the ease of control and full revocability of wills. Elevating form over functionality, although a characteristic of the common law, inevitably disserves the interests of those who cannot afford lawyers who can easily draft around the sometimes-arcane distinctions between testamentary and inter vivos transfers to gain the benefits of each while avoiding the burdens.

3. Transfers of property can occur during the owner's life, in which case they are termed inter vivos or non-testamentary, and they are subject to certain rules requiring intent and delivery. Transfers of property that occur at death are termed testamentary and are subject to different rules, usually requiring transfer according to a validly executed will or the laws of intestate succession. Many tax and property rules depend on the distinction between inter-vivos and testamentary transfers, although the line between these is blurring. The URPTODA has a contradiction built in when it provides that property rights do not transfer until death in Section 5, which would make it seem testamentary, while in Section 7, the statute declares that the TOD deed is non-testamentary. UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 5, 7 (UNIF. LAW COMM'N 2009).

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I. INTRODUCTION⁴

In Shakespeare's tragedy *King Lear*,⁵ the protagonist faces a universal human dilemma: when he gets tired of the work of maintaining his kingdom, does he give up his property and power to his daughters before he dies upon a promise that they will care for him in his old age, or does he hang onto it all until he dies, perhaps mismanaging it as he ages?⁶ Old age and the attendant period of decline and incapacity loom large in Lear's imagination. The tragic outcome of Lear's decision to give up his property and hope his children would support him turned out to be foolhardy, as it brought together all of those unfortunate circumstances of mental incapacity, ingratitude, greed, and helplessness. Yet, however we might try to learn from Lear's situation, we all face the same dilemma as we prepare for that journey into the other world, although each person's path is unique.

4. Certain descriptions of TOD deeds and their history appear in *Transfer on Death Deeds: It Is Time to Establish the Rules of the Game* by Stephanie Emrick and appear here with the permission of the *Florida Law Review*. Stephanie Emrick, Note, *Transfer on Death Deeds: It Is Time to Establish the Rules of the Game*, 70 FLA. L. REV. 469 (2018).

5. WILLIAM SHAKESPEARE, KING LEAR.

6. *Id.* at act 1, sc.1.

The estates-and-trusts practitioner must become adept at deciphering whether a client's children are more like Regan and Goneril or more like Cordelia,⁷ and whether the client is going to require significant care and attention like Lear or is going to remain independent and strong-willed until just moments before death. Armed with that knowledge, the practitioner prepares an estate plan that maintains the client's independence, transfers the property into trust, disposes of it well before death when the client's mind is strong and intentions are clear, or ties it up with strings and conditions to protect the client during a protracted period of incapacity. The practitioner also anticipates the transfer-tax effects of giving away property during life or at death, as well as the income tax or capital gains taxes that might attach to property because of changes in value. The practitioner also considers whether the client, like Blanche DuBois,⁸ has always relied on the kindness of strangers or has been an independent spirit who, like Polonius, would "[n]either a borrower nor a lender be."⁹ Facilitating the uniqueness of each client's approach to the universal metamorphosis of death makes practicing in this area of law particularly rewarding.

Today's practitioner has a much more robust toolbox than the estates lawyer of Shakespeare's day, Coke's day, or Blackstone's day.¹⁰ To a great extent, the probate revolution of the late twentieth century has been a steady march toward extricating property owners from the Lear dilemma by providing mechanisms to maintain as much control as possible over property up until the moment of death, but then providing for the smooth, private transmission of that property to the designated beneficiaries without the cost or delay of court-supervised probate proceedings, for the specter of *Jarndyce v. Jarndyce*¹¹ also looms large in the public imagination.¹² The

7. For those not familiar with *King Lear*, Regan and Goneril resented their father, refused to care for him according to the terms of his bequest, and ultimately cast him out where he perished from exposure and a broken heart. Cordelia, his youngest daughter, tried to save him and care for him out of true love, even though he had not given her any property, but her efforts came too late. Only in his last moments did he learn the true character of his three children. See WILLIAM SHAKESPEARE, *KING LEAR*.

8. See generally TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* (1947).

9. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 1, sc. 3, line 75 (Bigelow, Smith & Co. 1909) (1603).

10. In terms of the basic mechanisms of estate planning, little changed between the Statute of Wills of 1540, 32 Hen. 8, c. 1 (Eng.), and the probate revolution of the late twentieth century. Sir Edward Coke (1552–1634) and William Blackstone (1723–1780) would have likely recommended a will, a trust, or a strict settlement to accomplish the estate planning of the landed classes. By the late twentieth century, there existed life insurance, payable-on-death ("POD") securities accounts, and joint tenancies for bank accounts that were simply not available in their day. See J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 280–297 (4th ed. 2002) (explaining the evolution of different mechanisms of estate planning and the different motivations during the last few hundred years).

11. *Jarndyce v. Jarndyce* is the fictional probate case that looms over the plot of Charles Dickens' *Bleak House*. Eventually, the chancery case consumes the entire estate and all the bene-

revocable trust, the joint tenancy, the transfer-on-death securities account, as well as the old standby of the traditional life estate-and-remainder deed all provide additional tools, besides the will and the default rules of intestate succession, to allow decedents to control their property until death, yet designate its succession in the clearest, simplest manner that avoids probate wherever possible.¹³

The law has been both a help and a hindrance to this process of simplification, with its insistence on certain formalities to lessen the risk of fraud and its reliance on centuries-old property rules that have made rigid the interests and processes of inter-generational transmission of wealth. The person who wants to retain complete control of property until the moment of death may certainly do so, but then, to control distribution of the property after death, the decedent must execute a will with the traps of forms and formalities and the necessity of probate administration.¹⁴ Testators who want to avoid the difficulties of management during a period of incapacity, or who clearly know the primary objects of their bounty and have a solid safety net, may give away much of their property during life by making inter vivos gifts that are immediate and complete.¹⁵ But inter vivos gifts re-

ficiaries are left penniless long after the actual parties have passed from memory. CHARLES DICKENS, *BLEAK HOUSE* 15 (Nicola Bradbury ed., Penguin Books 2011) (1853).

12. See Kent D. Schenkel, *The Trust-as-Will Portmanteau: Trill or Spork?*, 27 QUINNIPIAC PROB. L.J. 40, 40 (2013) (discussing how trusts have become more will-like and wills should become more trust-like in order to ease some of the burdens of probate); see also John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108–09 (1984) (using the term “nonprobate revolution” for the first time to describe an era of probate avoidance); Grayson M. P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 759–60 (2008) (discussing the era of large-scale probate avoidance that began in the mid-twentieth century).

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

14. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislation Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism, Part One: The Wills Act Formula, The Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 176 (1991) [hereinafter Miller, *Part One*]; C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislation Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism, Part Two: Uniform Probate Code Section 2-503 and a Counterproposal*, 43 FLA. L. REV. 599, 199–204 (1991) [hereinafter Miller, *Part Two*].

15. Giving property away during life eases the succession of property at death because the property is no longer in the decedent’s estate and does not need to be administered or probated. But to gain the full benefits of inter vivos transfers, donors usually need to give away the full bundle of sticks; they cannot retain lifetime use or control without risking a determination that the property transfer will be deemed testamentary. See Austin W. Bramwell & Elisabeth O. Madden, *Toggling Gross Estate Inclusion On and Off: A Powerful Strategy*, EST. PLAN., Mar. 2017, at 3; see also, e.g., ALVIN ARNOLD & MYRON KOVE, REAL ESTATE PROFESSIONAL’S TAX GUIDE § 42:12 (Supp. 2018); Malcolm L. Morris, *The Tax Posture of Gifts in Estate Planning: Dinosaur or Dynasty?*, 64 NEB. L. REV. 25 (1985).

quire giving up an ownership interest. Thus, property owners often try to give up as few property rights as possible to retain control but make it appear that an inter vivos transfer has been made.¹⁶ Yet, as the Duke of Norfolk quipped,¹⁷ we may want to have our cake and eat it too, but the lawmakers of Norfolk's day, and ours, seem to think we are too weak-natured to be given such freedom.¹⁸ Most of us with a modest amount of property want a very simple process: to control the property fully until death, but then have it pass smoothly to designated beneficiaries without the cost and delays of court-supervised probate administration.¹⁹ And better yet, we want a simple process to make changes to our donative documents that do not require locking ourselves up with witnesses and a notary until the ritual execution is complete.²⁰ But the law of succession does not yet give us what we want. Instead, it gives us what long-dead common lawyers

16. Property owners have many reasons for wanting to make certain gifts appear to be one thing (inter vivos or testamentary), when they are really the other, and estate planning courses spend months parsing the distinctions so that estate plans can be drafted to get the best of both mechanisms. For instance, gifts made during life often are not included in the elective share calculation, so testators will try to keep control over property until death but part with enough property rights to make the transfer count as an inter vivos transfer that removes the property from the surviving spouse's elective share. Or, to take advantage of the unlimited marital deduction, testators may transfer wealth to a surviving spouse in a Qualified Terminable Interest Property trust that qualifies as a transfer to the spouse, but in fact significantly limits the spouse's control over the property. See Trav Baxter, *The Impact of Tax Reform on Estate Planning*, MITCHELL WILLIAMS: BETWEEN THE LINES BLOG (Feb. 8, 2018), <https://www.mitchellwilliamslaw.com/the-impact-of-tax-reform-on-estate-planning>.

17. 13 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII pt. 1, at 189 (James Gairdner ed., London, Her Majesty's Stationery Office 1892).

18. The primary reason given for insisting on the formalities of will execution is to prevent duress and fraud by beneficiaries against weakened testators. The mortmain statutes of the eighteenth and nineteenth centuries also were based on the assumption that the elderly would succumb to threats of eternal damnation if they did not leave adequate bequests to the church. Protecting the elderly from their own weakness is a principle function of the formalities in estates law. By allowing testators to execute instruments transferring property at their death without any of the formalities' protections, legislators fear that overreaching by trustees, beneficiaries, financial planners, life insurance agents, and the like will seriously frustrate the true intentions of decedents and deprive intended beneficiaries of their bequests. See Miller, *Part One*, *supra* note 14, at 201–04.

19. See Edward F. Koren, *Preparation and Uses of Trusts*, in 2 EST. TAX & PERS. FIN. PLAN. § 19:15 (2018) (discussing the length of time required to probate a typical estate and the potential delays that can prolong the process); George M. Turner, *Problems With the Probate System*, in 1 REVOCABLE TRUSTS 5th § 7:2 (2018) (analyzing the cost of probate and the controversies that arise); Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 559–63 (2008) (analyzing how the privacy aspects of trusts can be harmful to settlors, beneficiaries, and even trustees).

20. Most states' statutes of wills require a multitude of formalities, including signing at the bottom of the will, in front of witnesses, the witnesses signing in the presence of each other, and the testator acknowledging the will and/or the testator's signature. The Uniform Probate Code ("UPC") provides an attestation form and ritual process that satisfies the will formalities of every state in the UPC. UNIF. PROB. CODE §§ 2-502 to -504 (1969) (UNIF. LAW COMM'N, amended 2010); see, e.g., FLA. STAT. §§ 732.501–502 (2018); MD. CODE ANN., EST. & TRUSTS §§ 4-101 to -102 (LexisNexis 2018); N.Y. EST. POWERS & TRUSTS LAW §§ 3-1.1–2 (LexisNexis 2018).

thought we needed: a distinct line between inter vivos and testamentary transfers with significant legal consequences attendant on each.

Despite the fact that Coke and Blackstone would be deeply concerned by the opportunities for fraud and overreaching that may arise when we do away with probate and the will formalities, the probate revolution has moved the ideal closer for many decedents through a variety of will substitutes, including, but not limited to, revocable trusts, life insurance, and transfer-on-death (“TOD”) or payable-on-death (“POD”) beneficiary designations in securities accounts, bank accounts, and other contractual arrangements. These mechanisms all allow for almost completely unfettered control during life and smooth transmission to successors without court-supervised probate. But until recently, land has withstood the modernization of the age-old laws of succession. If the land was not transferred during life, either directly to a donee or into a trust, the transfer of the real property at death would not be effective without court-supervised probate administration. If a landowner wanted to control the disposition of the real property at death, and not have it pass according to the intestacy statutes, the real property had to be disposed of by a will, which required compliance with the will formalities. Historically, there was only one other alternative—a risky alternative that was less than ideal—the landowner could deed away the remainder and retain only a life estate, which meant relinquishing significant control over the land during life.²¹ Although securities, bank accounts, and personal property could be easily transferred at death outside probate without having to give up lifetime control and without making a will, land could only pass outside probate through a trust or an inter vivos transfer. Yet, if a \$500,000 securities account could pass using a beneficiary designation, why couldn’t a \$100,000 home pass the same way?²² After all, most people’s single largest asset is the family home, and but for that asset, they could easily avoid probate through the usual will substitutes.

Enter the beneficiary real-estate deed.²³ The beneficiary deed has been referred to by a multitude of terms through the years, but the most

21. This of course is a bad idea, as legal life estates are difficult to manage during the life tenancy. See *In re Will of Hall*, 456 S.E.2d 439, 440 (S.C. Ct. App. 1995) (illustrating the problems of dealing with a legal life estate followed by alternate contingent future interests).

22. See Michael A. Kirtland & Catherine Anne Seal, *The Significance of the Transfer-on-Death Deed*, PROB. & PROP., July/Aug. 2007, at 42, 42–43 (discussing how “[t]he 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”).

23. See *id.*; Dennis M. Horn & Susan N. Gary, *Death Without Probate TOD Deeds—The Latest Tool in the Toolbox*, PROB. & PROP., Mar./Apr. 2010, at 12, 13 (discussing the need for “flexible legal tools to allow individuals to transfer . . . property . . . on death while preserving the individual’s right to change his or her mind during life”); Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 540 (2006) (examining the advantages and disadvantages of TOD Deeds).

common term used in legislation seems to be *transfer-on-death* deed.²⁴ This term is often shortened to *TOD* deed²⁵ or occasionally fully abbreviated to *TODD*.²⁶ However, the terms *beneficiary deed*,²⁷ *revocable transfer-on-death deed* (“RTOD”),²⁸ *non-testamentary transfer*,²⁹ and *deed upon death*³⁰ are used as well with little or no distinction as to how the transfers operate. All of these deeds have extended the probate revolution to real property by allowing landowners to execute a real-estate deed with a beneficiary designation that, if not revoked before the landowner’s death, results in the land automatically transferring to the designated beneficiary outside of probate.³¹ And after lengthy study and consultation of a variety of state beneficiary-deed statutes, the Uniform Law Commission (“ULC”) has recommended a Uniform Real Property Transfer on Death Act (“URPTODA”) that has been adopted in fourteen states and the District of Columbia.³² Roughly half of states today have a mechanism, of one sort or another, to permit the transfer of land at death through some form of beneficiary deed.³³ Some of those states have recognized *enhanced-life-estate* deeds, sometimes known as *ladybird* deeds, through common law, while others have passed legislation, in some variation of the URPTODA or other legislation, that expressly permits the use of statutory beneficiary deeds.³⁴

Because of the diverse nomenclature surrounding these deeds, we refer to TOD deeds in their generic form as real-estate deeds that allow a transferor to retain control of the real property during life yet provide for a bene-

24. The term “transfer-on-death deed” is preferred by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in drafting the Uniform Real Property Transfer on Death Act (“URPTODA”). 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., para. 6 (UNIF. LAW COMM’N 2009).

25. See, e.g., KAN. STAT. ANN. § 59-3501 (2005).

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

27. See, e.g., ARIZ. REV. STAT. ANN. § 33-405 (2014).

28. See, e.g., CAL. PROB. CODE § 5642 (West Supp. 2018).

29. See, e.g., WYO. STAT. ANN. § 2-18-101 (2017).

30. See, e.g., NEV. REV. STAT. ANN. § 111.661 (LexisNexis Supp. 2016).

31. Gary, *supra* note 23, at 534; Julie Garber, *How to Use TOD or Beneficiary Deeds to Avoid Probate*, THE BALANCE, <https://www.thebalance.com/use-deeds-avoid-probate-3505250> (last updated Nov. 8, 2018). Transfer is not entirely automatic, but the beneficiary usually only needs to file a death certificate with the property recorder’s office and have a new deed recorded in the beneficiary’s name to perfect the transfer.

32. UNIF. REAL PROP. TRANSFER ON DEATH ACT (UNIF. LAW COMM’N 2009); see Memorandum from Thomas P. Gallanis, Professor of Law, Washington & Lee Univ., to Drafting Comm. for Unif. TOD for Real Prop. Act (Feb. 14, 2007), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=02bb980a-faf7-48fa-fae0-e03d818e6068&forceDialog=0> (describing background information about drafting a Uniform TOD for Real Property Act).

33. David Major, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California’s Trusts & Estates Attorneys Heading for the Hills*, 49 SANTA CLARA L. REV. 285, 291 (2009).

34. See *infra* Section III.B.

ficiary designation naming a person who will take the real estate upon the transferor's death. All of the TOD deed forms allowed by statute have the same basic structure in that no property rights transfer until the death of the transferor, although there are important differences regarding co-ownership, lapse, revocability, and other legal implications of these true TOD deeds.³⁵ We also discuss the enhanced-life-estate deeds that are generally the product of the common law, are not statutorily recognized, and seem to give away a remainder interest of some sort inter vivos, while the transferor retains only a life estate. Even though the transferor retains the right to revoke the remainder as well as the right to manage and maintain the real property as a fee owner, enhanced-life-estate deeds may function differently than true TOD deeds.³⁶ When referring to the entire universe of deeds that attempt to achieve this TOD effect, we use the more generic term beneficiary deed, even though that does not fully capture the range of deed forms that exist to accomplish essentially the same goal.

The key advantages of a beneficiary designation for real property include retained control for the transferor during life, simplicity of execution, full revocability, and probate avoidance.³⁷ The most important characteristic of the beneficiary deed is that the owner or grantor retains virtually complete control during his or her lifetime. Because no property interests vest 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. Additional benefits also accrue when possession and title to the property transfers upon death rather than inter vivos at the time of the execution of the deed, which is the case with true TOD deeds, although perhaps not with enhanced-life-estate deeds. Unlike taking title as joint tenants with right of survivorship, this form of transfer does not trigger the negative tax consequences of a completed gift during the owner's lifetime, nor does the property owner have to give up an ownership in-

35. Gary, *supra* note 23, at 534.

36. The enhanced life estate is something of a chimera. In a standard life estate deed, the transferor gives away everything but the life estate, making it clear that the remaindermen have received some future interests inter vivos. But with an enhanced-life-estate deed, the most the remaindermen receive is a contingent right to receive the property if the life tenant dies without revoking it. In that sense it functions like a will, except that under a will absolutely nothing passes to the beneficiary until death. With an enhanced-life-estate deed, some sort of contingent future interest has passed to the remaindermen, even if that contingency is not a recognizable property right. Although the typical enhanced-life-estate deed functions like the TOD deed in that the transferor retains full power to manage the property during life and the possession and title shift only upon death, the enhanced-life-estate deed allows for some customization of the retained powers in a way that the TOD deed does not.

37. See Major, *supra* note 33, at 302–06 (purporting that the primary advantage of transfer on death deeds is their simplicity); see also Gary, *supra* note 23, at 542–43 (discussing the many advantages of TOD deeds).

terest during life.³⁸ Moreover, the property is protected from the creditors of any of the beneficiaries until the time of the transferor's death.³⁹ The property is also protected from the transferor's creditors upon the transferor's death as a non-probate asset, except to the extent that the real estate itself secures the underlying debt.⁴⁰ Finally, the transferor may continue to exercise the normal rights of a property owner, including the right to sell or mortgage the property and receive applicable tax exemptions.⁴¹

Moreover, the cost of transferring real property assets through beneficiary deeds is much less expensive than the cost of transferring property through a trust or a will.⁴² The cost of a probate proceeding is often substantial, and in nearly all cases will exceed the cost of having a beneficiary deed prepared.⁴³ 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 beneficiary deeds.⁴⁴ 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."⁴⁵

Additionally, the beneficiary deed allows the transferor to revoke the beneficiary designation at any time during life through a straightforward process, which is set out by law in states that have enacted legislation.⁴⁶ "[G]enerally all that is required is the filing of a revocation of the [beneficiary deed] prior to the grantor owner's death."⁴⁷ 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.⁴⁸ Transferors wishing to modify the beneficiaries to a particular piece of real property can simply execute and record a subsequent beneficiary deed, which will supersede the previous transfer and become the effective deed

38. See Gary, *supra* note 23, at 542; see Catherine Anne Seal & Michael A. Kirtland, *The Transfer-on-Death Deed in the Elder Law Setting*, 4 NAT'L ACAD. ELDER L. ATT'YS J. 71, 73–75 (2008) (discussing the tax concerns of transferring real property assets during life).

39. Gary, *supra* note 23, at 542–43.

40. Amanda Kreshover, *Transfer on Death Deed*, HOUS. LAW., Mar./Apr. 2016, at 40, 40.

41. *Id.*

42. Gary, *supra* note 23, at 542–43.

43. *Id.*

44. *Id.*

45. *Id.* at 543.

46. Keriann L. Riehle, Comment, *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, 4 (2015).

47. *Id.*

48. Gary, *supra* note 23, at 542.

when the transferor dies.⁴⁹ When compared to the traditional joint tenancy, the revocability and flexibility of the beneficiary deed provides a clear advantage to the transferor in giving the ability to modify an estate plan during life while still avoiding probate.⁵⁰

A brief discussion of the diversity of beneficiary deed mechanisms, however, illustrates the need for statutory clarification and uniformity. Despite the basic similarities, the variety of statutory and common-law mechanisms has led to significant operational differences that create traps for the unwary estate planner.⁵¹ And even the Uniform Act may sometimes produce results that are contrary to the intentions of the drafters and many clients. For example, unlike other will substitutes, the URPTODA's provisions that no property rights transfer until death on the one hand,⁵² and declarations on the other that the TOD deed is non-testamentary⁵³ and, therefore, not subject to the will formalities, seem like an inconsistency likely to lead to significant interpretive confusion. But, ultimately, the problem lies not with the beneficiary-deed mechanism so much as with the arcane legal distinction between inter vivos and testamentary transfers; a distinction that has become so riddled with exceptions and statutory workarounds it has become "[m]ore honour'd in the breach than the observance."⁵⁴

In this Article, we will begin with a brief history of the common law's unique treatment of land and then explain the beneficiary real-estate deed and the variety of mechanisms that have been adopted in various states to achieve TOD results.⁵⁵ We then briefly discuss the Uniform Act and the specific way it resolves certain problems.⁵⁶ Next, we turn to a number of important situations that we argue need further attention from lawmakers, including the questions of revocability and the workings of the beneficiary deed in the context of powers of appointment.⁵⁷ There are also serious questions about the mechanics of the deed in the case of creditor claims of

49. 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. 2 JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES § 333 n.5.70 (3d ed. 2003 & Supp. 2012). 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. *Id.*

50. See Riehle, *supra* note 46, at 4.

51. See Memorandum from Thomas P. Gallanis, *supra* note 32, at appx. (reproducing all the state TOD statutes and discussing the differences within each provision).

52. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 5 (UNIF. LAW COMM'N 2009).

53. *Id.* § 7.

54. SHAKESPEARE, *supra* note 9, at act 1, sc. 4, line 16.

55. See *infra* Part II.

56. See *infra* Part III.

57. See *infra* Part IV.

joint tenants, grantors, and beneficiaries or remaindermen, as well as potential problems with lapse and the consequences of future-interests determinations. Finally, we conclude that the legal distinction between testamentary transfers and inter vivos transfers needs to be rejected as artificial, unnecessary, and counter-productive in today's legal landscape. We end with a call to eschew formalistic distinctions that only serve to hinder testamentary intentions without securing the important benefits that are, or should be, the hallmark of today's modern succession law.⁵⁸

II. THE UNIQUENESS OF LAND AND THE ADOPTION OF THE BENEFICIARY DEED FOR REAL ESTATE

For centuries in England, and then in the United States, real and personal property were treated differently at death. In England before the 1540 Statute of Wills,⁵⁹ decedents could execute a *testament* for distribution of personal property, which would be administered in the ecclesiastical courts, but could not execute a *will* for real property.⁶⁰ After 1540, the same legal document could be used to dispose of both real and personal property by men and unmarried women, but even then only two-thirds of the real property could be disposed of by will before 1645.⁶¹ After 1645, all real and personal property could be disposed of by a will, but the law still treated real and personal property differently.⁶² Personal property was deemed to pass to the executor upon death, while real property passed immediately to the designated heirs or beneficiaries.⁶³ Dower rights of surviving spouses also differed based on whether the estate consisted of real or personal property.⁶⁴

In the United States, similar distinctions existed in many state probate codes, and some continue even today.⁶⁵ Dower or elective-share rights

58. *See infra* Part V.

59. 32 Hen. 8, c. 1.

60. Both *wills* and *testaments* are legal documents disposing of property at death. The testament was used in the ecclesiastical courts to dispose of personal property only, and the will was used in the law courts to dispose of real property. Today many will drafters use the term *will and testament* out of habit even though the law does not distinguish between the two anymore. *See* BAKER, *supra* note 10, at 254–57 (discussing why wills for land were not allowed); *see also* Miller, *Part One*, *supra* note 14, at 196–200.

61. BAKER, *supra* note 10, at 254–57; Miller, *Part One*, *supra* note 14, at 196–200; *see* Tenures Abolition Act 1660, 12 Car. 2, c. 24.

62. BAKER, *supra* note 10, at 386–87.

63. 1 WIGGINS WILLS & ADMINISTRATION OF ESTATES IN NORTH CAROLINA, § 19:1 (4th ed. 2005) (citing 2 J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION § 201 (3d ed. 1923)).

64. BAKER, *supra* note 10, at 269–71, 386–87.

65. Distinctions between real and personal property are found in the elective share statutes of several states. *See, e.g.*, IOWA CODE ANN. § 633.238 (West Supp. 2018); KY. REV. STAT. ANN. § 392.020 (West 2017); R.I. GEN. LAWS § 33-25-2(a) (2011). They are also found in the intestacy

might attach only to real or only to personal property.⁶⁶ Homestead rights usually attach only to real property.⁶⁷ Estates that contain real property are often ineligible for summary administration.⁶⁸ And, consistent with the old common-law distinctions between real and personal property, the law of concurrent estates continues to differentiate between real property and personal property when determining, at the time a gift is made, if someone's name is added to a real-estate deed or to a bank account. If a joint tenancy is created through a transfer of an interest in real property, the presumption is that a gift is made of half the real estate at the time the co-owner's name is added.⁶⁹ But if a joint owner is added to a bank account, courts usually attribute ownership on the basis of intent and contribution to the fund and not the formalities of title.⁷⁰ Joint tenancies of real property often still require the four unities, while joint tenancies of bank accounts do not.⁷¹

The court-supervised probate process has always been a necessary price to pay for using a will and thus retaining full control over property until death. But as the probate revolution unfolded throughout the last half of the twentieth century, lawyers, clients, and legislators pushed to enable property owners to transfer personal property at death using a variety of different mechanisms that allowed them to avoid probate.⁷² For example, life insurance came about via a contract provision that an insurer would pay

statutes of Rhode Island and Texas. R.I. GEN. LAWS § 33-1-10 (2011); TEX. PROB. CODE ANN. § 38(b)(1) (West 2003).

66. See, e.g., ARK. CODE ANN. §§ 28-11-301(a) (real property), 28-11-305 (personal property) (2012); D.C. CODE § 19-301 (2001) (real estate and surplus personal property); IOWA CODE ANN. § 633.238 (2018); KY. REV. STAT. ANN. § 392.020 (West 2017); MASS. GEN. LAWS ANN. ch. 191 § 15 (West); R.I. GEN. LAWS § 33-25-2(a) (real estate only).

67. See, e.g., CAL. PROB. CODE §§ 6500, 6520–27 (West 2009); IOWA CODE ANN. §§ 561.11–.12 (2018); MASS. GEN. LAWS ANN. ch. 188, § 4 (West 2014); MINN. STAT. ANN. § 524.2-402 (West 2012); W. VA. CODE ANN. § 38-9-1 (LexisNexis 2011).

68. See, e.g., ALA. CODE § 43-2-692(b) (LexisNexis Supp. 2016); CAL. PROB. CODE § 13101(a) (West Supp. 2018); DEL. CODE ANN. tit. 12, § 2306(a) (LexisNexis Supp. 2016); FLA. STAT. § 735.301–02 (2018); HAW. REV. STAT. ANN. § 560:3-1201 (LexisNexis 2015); 755 ILL. COMP. STAT. ANN. 5/25-1(a) (West Supp. 2018); MISS. CODE ANN. § 91-7-322(1); N.Y. SURR. CT. PROC. ACT LAW § 1302 (McKinney 2011); N.C. GEN. STAT. ANN. §§ 28A-25-1(a), 28A-25-1.1(a) (2015); 20 PA. STAT. AND CONS. STAT. ANN. § 3102 (West Supp. 2018); R.I. GEN. LAWS §§ 33-24-1–2 (2011).

69. 1 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 5:43 (3d ed. 2005); John V. Orth, *Presumed Equal: Shares of Cotenants*, 37 AM. C. TR. & EST. COUNS. L.J. 463, 464–65 (2011).

70. See *Deposit of Fund Belonging to Depositor in Bank Account in Name of Himself and Another*, 149 A.L.R. 879 (1944), and the cases cited therein, such as *Williams v. Tuch* (*In re Estates of Williams*), 39 N.E.2d 695 (Ill. App. 1942), and *Allstaedt v. Ochs*, 4 N.W.2d 530 (Mich. 1942).

71. The four unities of time, title, interest, and possession meant that joint tenancies of real property had to be created at the same time, with the same instrument, and grant each joint tenant the same interest and the full right to possession. See *Gardner v. Gardner*, 25 Md. App. 638, 335 A.2d 157 (1975); *Alexander v. Boyer*, 253 Md. 511, 253 A.2d 359 (1969).

72. See Langbein, *supra* note 12, at 1115–25; McCouch, *supra* note 13, at 1124–31.

benefits to a designated beneficiary if the insured made regular premium payments.⁷³ Life insurance was not a direct transfer of property from the decedent to the beneficiary; rather, it was a contractual right to have the company pay the beneficiary if the insured died during the term of the contract.⁷⁴ Similarly, the revocable trust permitted a property owner to transfer property to a trustee during life, with instructions to transfer that property at the settlor's death according to a set of instructions laid down in advance.⁷⁵ Contract and trust law defined the rights and responsibilities of the various parties and gave some assurances that property transfers were not fraudulent and appropriately reflected the decedent's intentions. Then came TOD and POD bank and securities accounts. These types of accounts, held by banks or securities companies, rested again on contract law.⁷⁶ They provided that if a decedent designated a particular beneficiary on an account, the company would transfer or pay to that beneficiary the proceeds of the account upon the account holder's death. Contract and trust law thus provided mechanisms to circumvent the strict probate rules that required inter vivos transfers of property to be physically delivered during life or testamentary transfers of property to go through the probate process and be guided by a will signed with the appropriate will formalities.⁷⁷

The beneficiary real-estate deed does not fall neatly into the category of will substitutes, however, because no third party (insurance company, bank, securities company, or trustee) is obligated by contract or trust law to perform a duty to transfer or pay over the decedent's property. Instead, the landowner simply executes and records a deed that designates a beneficiary to take the landowner's real property if the landowner dies without having revoked the beneficiary designation. In this sense, it is more like a will than a contract, for it designates who takes the property upon death, and it is fully revocable by the decedent up until death. But the beneficiary real-estate deed does not fall neatly into the trust or will category either. There is no trustee bound by a fiduciary duty to comply with any trust provisions, nor is

73. Gary, *supra* note 23, at 534–35; UNIF. PROB. CODE § 6-101 (1969) (UNIF. LAW COMM'N, amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 (AM. LAW INST. 2001).

74. *See* Miller, *Part One*, *supra* note 14, at 264–65.

75. *See* Gary, *supra* note 23, at 537.

76. Most states have since adopted legislation to permit standby trusts or POD/TOD designations. The UPC has a number of provisions to validate will substitutes that would likely not be valid in the absence of statutory authorization. *See, e.g.*, UNIF. PROB. CODE §§ 6-101 to -102, 6-301 to -311 (1969) (UNIF. LAW COMM'N, amended 2010).

77. Admittedly, this was not a complete circumvention because possession of the property was technically in the hands of the bank or securities company.

there a probate court supervising the transfer of the real property.⁷⁸ One of the big questions facing courts, lawmakers, and scholars regarding the beneficiary deed is whether it is testamentary (like a will) or inter vivos (like a trust or a joint account) and how the law should incorporate protections against duress and fraud if it is deemed non-testamentary.⁷⁹ If deemed testamentary, the deed would presumably need to be executed according to the will formalities. If deemed inter vivos, one would presume the requirements of a present transfer of a property right.

For centuries, a bright line existed between an inter vivos gift, which requires the present transfer of a property right to the beneficiary-grantee during the grantor's lifetime,⁸⁰ and a testamentary gift, which requires a will executed with the will formalities, or the strict rules of intestate succession.⁸¹ This made sense in a world when most property was tangible, when corporate forms and contracts did not aspire to manage the succession of property at death, and when probate was as easy as inviting the justice of the peace to the funeral to oversee the disposition of the property.⁸² For the sophisticated elite, property could be transferred inter vivos to avoid the feudal incidents by splitting up ownership over time, or across multiple grantees.⁸³ And, the modern will substitutes all gesture toward an inter vivos transfer of an ownership interest to move the transfer beyond the need for will formalities and probate. Thus, a fee owner who transfers a remainder and retains a life estate makes a present transfer of the remainder.⁸⁴ So too does the grantor who adds another's name to a joint bank account or to a parcel of real estate.⁸⁵ Revocable trusts are deemed to be inter vivos because a trust obligation is placed on the property when it is retitled into

78. Deeds are of record and courts can enforce the deed as with any real property transfer, but if a beneficiary fails to retitle the real property, there is no third-party fiduciary, account manager, or trustee with a legal duty to effectuate the transfer.

79. See *infra* Part V.

80. See Gary, *supra* note 23, at 535; Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955) (upholding as an inter vivos trust stock with a beneficiary designation that would pass to the beneficiary only at the death of the settlor).

81. Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 336 (2018) (discussing the resulting intestacy that occurs when the will execution formalities are not met).

82. See generally AMY LOUISE ERICKSON, *WOMEN AND PROPERTY IN EARLY MODERN ENGLAND* (1993).

83. See BAKER, *supra* note 10, at 259–79.

84. See, e.g., Still v. Hopkins (*In re* Hopkins), 494 B.R. 306, 319–20 (Bankr. E.D. Tenn. 2013); Abercrombie v. Andrew Coll., 438 F. Supp. 2d 243, 268 (S.D.N.Y. 2006); Moss v. Moss, 175 P.3d 971, 974 (Okla. Civ. App. 2007).

85. See Hilterbrand v. Carter, 27 P.2d 1086, 1088–89 (Or. Ct. App. 2001); POWELL ON REAL PROPERTY, § 51.03[3] (Michael Allan Wolf ed. 2009).

trust, even if the settlor, trustee, and beneficiary are all the same person.⁸⁶ In the case of testamentary gifts, however, the property rights transfer at death. Testamentary gifts generally occur through the laws of intestate succession, or via a validly executed will, and both entail the decedent's retention of full property rights and complete control and dominion up until death.⁸⁷ Because the property rights do not transfer during life in the case of a testamentary gift, any instrument purporting to make a testamentary gift is deemed to be fully revocable, leaving the decedent with complete control over the property during life. The cost of that complete control during life, however, is the necessity of court-supervised probate.

This dichotomy between inter vivos and testamentary gifts is usually simplified to the essential requirement that an inter vivos gift requires a present transfer of a property right or a contract right, while a testamentary gift, in which the property rights transfer only at death, is effective only if executed with the will formalities.⁸⁸ But a number of modern estate-planning tools and mechanisms have arisen that challenge this binary structure. The most common is the revocable trust, wherein the settlor transfers property into trust with the full power to revoke it at any time before his death, and only if not revoked does the property transfer at the settlor's death to the beneficiaries. Because after-acquired property can be added to the trust, as well as property pouring over from a will, and because the trust is easily revocable, it is hard to imagine the revocable trust as a fully inter vivos transfer. This is especially true when the trustee can revoke the trust merely by alienating trust property or otherwise acting like an outright owner and there are no fiduciary duties if the settlor is the trustee of a revocable trust.⁸⁹ The same is arguably true in the case of a life estate with a remainder contingent on the life tenant not revoking the remainder. Only when the life tenant dies without revoking is the remainderman assured of enjoying the property. Even life insurance and POD and TOD designations on bank and securities accounts seem testamentary in that they become ef-

86. See *Di Maggio v. Petralia* (*In re Estate of Petralia*), 204 N.E.2d 1, 3 (Ill. 1965); *Farkas v. Williams*, 125 N.E.2d 600, 603 (Ill. 1955); *Ridge v. Bright*, 93 S.E.2d 607, 610–13 (N.C. 1956); *Westerfeld v. Huckaby*, 474 S.W.2d 189, 192–93 (Tex. 1972).

87. *Katheleen R. Guzman, Intents and Purposes*, 60 KAN. L. REV. 305, 329 n.91 (2011) (discussing how testamentary intent involves the intent to make a gift at death and not during life).

88. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 6.1–2 (AM. LAW INST. 2001); Alex M. Johnson, Jr., *Contracts and the Requirement of Consideration: Positing a Unified Normative Theory of Contracts, Inter Vivos and Testamentary Gift Transfers*, 91 N.D. L. REV. 547, 569–70 (2016); Gary, *supra* note 23, at 537; E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1083 (1999).

89. UNIF. TRUST CODE §§ 601–604 (2000) (UNIF. LAW COMM'N, amended 2010).

fective to transfer the property at the moment of death, although they are considered at law to be non-testamentary (that is, *inter vivos*) transfers.⁹⁰

At some level, however, all of these will substitutes contain a limitation on the grantor's control over the property. Thus, with the revocable trust, the settlor must revoke the trust according to the terms of the trust documents.⁹¹ Similarly, the POD, TOD, and life insurance beneficiary designations can be revoked only through compliance with the terms of the contract under which the property is held.⁹² Even a contingent remainder must be revoked according to whatever protocol is identified in the instrument creating the remainder.⁹³ At a basic level, the property owner has given up some modicum of legal control over the property to justify treating its succession to designated beneficiaries as an *inter vivos* transfer and thus not subject to the will formalities and probate administration. In all of these will substitutes, the transferor's ability to revoke is constrained by the instrument, enforceable by contract or trust law.

This is not true with the beneficiary deed. The *inter vivos*/testamentary line disappears altogether in the case of the beneficiary real-estate deed. Whether a donor uses an enhanced-life-estate deed and retains the full right to revoke the remainder, or a statutory form TOD beneficiary deed, the donor purportedly gives up no property rights and yet, assuming the deed is not revoked, the beneficiary takes the property upon the donor's death without compliance with the will formalities. In the case of many beneficiary deeds, the donor can simply transfer full ownership, mortgage it, or otherwise exercise dominion and control over the property during life, to effect a revocation.⁹⁴ So unlike the TOD securities account, in which the beneficiary designation can be revoked only through filling out the proper forms and delivering them to the account manager, the beneficiary deed can be revoked simply by doing some of the same things with the property that one does as an outright owner.⁹⁵ Because no third party

90. See Miller, *Part Two*, *supra* note 14, at 705 (noting that the property transfer and formalities needed for will-substitutes, which do not require probate in large part because other areas of law take over, and for which the law provides different formalities, make such *inter vivos* transfers more flexible).

91. See *Heaps v. Heaps*, 21 Cal. Rptr. 3d 239, 242–43 (Ct. App. 2004).

92. See, e.g., *Masry v. Masry*, 82 Cal. Rptr. 3d 915 (Ct. App. 2008); *In re Schlicht*, 329 P.3d 733 (N.M. Ct. App. 2014); *Paul v. Arvidson*, 123 P.3d 808 (Okla. Civ. App. 2005).

93. See *In re Mergenhagen*, 856 N.Y.S.2d 389, 390–91 (N.Y. App. Div. 2008).

94. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 12 (UNIF. LAW COMM'N 2009); Memorandum from Thomas P. Gallanis, *supra* note 32, at 22–24.

95. For instance, the real property could be sold, partitioned, mortgaged, or deeded away through the normal processes and those actions alone would result in a revocation of the beneficiary designation. The same is also true, to a certain extent, with money in a bank account, that withdrawal of the funds would effectuate a revocation of any beneficiary designation on the account, the funds are still held subject to the rules and responsibilities of the bank.

transfers the property pursuant to a contract from the donor to the beneficiary in the case of a beneficiary real-estate deed, the deed is self-executing and functions more like a will than the other will substitutes.⁹⁶ Further, since the power of revocation requires no different act than an outright owner would do, the beneficiary deed more closely resembles a testamentary transfer than an inter vivos transfer—and some courts have so held.⁹⁷

Whether a beneficiary real-estate deed should be considered inter vivos or testamentary has both theoretical and functional consequences. To the extent a beneficiary deed constitutes a testamentary transfer, it seems to follow that it should require the will formalities and probate. Yet, most states have formalities for the execution of real-estate deeds that, if not exactly identical to the will formalities, are similar enough to provide the same protections against fraud that the will formalities are assumed to provide.⁹⁸ Thus, should we treat the beneficiary deed as testamentary just because no interest transfers during life, there is no contract, and the deed is executed according to formalities that are essentially similar to the formalities for a will? Or do we treat the beneficiary deed as testamentary but excused from the will formalities altogether by statute? Or do we treat it as inter vivos, in which case we either need to identify a present transfer of a property interest (a contingent remainder, an executory interest, an expectancy)? Or do we treat it as inter vivos but excused from the present-transfer requirement by statute? These are the kinds of questions that trusts and estates professors contemplate and build into their exams to make their students realize that those bright lines we try to teach are fuzzy guidelines at best or arbitrary distinctions at worst.

This whole mental exercise brings into focus the question of whether to retain the supposedly bright line between inter vivos and testamentary gifts as we develop more effective estate-planning tools that enable a decedent to retain full control over property until death and still avoid probate. The discussion below on powers of appointment argues against maintaining the artificial distinction and suggests that to the extent we continue to retain the bright line, with its significant legal consequences, we are likely to create more problems for donors than benefits.⁹⁹ A fuller discussion of this point must wait, however, until we have explored the history and characteristics of the beneficiary deed and some of its variations.

96. It is self-executing in the sense that the grantor is in complete control of the property and has full title during life, and at the grantor's death no one has to perform any duty or act to transfer the property to the beneficiary except the ministerial act of filing a new deed.

97. See Orth, *supra* note 69, at 465–68.

98. Memorandum from Thomas P. Gallanis, *supra* note 32, at 5–6.

99. See *infra* Section IV.C.

III. A ROSE BY ANY OTHER NAME: VARIETALS AND VARIATIONS ON BENEFICIARY REAL-ESTATE DEEDS

As noted above, land has generally been subject to different rules than personal property under the common law of succession. Since feudal times, English landowners have contrived mechanisms to avoid the inconveniences of strict legal rules regarding the succession of real property.¹⁰⁰ To avoid triggering the feudal incidents (essentially estate taxes)¹⁰¹ that attached when land descended by intestate succession, and to obtain the flexibility of testamentary transfers in a world in which land could not be devised by a will, landowners created complex inter vivos transfers and uses.¹⁰² These mechanisms depended on the strict legal distinctions between inter vivos and testamentary transfers to obtain the relevant benefits. And these mechanisms continue to be used today, even though the dire consequences attendant upon inter vivos and testamentary transfers is less relevant in many respects.

Thus, one mechanism was to hold land as joint tenants with rights of survivorship.¹⁰³ At the death of the first co-owner, no feudal incidents would accrue because the survivor had received an inter vivos interest in the land when the joint tenancy was created. And if the survivor was quick to re-transfer the land into another joint ownership before he died, joint tenancies could be used to avoid the feudal incidents for centuries, especially with a multitude of joint tenants at one time. But joint tenancies had their drawbacks, not least of which was the fact that the landowner had to transfer a partial interest in the land to the joint tenant, a transfer that was effective immediately.¹⁰⁴ If the original landowner then sought to sell, mortgage, or gift the land elsewhere, the joint tenant would have to agree. This is because there had been a present inter vivos transfer of a half interest to the joint tenant that was irrevocable without the joint tenant's consent.

A second mechanism to avoid the feudal incidents was to transfer a remainder interest and keep a life estate.¹⁰⁵ Upon the death of the life tenant, the right to possession of the land would shift automatically to the re-

100. DANAYA C. WRIGHT, *THE LAW OF ESTATES AND FUTURE INTERESTS* 1–18, 180–81 (2015).

101. The incidents of feudal seisin are too complex to discuss in detail here. But suffice it to say that prior to the 1540 Statute of Wills, land had to pass either inter vivos or by intestacy. When it passed by intestacy, the incidents of relief, primer seisin, and wardship might apply, all of which were costly burdens on the estate that could ruin the estate. See BAKER, *supra* note 10, at 238–41.

102. *Id.* at 248–58.

103. *Id.* at 252.

104. See Orth, *supra* note 69, at 468.

105. See BAKER, *supra* note 10, at 280–85 (discussing fee tails and remainders as ways to accomplish family estate planning).

mainderman(men). Like the joint tenancy, the life estate-and-remainder avoided the feudal incidents, but it suffered from the same infirmities. The landowner had to make a present transfer of the remainder interest to the remainderman, who had to consent to the alienation of the land to others. This avoided the incidents but did not resolve the problem of the inability to make a will. The remainderman could not devise the remainder, so at every generation the estate had to come back together into fee only to be split again before the fee tenant died in possession.¹⁰⁶ The remainderman also could sue for waste, prevent alienation, and effectively block many of a life tenant's decisions regarding use and management of the land.

The most common mechanism in the late medieval period was the *use*,¹⁰⁷ whereby a landowner transferred the land to an entity that could not die, or to a number of joint owners, upon the promise that they would hold the land for the benefit of the landowner and then transfer the land as the landowner requested. Notwithstanding the hiccup of the Statute of Uses of 1536,¹⁰⁸ which threatened to derail all uses, the use has become a key feature of estate planning today. Of course, today we call it a trust, and there are certain critical elements necessary for a valid trust, like active duties, arising as a result of Henry VIII's attempt to crack his tenants' tax avoidance schemes.¹⁰⁹ But the effect is essentially the same. A landowner makes an inter vivos transfer of the land to a trustee who manages it subject to certain fiduciary duties, complies with the trust terms, and eventually transfers the land to the designated beneficiaries when the trust settlor dies.¹¹⁰ The irony, as John Baker explained, is that "it was foolish for any-

106. With both joint tenancies and life estates, problems arose if the parties died simultaneously and the land ended up passing to heirs by intestacy. If the remainderman died before the life tenant, the life tenant needed to scramble to ensure that a successor remainderman was named if the remainder had not already passed by intestacy to the remainderman's heirs. But a landowner didn't want to name a whole host of possible remaindermen in case he later decided to sell the land. All of the named remaindermen would need to consent to the sale. And once the remainderman had ownership of the land in fee simple, the whole process had to begin all over again. It would not do, however, for a landowner to grant a remainder to an underage child if, when the landowner died, the child was still underage and therefore not able to transfer it again because of the child's nonage. If the underage child died, intestacy happened and the feudal incidents would be due. And even with the abolition of the feudal incidents in 1645, the disadvantages of the present transfer requirement were even greater with the adoption of the strict settlement. *See id.* at 280–96.

107. *Id.* at 248–57.

108. 27 Hen. 8, c. 10 (Eng.).

109. *See id.* (establishing that active duties are required to prevent the use or trust from being terminated under the Statute of Uses).

110. The use of trusts in the past was different than today. In the past, most uses were inter vivos, designed to carry the property over the death of the grantor and get it passed to the successor, who then would execute a new use. After 1540, when wills could be made of real estate, and especially after 1645, when wills for real estate could pass all of a decedent's real property, testamentary trusts tended to be used to protect property passing to minors. Only in the twentieth cen-

one to leave land vested in his own name. By vesting it in others he paradoxically became a more absolute owner than the common law allowed.”¹¹¹

Even with a trust, however, the landowner must make an inter vivos transfer of title in the land to the trustee because even when the landowner is also the trustee, a deed of transfer into the trust must be executed. And today, for purposes of facilitating the smooth transmission of property, trusts remain rather expensive compared to a simple will or a joint tenancy deed.¹¹² And even if a trust is revocable, some legal duties constrain the trustee, and the trust beneficiaries have certain enforceable legal rights that accrue when land is transferred into trust.¹¹³

The joint tenancy, the life estate, and the use each had the effect of avoiding intestacy, which, in the medieval period, risked imposition of the potentially devastating feudal incidents. Today, the tax differences between inter vivos and testamentary transfers have generally been eliminated, only to be replaced by probate implications.¹¹⁴ All three mechanisms avoid probate and do not require a will executed with the formalities, but they do require giving up a present interest in the land. Holding on to the property until death results in probate and requires a valid will, executed with the

ture has the inter vivos trust been revived primarily as a tax and probate avoidance and wealth preservation tool after the imposition of the estate tax. BAKER, *supra* note 10, at 291–292.

111. *Id.* at 252–53.

112. Howard B. Solomon, *Revocable Trusts—A Contrarian’s Viewpoint*, N.Y. ST. B.J., Feb. 1996, at 34, 37 (explaining that trusts can be not only more expensive, but sometimes seem to be recommended solely to make money for the attorneys).

113. The court explained in *Farkas v. Williams*:

[C]onsidering the terms of these instruments we believe Farkas did intend to presently give Williams an interest in the property referred to. For it may be said, at the very least, that upon his executing one of these instruments, he showed an intention to presently part with some of the incidents of ownership in the stock. Immediately after the execution of each of these instruments, he could not deal with the stock therein referred to the same as if he owned the property absolutely, but only in accordance with the terms of the instrument.

....

It is not a valid objection to this to say that Williams would never question Farkas’ conduct, inasmuch as Farkas could then revoke the trust and destroy what interest Williams has. Such a possibility exists in any case where the settlor has the power of revocation. Still, Williams has rights the same as any beneficiary, although it may not be feasible for him to exercise them. Moreover, it is entirely possible that he might in certain situations have a right to hold Farkas’ estate liable for breaches of trust committed by Farkas during his lifetime.

125 N.E.2d 600, 603, 608 (Ill. 1955).

114. Not all differences have been eliminated, however. For instance, prior to 1976, the rates of the gift tax and the estate tax were different, making very significant one’s decision to make an inter vivos or a testamentary gift of property valued over the transfer tax threshold. Today the rates are the same, but the gift tax is tax-exclusive and the estate tax is tax-inclusive. The gift tax is ineligible for the step-up in basis, and recipients of testamentary gifts receive a step-up in basis that beneficiaries of inter vivos gifts do not. See DANAYA C. WRIGHT, *THE LAW OF SUCCESSION: WILLS, TRUSTS, AND ESTATES* 672–73 (2013).

formalities if a donor wants the land to pass to a non-heir. Thus, even into the twentieth century, donors continued to be faced with the inter vivos/testamentary problem of having to either transfer a present interest in the land, with its attendant risks and potential loss of dominion, or use a will and probate to retain complete control until death.

But the estate planning lawyers of today are just as clever as those medieval conveyancers who used the inter vivos/testamentary divide to craft ways to avoid the feudal incidents. As will substitutes swept the field in the late twentieth century, estate planners began to tinker with these common-law forms to achieve the probate-avoidance effect of life estates and joint tenancies while giving up only a tiny sliver of a present interest. This was accomplished by combining the power of revocation of trusts with the good, old-fashioned life estate.¹¹⁵ Thus, in order to avoid the present-transfer problem, to ensure that the remainder designation would not become effective until death, and to gain the benefits of full revocability during life characteristic of a will, a donor transferred a *revocable* remainder rather than a *vested* remainder to the transferee. This is called an enhanced-life-estate deed or a ladybird deed. The transferor retains a life estate and all powers to manage and revoke, and transfers—it seems—only a contingent remainder that will take effect only if the life tenant does not otherwise transfer the property to another prior to the life tenant's death.

A. *Creating and Adjusting the Common-Law Mechanisms*

Florida was one of the first states to adapt the common law forms to create an enhanced-life-estate type of transfer deed. It was prepared in 1982 by Florida estate planning and elder law attorney, Jerome Solkoff.¹¹⁶ While this is one of the first traceable deeds in this form, the type of transfer was not a new phenomenon.¹¹⁷ Commonly, the interest held by the life tenant in an enhanced-life-estate deed is considered analogous to a life estate with a general power of appointment.¹¹⁸ For over a century now, the issue with this type of devise or grant has been whether the life tenant's enhanced powers—specifically, the reservation of the absolute power of dis-

115. *See generally Farkas*, 125 N.E.2d 600; UNIF. TRUST CODE § 602 (2000) (UNIF. LAW COMM'N, amended 2010). After the 1536 passage of the Statute of Uses, contingent remainders were more durable, and executory interests were recognized at law, both of which are interests that could be used in this context. *See also* WRIGHT, *supra* note 100, at 87–88.

116. Kary C. Frank, *The Search for the Lady Bird Deed*, 34 MICH. PROB. & EST. PLAN. J. 25, 26 (2015).

117. Kary C. Frank, *Ladybird Deeds Purposes and Usefulness*, 95 MICH. B.J. 30, 31 (2016).

118. Patricia P. Jones, Attorney's Title Insurance Fund, Inc., *Transfers into Trusts and Related Issues* (May 17, 2002) (unpublished materials distributed at Broward County Bar meeting), https://www.browardbar.org/wp-content/uploads/staley-memorial/SpakerLeonardEMondschein/Lady-Bird-Deed-Presentation_42-pages.pdf.

position—operate to enlarge the traditional life estate interest of the life tenant to a fee interest.¹¹⁹ In other words, if a life estate deed reserves to the life tenant the absolute power to deed the property in fee, courts have grappled with whether the life tenant only has a life estate interest and the remainderman has some interest or a fee interest where the remainderman has nothing.¹²⁰ But as with all powers of appointment, the default takers have contingent remainders that enable them to take if the power is not exercised. This remainder interest suggests that the present estate holder only has a life estate and not a fee interest, despite the fact that the *Restatement (Third) of Property* and the Internal Revenue Code (“IRC”) treat a life estate with a general power as ownership equivalent.¹²¹ Because the traditional life estate deed has evolved by creative legal mechanisms through the 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, in some instances, case by case.¹²²

As to the life tenant’s interest, the majority rule holds that 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.¹²³ Accordingly, the minority rule holds that

119. H. C. J., Annotation, *Absolute Power of Disposition in Life Tenant as Elevating Life Estate to Fee*, 36 A.L.R. 1177 (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); see *Cowman v. Classen*, 156 Md. 428, 144 A. 367, 371 (1929) (“Now, it is quite clear, upon all the authorities, that where an estate is given to a person generally or indefinitely, with power of disposition, such gift carries the entire estate; and the devisee or legatee takes, not a simple power, but the property absolutely. But where the property is given . . . to a person expressly for life, and there be annexed to such gift a power of disposition of the reversion, there the rule is different, and the first taker, in such case, takes but an estate for life, with the power annexed; and if the person so taking fails to execute the power and thus dispose of the reversion, it goes, where there is no gift or devise over, to the heir or next of kin of the testator, according to the nature of the property. This distinction, while it has been said to be a refined one, is, nevertheless, as well established as any in the law; and judges and text-writers alike recognize and adopt it as a principle too firmly settled to be questioned.” (quoting *Benesch v. Clark*, 49 Md. 497, 504 (1878))); John A. Facey, III et al., “*Top Ten Pitfalls in Preparing Lady Bird Johnson Deeds*,” VT. B.J., Winter 2008/2009, at 42, 42.

120. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 22.3 cmt. a (AM. LAW. INST. 2011) (referring to life estates with general powers of appointment as “ownership equivalent” interests).

121. *Id.* See also I.R.C. § 2056(5) (2012).

122. See H. C. J., *supra* note 119 (“[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.”); see also J.V.D., Annotation, *Absolute Power of Disposition in Life Tenant as Elevating Life Estate to Fee*, 76 A.L.R. 1153 (1932) (citing related cases therein).

123. 1 TIFFANY REAL PROP. § 56 (3d ed. 1970); see also H. C. J., *supra* note 119 (analyzing thoroughly the historical cases across numerous jurisdictions that have adopted the majority rule).

“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.”¹²⁴ While the majority view that a life estate interest with the enhanced power to sell or transfer fee seems legally inconsistent, most courts have determined otherwise.¹²⁵

Opinions differ as to what interest the remainderman or beneficiaries have when an enhanced-life-estate deed is executing and continuing through the duration of the life tenants’ lifetime. Some cases have held that where a life estate reserved the absolute power of disposal in the life tenant, the gift over to the remainderman at the death of the life tenant was actually void.¹²⁶ However, all jurisdictions that once held this view have resolved that the remainder that follows is valid.¹²⁷ The beneficiary or remainder interest resulting from an enhanced-life-estate deed has been referred to as a vested remainder subject to total divestment,¹²⁸ but it has also been categorized as a contingent remainder or possibly just an expectancy interest.¹²⁹

Whether we identify the remainder interest as vested or contingent does in fact matter for certain purposes, despite the aversion most first year law students have to the subject.¹³⁰ A vested remainder would normally be considered a part of the remainderman’s estate if the remainderman prede-

124. H. C. J., *supra* note 119; *see e.g.*, *Waller v. Sproles*, 22 S.W.2d 4 (Tenn. 1929) (obiter); *Vandeventer v. McMullen*, 11 S.W.2d 867 (Tenn. 1928); *Ogden v. Maxwell*, 140 S.E. 554 (W. Va. 1927); *Wiant v. Lynch*, 140 S.E. 487 (W. Va. 1927); *Blake v. Blake*, 115 S.E. 794 (W. Va. 1923) (applying the rule to personal property only).

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

126. 3 SIMES & 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).

127. *Id.*

128. *See Frank*, *supra* note 117, at 31 (referencing a definition provided by Gerry W. Beyer, Governor Preston E. Smith Regents, Professor of Law, Texas Tech University School of Law); Suzanne M. Barry, *Enhanced Life Estates Deed Growing in Popularity*, 9 *IN THE TITLE CORNER*, 1, 4 (2006).

129. *Farkas v. Williams*, 125 N.E.2d 600, 603 (Ill. 1955) (calling the future interest of a remainderman in a revocable trust an expectancy interest).

130. Stephen Mackey states:

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.

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!*, *THE FUND CONCEPT* (Attorneys’ Title Fund Servs., LLC, Orlando, Fla.), Aug. 1999, at 124, 124.

ceased the life tenant and would therefore be available for elective share purposes or to creditors of the remainderman. If a vested remainder subject to divestment passed to the remainderman, then the remainderman's death before the life tenant would not cause the gift to lapse. A contingent remainder designed to vest only if the remainderman survives the life tenant would lapse if the remainderman predeceased the life tenant. While we would assume that most life tenants of an enhanced-life-estate deed would re-execute a new deed upon the remainderman's death, we all know that such actions are not always feasible or likely. If the life tenant and the remainderman died simultaneously, the remainderman's estate might take the real property if the remainderman held a vested remainder, but would take nothing if it was a contingent remainder.¹³¹

But expectancies, such as the rights of beneficiaries in revocable trusts¹³² or the interests of takers in default under a power of appointment, wax and wane with state-law interpretations of their status as property rights. Like the common law's historical aversion to contingent remainders, certain property rights are deemed so evanescent that, like old King Hamlet, they only appear real at midnight during a full moon.

The expectancy interest is presumably a type of really-contingent remainder that is, of course, not recognized by traditional future-interests law. The problem that arises in any case using a life estate-and-remainder mechanism, however, is that some property interest does in fact need to transfer to the remainderman during life, whether we call it a vested remainder, a contingent remainder, an expectancy interest, a lottery ticket, or something else. That transfer is technically *inter vivos* and has some value to the remainderman or the remainderman's estate. Possessing a lottery ticket is clearly better than having no lottery ticket at all. This means that, under certain circumstances, the remainderman's estate may include the remainder and it may be available to the creditors of the remainderman. But because a future interest transfers to the beneficiary, and the life tenant does not retain an absolute fee, this form of real-estate deed clearly falls on the *inter vivos* side of the juridical binary.

However, problems with the life estate-and-remainder mechanism can become quite complex when used by joint owners. In a case in Florida, *Brock v. Willhoite*,¹³³ the issue of revocability triggered a legal challenge

131. 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, 422-23 (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 *Travis v. Ashton*, 23 So.2d 725, 726-27 (Fla. 1945).

132. *Farkas*, 125 NE.2d 600.

133. 227 So.3d 596, No. 5D16-1925, 2017 WL 2493584 (Fla. Dist. Ct. App. June 6, 2017) (unpublished table decision). Certain descriptions and footnotes from Stephanie Emrick's article,

that points right to the concerns we have with beneficiary deeds.¹³⁴ In this case, the grantors, an unmarried couple, previously held the property as joint tenants with rights of survivorship.¹³⁵ The grantors later executed a quitclaim deed¹³⁶ to themselves for life, and upon the death of both grantors, the remainder was to pass one-half to his trust and one-half to her trust.¹³⁷ However, the grantors did not include in the deed the form of tenancy in which they would hold the property for the remainder of their lifetime.¹³⁸ Following the first grantor's death, the surviving grantor revoked the deed and conveyed the full fee simple title of the property to herself, with the intent to wholly divest the remainder trusts of any interest.¹³⁹ The children of the deceased grantor—who were the beneficiaries of his trust—filed suit alleging that the surviving 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.¹⁴⁰

The Florida Fifth District Court of Appeal sidestepped the revocability issue by determining that the enhanced-life-estate deed would be construed in light of Florida's statute establishing that tenancies in common are the default if no other form of tenancy is specified.¹⁴¹ Because the court ruled that the couple held the life estates as tenants in common, the remainder-

Transfer on Death Deeds: It Is Time to Establish the Rules of the Game, 70 FLA. L. REV. 469 (2018), are reprinted throughout the discussion of *Brock v. Willhoite* with the permission of the *Florida Law Review*.

134. See Brief for Appellant, *Brock v. Willhoite*, 227 So.3d 596 (Fla. Dist. Ct. App. Sept. 29, 2016) (No. 5D16-1925), 2016 WL 6403914, at 2.

135. *Id.* at 4.

136. Quitclaim deeds are routinely used when transferors wish to add someone's name to a deed, to change the form or quantity of ownership interests, or to clear up defects in title.

137. The conveyance language of the Quitclaim Deed stated:

[T]o 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 134, at 4.

138. Under Florida law, co-owners of real property are presumed to be tenants in common. The operative language of the statute states: “[T]ransfer or conveyance 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.” FLA. STAT. § 689.15 (2018).

139. Brief for Appellant, *supra* note 134, at 6.

140. *Id.*

141. FLA. STAT. § 689.15 (2018).

men prevailed;¹⁴² but if the court had held it as a joint tenancy with right of survivorship, which is how the property was held before the enhanced-life-estate deed was executed, presumably the surviving grantor would have prevailed.¹⁴³ The real question facing the Florida court was whether the life tenants–joint grantors intended to create joint life estates, with the survivor taking the entire life estate until her death, with the full power to revoke, or whether they intended to each have a life estate in their own half, and at the death of each that remainder would vest. What makes the case so difficult is that the right of survivorship of a joint tenancy is inconsistent with a life estate; but a tenancy in common, which is the default form of co-ownership, is inconsistent with the idea of full revocability that characterizes the enhanced-life-estate deed. The problem illustrated by this case is that when deeds are customizable, as in those states that permit enhanced-life-estate deeds, drafting must be done very carefully.

Because the enhanced-life-estate deed is relatively new and has not been litigated extensively, the drafting principles for estate planning lawyers are simply not clear. The lawyers who drafted the enhanced-life-estate deed in *Brock v. Willhoite* seemingly failed to contemplate the possibility that the surviving life tenant would revoke and cause the children of the deceased life tenant to lose all interest, passing the entire property to her own children. If this property had been held in trust, the outcome would have been much simpler. Each settlor would be entitled to the life income and full use of the trust corpus, but the trust would become irrevocable upon the death of the first settlor. The presumption of irrevocability upon the death of the first settlor protects the interests of the beneficiaries, especially in the case of blended families where the children of the first settlor to die could otherwise be easily divested of any trust interest by the surviving settlor's power to revoke.

The *Brock* case illustrates one of our concerns with the Uniform Act, which provides that all TOD deeds are fully revocable up until the last co-life tenant dies.¹⁴⁴ And it highlights why enhanced-life-estate deeds that don't have the benefit of uniform rules of construction can be problematic. 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 diverse and inconsistent.¹⁴⁵ The case also points to the tension between many state's probate

142. See Final Judgement ¶ 2, *Willhoite v. Brock*, No. 2014-CA-000640 (Fla. Cir. Ct. May 12, 2016), *aff'd*, 227 So.3d 596, No 5D16-1925, 2017 WL 2493584 (Fla. Dist. Ct. App. June 6, 2017) (unpublished table decision).

143. See *Brock*, 2017 WL 2493584.

144. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 6 (UNIF. LAW COMM'N 2009).

145. For instance, Arizona refers to beneficiary deeds as "beneficiary deeds," ARIZ. REV. STAT. ANN. § 33-405 (2014), Vermont refers to them as "ladybird deeds" or "enhanced life estate

codes and their real property codes. Probate codes tend to establish defaults to protect the living, like children and spouses, while property codes establish defaults to make real property marketable, to remove outstanding contingencies, and to settle title disputes in ways that maintain the integrity of the title and recording system.¹⁴⁶

*B. Legislative Recognition*¹⁴⁷

As the popularity of enhanced-life-estate deeds continued to grow, states began to respond by enacting legislation that permitted the execution of TOD deeds. The first state to enact specific legislation was Missouri in 1989 as a part of its Nonprobate Transfers Law of Missouri.¹⁴⁸ Nearly a decade later, numerous other states began to follow suit.¹⁴⁹ In 2007, the Uniform Law Commission formed a drafting committee with the goal of producing a Uniform Transfer on Death for Real Property Act.¹⁵⁰ While the drafting committee was working on producing the proposed uniform law, Montana,¹⁵¹ Oklahoma,¹⁵² Minnesota,¹⁵³ and Indiana¹⁵⁴ enacted their own forms of legislation, bringing the total number of states with independent legislation to thirteen.¹⁵⁵

deeds,” VT. STAT. ANN. tit. 14, § 321 (2018), and Indiana refers to them as “transfer-on-death deeds.” IND. CODE ANN. § 32-17-14-3 (West 2015). *See also* *People v. Cooper*, No. 333828, 2018 WL 384013 (Mich. Ct. App. Jan. 11, 2018) (referring to them as “ladybird deeds”).

146. State probate codes provide primarily for the succession of property at death and therefore make provisions for minor children, surviving spouses, creditors, and other survivors who might have been dependent on the decedent for support. The UPC accomplishes this through complicated elective share statutes, family allowance and homestead, and protections for pretermitted spouses and children. State property codes provide for the smooth transmission of property, usually real property, by providing default interpretations for ambiguous terms, cut-offs and statutes of limitations for enforcing outstanding reversionary interests, and recording procedures to reduce claims.

147. Certain descriptions and footnotes from Stephanie Emrick’s article, *Transfer on Death Deeds: It Is Time to Establish the Rules of the Game*, 70 FLA. L. REV. 469 (2018), are reprinted throughout this subsection with the permission of the *Florida Law Review*. *See id.* at 484–88.

148. *See* MO. REV. STAT. § 461.025 (1989).

149. 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* ARIZ. REV. STAT. ANN. § 33-405 (2014); ARK. CODE ANN. § 18-12-608 (2015); COLO. REV. STAT. § 15-15-401(1) (2011); KAN. STAT. ANN. § 59-3501 (2005); NEV. REV. STAT. § 111.109 (2010); N.M. STAT. ANN. § 45-6-401 (2012); OHIO REV. CODE ANN. § 5302.22 (LexisNexis 2016); WIS. STAT. § 705.15 (2016).

150. *See generally* Memorandum from Thomas P. Gallanis, *supra* note 32 (produced in response to the ULC’s appointment of a committee to construct a uniform law).

151. MONT. CODE ANN. § 76-6-121 (2015).

152. OKLA. STAT. tit. 58, § 1253 (2014).

153. MINN. STAT. § 507.071 (2014).

154. IND. CODE § 32-17-14-11 (2016).

155. *See* Emrick, *supra* note 4, at 484.

The drafting committee carefully looked at the legislation each state had then adopted, in addition to the comprehensive study completed by the California Law Revision Commission, to identify the major issues and compare the relevant statutory language from each.¹⁵⁶ The drafting committee identified issues that it wished to address in the final uniform act,¹⁵⁷ including execution formalities and the effect of co-ownership with right of survivorship;¹⁵⁸ the rights of the transferor,¹⁵⁹ of the beneficiary,¹⁶⁰ of family members,¹⁶¹ of creditors,¹⁶² and of third-party purchasers;¹⁶³ and taxation,¹⁶⁴ Medicaid eligibility and reimbursement,¹⁶⁵ and the procedural requirements of implementation of the revocable TOD deed.¹⁶⁶ The drafting committee met and consulted with a variety of experts in the field before finalizing the URPTODA at the ULC's 2009 Annual Meeting.¹⁶⁷ 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."¹⁶⁸ More importantly, through the statute states could permit true TOD deeds that are not some form of enhanced life estate that might be found to effectuate a present transfer of a remainder interest.¹⁶⁹

While there are too many details in the URPTODA to discuss at length, a few points are worth noting. Besides introducing clear definitions for the terminology used in connection with this form of transfer of real property,¹⁷⁰ Section 5 explicitly provides that the transfer of property via a TOD deed is "effective at the transferor's death."¹⁷¹ However, Section 7 states that a "transfer on death deed is nontestamentary," which presumably is necessary to make clear that a TOD deed need not be executed with the

156. Memorandum from Thomas P. Gallanis, *supra* note 32, at 4–66.

157. *Id.*

158. *Id.* at 4–20.

159. *Id.* at 20–30.

160. *Id.* at 31–49.

161. *Id.* at 50–51.

162. *Id.* at 52–53.

163. *Id.* at 56–57.

164. *Id.* at 57–58.

165. *Id.* at 58–59.

166. *Id.* at 59–66.

167. See *Real Property Transfer on Death Act: Committee Archive*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/viewdocument/committee-archive-28?CommunityKey=a4be2b9b-5129-448a-a761-a5503b37d884&tab=librarydocuments> (last visited Mar. 30, 2019) (listing agendas, memos, drafts, and other Drafting Committee documents).

168. UNIF. REAL PROP. TRANSFER ON DEATH ACT, prefatory note (UNIF. LAW COMM'N 2009).

169. See Emrick, *supra* note 4, at 484–85.

170. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 2 (UNIF. LAW COMM'N 2009).

171. *Id.* § 5.

formalities of a will, nor does a TOD deed need to be probated.¹⁷² Thus, like any TOD designation, the TOD real-estate deed takes effect at death but is treated as non-testamentary (that is, as an inter vivos transfer), even though no present interests transfer to the beneficiary and there is no third party trustee or account holder.¹⁷³

For purposes of determining the legal effectiveness of a TOD deed, a statute like the URPTODA can override the common-law binary of either requiring a present transfer of an interest or execution with the will formalities. But declaring the deed to be effective does not solve many of the ancillary issues like those raised in *Brock*¹⁷⁴ or issues surrounding enforceability of revocation constraints or anti-lapse.

Further, the URPTODA specifies that “[a] transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.”¹⁷⁵ The prefatory note explains 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.”¹⁷⁶ The Comment to Section 6 clarifies that even if the transferor includes a promise in the TOD deed that the deed will be irrevocable, the deed remains revocable, and recourse must be sought under other law if a transferor revokes a deed that expressly states will be irrevocable.¹⁷⁷ Section 12 unequivocally resolves the question of who has what interest at what time. So long as the transferor is alive, a TOD 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—either legal or equitable—so creditors of the designated beneficiary cannot attach the property.¹⁷⁸

Since the promulgation of the URPTODA, several states have replaced previous legislation with the URPTODA; however, other states have enacted legislation that differs from the Uniform Act.¹⁷⁹ And seventeen states

172. *Id.* § 7.

173. *See* Emrick, *supra* note 4, at 485–86.

174. *See supra* notes 133–143 and accompanying text.

175. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 6 (UNIF. LAW COMM’N 2009).

176. *Id.* prefatory note.

177. *Id.* § 6 CMT.

178. *Id.* § 12; *see* Emrick, *supra* note 4, at 485–86.

179. In 2011, Nevada repealed previous legislation and enacted the URPTODA. NEV. REV. STAT. ANN. § 111.655 (LexisNexis 2016). Oklahoma had legislation prior to the URPTODA but introduced the URPTODA to the legislature in 2010. OKLA. STAT. ANN. tit. 58, § 1253 (West 2016); H.R. 3103, 52d Leg., 2d Sess. (Okla. 2010). In 2009, Indiana adopted a comprehensive Transfer on Death Property Act that includes a section specifically dealing with Transfer on Death Deeds. IND. CODE ANN. § 32-17-14-11 (LexisNexis 2016). And in 2015, Massachusetts introduced legislation that differed from the URPTODA. H.R. 1565, 189th Gen. Ct. (Mass. 2015). Interestingly, Mississippi introduced legislation in 2016, to adopt the URPTODA, S. 2736, 2016

currently do not recognize a beneficiary deed through common law or through enacted legislation.¹⁸⁰ However, that does not mean that those states have not contemplated the idea. Since the URPTODA's appearance, several states that do not currently recognize the beneficiary deed—or some form thereof—have introduced legislation that has not been enacted, including Alabama,¹⁸¹ Connecticut,¹⁸² Maryland,¹⁸³ and Utah.¹⁸⁴ In addition to legislators introducing bills, practitioners have called for using beneficiary deeds in an effort to simplify the estate planning process.¹⁸⁵

Even a quick review of the law in the many states that have some process for creating a beneficiary designation in real estate shows the vast diversity of treatment of the beneficiary form of deed.¹⁸⁶ This diversity has created confusion and controversy around the functional and practical legal effect of using a beneficiary deed. Moreover, the terminology, technical requirements, revocability, and operation vary from state to state.¹⁸⁷ For the states that recognize the use of beneficiary deeds, such deeds have become a common device 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 jurisprudence and inconsistent statutory schemes has led to confusion and uncertainty for legal practitioners and their clients. For the beneficiary deed to emerge in common usage as a successful estate planning tool, it is important that each state enact clear legislation that will define and establish the rules of the game. In the next

Reg. Sess. (Miss. 2016), but also introduced legislation that differed from the URPTODA in 2016, S. 2068, 2016 Reg. Sess. (Miss. 2016), and again in 2017, H.R. 806, 2017 Reg. Sess. (Miss. 2017). However, perhaps the most interesting legislation that differs from the URPTODA is in Ohio where the legislature amended the prior law to allow for the transfer of real property at death through an affidavit. OHIO REV. CODE ANN. § 5302.22 (LexisNexis 2016); *see also* Riehle, *supra* note 46, at 2 (analyzing Minnesota's current transfer-on-death deed statute).

180. As of 2018, 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, Vermont. *See* Emrick, *supra* note 4, at 487 n.171.

181. H.R. 406, 2016 Reg. Sess. (Ala. 2016).

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

183. H.D. 946, 2013 Leg., 433d Sess. (Md. 2013); H.D. 59, 2014 Leg., 434th Sess. (Md. 2014); H.D. 186, 2015 Leg., 435th Sess. (Md. 2015).

184. H.R. 224, 2010 Gen. Sess. (Utah 2010); H.R. 199, 2016 Gen. Sess. (Utah 2016); H.D. 14, 2017 Gen. Sess. (Utah 2017).

185. *See* Tyler H. Gablenz, *Simplify the Process: Why Connecticut Should Adopt the Use of Transfer-on-death Deeds*, 28 QUINNIPIAC PROB. L.J. 165, 165 (2015); Michael A. Kirtland & Catherine Anne Seal, *Beneficiary Deeds and Estate Planning*, 66 ALA. LAW. 118, 118 (2005); *see also* *see* Emrick, *supra* note 4, at 487.

186. *See* Memorandum from Thomas P. Gallanis, *supra* note 32, at 4–20 (comparing the different state laws regarding different operational issues).

187. *See* PALOMAR, *supra* note 49, § 333 (discussing generally the various ways that states handle the transfer-on-death deed, or some form thereof).

Section, we want to draw attention to a couple of unfortunate situations where we think the ULC went astray in the Uniform Act.

Ultimately, the URPTODA may bring clarity, but in some cases it does so at the expense of donative intent. And it may unnecessarily lead to some unintended consequences. In our opinion, the revocability and creditor questions highlight the fundamental flaw of trying to fit the TOD real-estate deed into the inter vivos/testamentary binary, a binary that has been rejected by the tax code and probably should be rejected in the property world of succession law as well.

IV. HICCUPS WITH THE URPTODA AND OTHER VARIETIES OF THE BENEFICIARY DEED

Although we agree that the true TOD form real-estate deed is an excellent innovation in estate planning, and that a uniform statute is a good way to avoid many of the idiosyncrasies of diverse state laws, we want to voice a few concerns. On the one hand, because of the variety of mechanisms for achieving a TOD effect in real estate, there can be very real and very serious differences in results depending on state law. Thus, while a beneficiary's creditors may have no rights to property in a TOD deed under the URPTODA, they might have access to property under an enhanced-life-estate deed where the beneficiary is deemed to hold a vested remainder subject to divestment. Similarly, anti-lapse statutes might apply in cases of a TOD deed but not an enhanced-life-estate deed if the beneficiary-remainderman predeceases the transferor. We discuss some of these issues below. But more importantly, the formalistic distinctions between inter vivos and testamentary transfers, between wills and will substitutes, as they operate through these problematic issues of lapse, creditors rights, and revocability, may cause even more disparate outcomes that do not match the intentions of transferors or the promises of estate planning professionals who hope that beneficiary deeds will provide a powerful and beneficial tool to the modest estate plan.

In discussing a few of the ways in which the different deed mechanisms may result in different results, we also point to how the formalistic division between inter vivos and testamentary transfers gets in the way of the promises of TOD deeds. Nearly thirty years ago, Professor Doug Miller advocated for “[a] unified approach to formalities of transfer” to “eliminate the need to maintain the juridical fiction of the ‘present interest’ test as a justification for treating the will substitutes as valid transfers despite their noncompliance with the wills acts.”¹⁸⁸ He argued that “[a]bolishing the statute of wills in favor of a flexible provision addressing the consequences

188. Miller, *Part Two*, *supra* note 14, at 718.

of a transferor's compliance with 'alternative formality' would effectively eliminate the need for distinguishing the standard of formality for wills and will substitutes."¹⁸⁹ It seems to us that the TOD real-estate deed fundamentally challenges the binary between inter vivos and testamentary transfers. This occurs not only with the URPTODA's incoherent provisions that no property rights transfer until death but the deed is declared to be non-testamentary, but with the past thirty years of legal contortions necessary to maintain some illusive allegiance to a fictional divide that is so full of holes it has virtually no meaning.

By looking at issues of revocability, lapse, powers of appointment, creditors rights, homestead, and future interests in the context of the different mechanisms existing across the states, we can see distinctly how the juridical binary and the meaningless formalities ultimately frustrate intent, undermine effectiveness of the TOD mechanism, and result in unanticipated consequences.

A. *Revocability*

Section 6 of the URPTODA provides that a "transfer on death deed is revocable even if the deed or another instrument contains a contrary provision."¹⁹⁰ Commentary to the URPTODA states that the reason revocability is mandatory is to "prevent[] an off-record instrument from affecting the revocability of a transfer on death deed" and to "protect[] the transferor who may wish later to revoke the deed."¹⁹¹

Although the goal of the ULC was to make the URPTODA mimic the revocability of other will substitutes, especially POD and TOD accounts, the aspect of mandatory revocability may be contrary to the wishes of many transferors, especially in the context of jointly held property. Thus, an individual who owns Blackacre outright in fee simple and executes a TOD deed to have it pass to a favored child or niece at death will certainly want the deed to be revocable. Without revocability, it does not look like a TOD deed, but rather like a life estate with an absolutely vested remainder. Thus, revocability makes sense in order to maintain the bright line distinction that no property rights transfer to the beneficiary until the transferor's death so the transferor has maximum control.

The case is much more complex when the land is jointly held, as the diversity of state laws attests.¹⁹² And differences between how the land is jointly held also can matter, as between tenancies in common, joint tenan-

189. *Id.*

190. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 6 (UNIF. LAW COMM'N 2009).

191. *Id.*

192. *See* Memorandum from Thomas P. Gallanis, *supra* note 32, at 24.

cies, tenancies by the community, or tenancies by the entirety. And the state variation reveals that full revocability has not been fully embraced. In California, the TOD is void if the transferor holds title in joint tenancy, although this provision was only added in 2015.¹⁹³ Prior to that time, the TOD deed severed a joint tenancy so that the death of one co-owner passed that owner's share to the beneficiary, who then took as a tenant in common with the surviving co-tenant.¹⁹⁴ In Missouri and Wisconsin, a joint-tenancy beneficiary deed must be revoked by all joint tenants, while a tenancy in common can be revoked by any single co-tenant.¹⁹⁵ Ironically, although most states treat the right of survivorship as trumping the beneficiary designation of the TOD, California originally held otherwise. In California, if co-tenants executed a TOD deed and one died, the deceased tenant's portion passed to the beneficiaries, who held as tenants in common with the surviving co-tenant.¹⁹⁶ California has since repealed this provision, which we believe is closer to the outcome of a jointly settled trust than the full revocability mandated by the URPTODA.

One can imagine situations in which full revocability would be desirable, and others in which non-revocability would be desirable. For example, consider a married couple who executes a beneficiary deed naming their children as beneficiaries. After the death of the first tenant, the survivor might need expensive cancer treatment and decides to revoke and sell the property. This power to revoke is most likely what the couple would have wanted. On the other hand, recall the case of *Brock v. Willhoite*,¹⁹⁷ in which an unmarried couple executed an enhanced-life-estate deed that allowed them to retain full powers to revoke, transfer, mortgage, or otherwise encumber the property, but at their deaths the property was to pass half to his trust and half to hers. Upon his death, the surviving co-tenant attempted to revoke the entire deed, thus divesting the interests of the deceased co-tenant's trust beneficiaries. Had the property been placed in a revocable trust, the surviving co-tenant most likely would not have been able to revoke the share passing to the children of the deceased co-tenant because, in the case of most revocable trusts, the death of the first settlor causes the trust to become irrevocable. Under the URPTODA's mandatory revocability, the surviving co-tenant can fully revoke the deed, as the survivor did with the enhanced-life-estate deed in *Brock*.

One possible way to address some undesirable outcomes would be to make revocability the default in cases of individually held property, but that

193. CAL. PROB. CODE § 5664 (West 2016).

194. See CAL. PROB. CODE § 5662 (repealed).

195. MO. ANN. STAT. § 461.033(1) (West 2007); WIS. STAT. ANN. § 705.15(3) (West 2016).

196. CAL. PROB. CODE § 5662 (repealed).

197. See *supra* notes 134–143 and accompanying text.

in the case of jointly held property, a default of non-revocability would apply unless the parties expressly state otherwise. This would correspond to the way most revocable trusts operate when there are multiple settlors and would protect the interests of beneficiaries in blended families where revocable trusts and joint-beneficiary deeds are highly recommended.

But even individuals ought to be able to build non-revocability into their deeds under certain circumstances.¹⁹⁸ Although there might be better ways of managing things, a property settlement at divorce could easily use a beneficiary deed rather than an unenforceable contract to make a will or complex provisions of the property settlement agreement to protect the interests of children and preclude a second marriage disinherit those children, if the deed were non-revocable.¹⁹⁹ Although non-revocability would constitute a restraint on alienation, that restraint would be no greater than one created by giving away a vested remainder.

Although the enhanced-life-estate deed and the TOD deed both tend to be revocable and, therefore, their differences in that regard are minimal when the transferors seek to revoke, the differences can be significant when we consider whether the beneficiary has received any expectancy interest inter vivos. In the well-known case of *Farkas v. Williams*,²⁰⁰ which appears in nearly every trusts and estates casebook, the Supreme Court of Illinois explained that the property right the beneficiary received in a revocable trust was the right to enforce the trust's revocability provisions against the settlor-trustee's estate.²⁰¹ In the case of life insurance or a POD designation in a securities account, the owner of the account must revoke the beneficiary designation in conformity with rules established by the account's manager for the revocation to be effective.²⁰² In the case of a revocable trust, beneficiaries can enforce the provisions of the trust and hold a trust settlor's estate accountable if the trust is not revoked according to the appropriate terms.²⁰³ But would a beneficiary of a beneficiary deed be entitled to enforce any breach of the revocability mechanism if there is no present interest transfer of the right to enforce? That right to enforce is deemed to be a significant property right even if there are practical limitations on the beneficiary's ability to exercise the power during the transfer-

198. Non-revocability could be used for charitable giving when a Charitable Remainder Trust is too expensive.

199. Of course, we understand that non-revocability essentially would create a life estate with an absolutely vested remainder, with all of the negatives that go along with that.

200. 125 N.E.2d 600 (Ill. 1955).

201. *Id.* at 607.

202. John Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1668 (2014).

203. *Heaps v. Heaps*, 21 Cal. Rptr. 3d 239, 295 (Ct. App. 2004).

or's life.²⁰⁴ To the extent the URPTODA holds that the TOD deed is non-testamentary, one would assume that an interest transferred inter vivos, and that that interest consists, at the very least, of the ability to enforce the terms of revocation. But in that regard, the TOD deed, and certainly not the enhanced-life-estate deed, is not the functional equivalent to a will.

One of the reasons for the URPTODA's insistence on revocability is that the ULC treats the TOD deed like a functional will, fully revocable until death. That makes sense if no property rights transfer until death of the transferor. But it is contrary to the express articulation that the TOD is *not testamentary*. If it is not testamentary, then it is presumably inter vivos; but if it is inter vivos then some present interest would normally be deemed to have passed. Revocability is not inconsistent with either an inter vivos or a testamentary characterization, but it could matter in the context of anti-lapse, as discussed below.

A TOD deed is similar to a lottery ticket. If the ticket passes inter vivos, then the beneficiary has ownership of the ticket and can redeem it if the ticket wins. But most importantly, it can only be voided by failure to comply with the lottery rules. If no interest passes inter vivos, then the beneficiary is more like the first person standing in line to buy a theater ticket outside the closed box office. If the box office never opens, because the transferor revokes the TOD deed, the beneficiary has no grounds to complain because the beneficiary never had any ticket at all. It is rather like the difference between an heir apparent and an heir presumptive. The heir apparent cannot be displaced while the heir presumptive can be displaced by the birth of a more direct heir. With the lottery ticket in possession, the remainderman has more of a property right than the person waiting outside a locked door in the hope that it will one day open.

Besides the logical incoherence of treating a TOD deed as both non-testamentary and at the same time freely revocable without constraint, there are bound to be situations in which non-revocability might be desirable. For instance, making the beneficiary designation irrevocable may have transfer tax consequences.²⁰⁵ Because revocability is something that people may want in certain circumstances, and not want in others, mandating revo-

204. The court in *Farkas* explained:

It is not a valid objection to this to say that Williams would never question Farkas' conduct, inasmuch as Farkas could then revoke the trust and destroy what interest Williams has. Such a possibility exists in any case where the settlor has the power of revocation. Still, Williams has rights the same as any beneficiary, although it may not be feasible for him to exercise them. Moreover, it is entirely possible that he might in certain situations have a right to hold Farkas' estate liable for breaches of trust committed by Farkas during his lifetime.

Farkas, 125 N.E.2d at 608.

205. For example, making an irrevocable lifetime designation of the beneficiary should set the time for valuing the property for capital gains or transfer tax purposes.

cability in all cases constrains those who want irrevocability, like co-tenants who want their children to step into their interest and share it with the surviving co-tenant. At the same time, to the extent full revocability treats TOD deed beneficiaries like will beneficiaries, with no property rights whatsoever that can be enforced even after the transferor's death, the limitations on how beneficiaries can enforce the terms of revocation may be a cost that not all transferors are likely to want to pay.²⁰⁶

Revocability also raises legal concerns in the case of enhanced-life-estate deeds. One of the most significant legal uncertainties is whether life tenants with reserved additional powers retain the power to revoke the remainder interest and restore the full fee simple title to themselves or a third party without the joinder of the remainder beneficiaries.²⁰⁷ In *Bohr v. Nodway Valley Bank*,²⁰⁸ the Missouri Court of Appeals 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."²⁰⁹ This holding is similar to the landmark Florida case, *Oglesby v. Lee*,²¹⁰ which held that 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.²¹¹ And in *Jennings v. Atkinson*,²¹² 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.²¹³

But not all states have followed suit, nor have they all settled on what acts constitute revocation of a recorded deed.²¹⁴ Can a will, a transfer out, a

206. For instance, in *Hodel v. Irving*, 481 U.S. 704 (1987), the United States Supreme Court held that intestate heirs have no property rights to inherit that would be enforceable through a takings action, even if the decedents indeed have a property right to have their property pass according to their wills or the default rules of intestate succession. *Id.* at 711–12.

207. See Benjamin T. Jepson, *Insuring Title Out of Enhanced Life Estates*, THE FUND CONCEPT (Attorneys' Title Fund Servs., LLC, Orlando, Fla.), Oct. 2016, at 97, 100.

208. 411 S.W.3d 352, 359 (Mo. Ct. App. 2013) (emphasis omitted).

209. *Id.* at 359.

210. 73 So. 840 (Fla. 1917).

211. *Id.* at 841.

212. 456 S.W.3d 461 (Mo. Ct. App. 2014).

213. *Id.* at 467.

214. For instance, in Arkansas, revocation of a TOD deed with multiple owners requires revocation by all owners. ARK. CODE ANN. § 18-12-608(d) (West 2007). In Nevada, revocation of a TOD deed with multiple owners held in tenancy in common may be done by any one owner for his or her share. NEV. REV. STAT. ANN. § 111.109(7) (West Supp. 2010). Some states allow a will to revoke a TOD deed if expressly mentioned in the deed that the transferor retains that power. See, e.g., MO. REV. STAT. § 461.033(4) (West 2007). Many states do not allow that option.

mortgage, or a contract constitute revocation? Unlike the will, which can be revoked by physical act, a recorded real-estate deed cannot simply be torn up and thrown away. Although the URPTODA provides that the only way to revoke a TOD deed is by recording a new deed,²¹⁵ states that have their own legislation have not always thought through the different ways such a deed might be revoked.²¹⁶

There is no question that the simplicity, ease of transfer, and generally low warrant widespread use of beneficiary deeds. But to make them all absolutely revocable under all circumstances is likely to work against the interests of some transferors and is, we believe, unnecessary, especially considering the incoherence of calling the deed non-testamentary. We can see this incoherence play out in the context of anti-lapse statutes.

B. Anti-Lapse

Anti-lapse issues can easily arise with beneficiary deeds in both forms of enhanced-life-estate deeds and true TOD deeds under the URPTODA when the beneficiary predeceases the transferor. Under the URPTODA, because the beneficiary received no property interest prior to the death of the transferor, the beneficiary's interest would lapse upon predeceasing the transferor.²¹⁷ Presumably, the state's anti-lapse statute could be used to save the gift if the beneficiary had issue and was of the required degree of relationship.²¹⁸ That is how a predeceased beneficiary would be treated under a will. But again, the TOD deed is declared to be non-testamentary, so a real question would arise whether a state's anti-lapse statute would even apply if it is located in the probate code and is interpreted to apply only to wills. Because many states have not addressed anti-lapse in the context of will substitutes, it is conceivable that a TOD deed beneficiary who predeceases the transferor would not find the gift saved to benefit issue under a narrowly conceived anti-lapse statute that applies only to wills. We should ask whether formally naming the deed *non-testamentary* would trump the deed's function of effectuating a property transfer at death when deciding whether to apply a state's anti-lapse statute.²¹⁹

See, e.g., ARIZ. REV. STAT. ANN. § 33-405(J) (2014); COLO. REV. STAT. § 15-15-405(4) (West 2004).

215. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 11 (UNIF. LAW COMM'N 2009).

216. *See* Memorandum from Thomas P. Gallanis, *supra* note 32, at 67-147 (discussing the different statutory mechanisms in effect when the URPTODA was approved).

217. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13(a)(2) (UNIF. LAW COMM'N 2009).

218. Section 2-603 of the UPC provides that the anti-lapse statute will apply only if the devisee is related to the testator through a grandparent or closer relative. UNIF. PROB. CODE § 2-603 (1969) (UNIF. LAW COMM'N, amended 2010).

219. The ULC considered this issue. *See* Memorandum from Thomas P. Gallanis, *supra* note 32, at 39-41. *See generally* Eloisa C. Rodriguez-Dod, "I'm Not Quite Dead Yet!": Rethinking the

On the other hand, in states that use enhanced-life-estate deeds with a vested remainder subject to divestment, the death of the remainderman before the life tenant presumably would have no effect on the remainder because the transfer of the remainder was inter vivos. The only event that would cause divestment would be the revocation of the remainder by the life tenant. Absent revocation, the property would presumably pass to the predeceased remainderman, with all the attendant issues of the transmissible-remainder problem.²²⁰ The remainderman's estate would need to be re-opened and the property could be potentially taxed as it passed through that deceased remainderman's estate.

In states that use an enhanced-life-estate deed with a contingent remainder, the contingency would be the death of the transferor/life tenant without having revoked. In that case, even the contingent remainder would suffer the transmissible-remainder problem. Only if the contingent remainder were interpreted to require survival of the life tenant plus non-revocation could one escape the transmissible-remainder problem. And perhaps a state would apply a provision like the Uniform Probate Code's ("UPC") Section 2-707 to require survivorship of a transferor of a beneficiary deed, just as it applies to trusts, with all of the attendant complexity that that provision has created.²²¹ In such a case, the gift would lapse unless the transferor provided for alternate beneficiaries.²²² And the anti-lapse

Anti-Lapse Redistribution of a Dead Beneficiary's Gift, 61 CLEV. ST. L. REV. 1017 (2013); Kevin Purcell, *Ghosts from the Grave—Inheriting Through the Predeceased Under Ohio Law*, 50 CLEV. ST. L. REV. 189 (2003).

220. The transmissible remainder problem is an enduring one in the trusts and estates field. It occurs when a decedent holds a remainder in property and predeceases the time when the remainder would vest in possession. When that happens, the value of the remainder passes through the estate of the deceased remainderman, requiring probate, possibly re-opening the administration of the estate, and possible taxation of the value of the remainder as it passes through the estate, which are costs that are not offset for the remainderman by having been able to enjoy possession of the property during life. See *In re Estate of Houston*, 201 A.2d 592 (Pa. 1964); UNIF. PROB. CODE § 2-707 & CMT. (1969) (UNIF. LAW COMM'N, amended 2010) (amended to address the transmissible remainder problem, although § 2-707 continues to be controversial among scholars and practitioners).

221. Section 2-707 of the UPC provides that future interests in trusts will be deemed to be contingent remainders rather than vested remainders, creating an alternate give in descendants of the beneficiary, and if there are no descendants, then a resulting trust back to the settlor. UNIF. PROB. CODE § 2-707 (1969) (UNIF. LAW COMM'N, amended 2010). This provision has generated significant controversy. See, e.g., David Becker, *Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. REV. 339 (1999); Jesse Dukeminier, *The Uniform Probate Code Opens the Law of Remainders*, 94 MICH. L. REV. 148 (1995); Lawrence Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996).

222. Section 2-707 of the UPC provides that if there is no issue of a predeceased remainderman, the gift lapses and passes back to the trust settlor. UNIF. PROB. CODE § 2-707 (1969) (UNIF. LAW COMM'N, amended 2010). If the statute applied here, the remainder would lapse and pass back to the transferor, thus necessitating probate and possibly intestacy. Although Section 2-707 applies only to trusts, the remainder problem in an enhanced-life-estate deed poses the same issues

statute would presumably not apply in a state that interpreted the remainder interest to be contingent on survival unless, of course, the state followed some version of the UPC's presumption that survivorship language does not automatically defeat application of the anti-lapse statute.²²³

This anti-lapse conundrum is made particularly confusing by the state variations between true TOD deeds and enhanced-life-estate deeds with actual inter vivos remainders. If the deed is non-testamentary, then you may have transmissible-remainder problems and/or non-application of anti-lapse statutes. But if the deed is testamentary, and anti-lapse applies, you may run into will formality issues. And just consider how all of this would be even more confusing if a beneficiary predeceased the transferor and the transferor purportedly revoked using the wrong procedures. Who would have a right to enforce the terms of revocation under the anti-lapse statute: (a) the beneficiary's issue, (b) devisees of the transferor, or (c) the transferor's heirs? Ah, the whole thing is perplexing precisely because the TOD deed attempts to cross an imaginary line in order to reap the benefits of both categories in a legal world in which the imaginary line has consequences. Giving the transferor complete revocability and no property rights passing until death would mean the beneficiary has no inter vivos right to enforce the revocability provision but anti-lapse might apply. Anti-lapse would presumably not apply if a property interest passed inter vivos, but that might fetter the power of free revocability.

C. The Transferor with a Testamentary Power of Appointment

Another situation in which beneficiary deeds in any of their myriad forms may have unintended consequences is in the case of powers of appointment. If the deed is non-testamentary, as the URPTODA declares, then a transferor might not be able to use one to exercise a testamentary power of appointment. But if the property rights do not transfer until death, a beneficiary deed might not be effective if created by a presently-exercisable power. If the deed is an enhanced-life-estate deed with a vested remainder subject to divestment, the transfer to the remaindermen inter vivos might not qualify as an appropriate exercise of a testamentary power either. Even though property rights do not actually transfer until death, none of these deeds might count as an exercise of a testamentary power of appointment. Yet it is unclear whether either would count as an exercise of

as for trusts, so it would not be unreasonable for a state to apply the provision to a remainder interest in a beneficiary deed.

223. Section 2-707 and 2-603 of the UPC both provide that survivorship language in a testamentary or trust instrument is not enough to defeat application of the anti-lapse statute because simple survivorship language, without designated alternate beneficiaries, is often boilerplate. UNIF. PROB. CODE §§ 2-707, 2-603 (1969) (UNIF. LAW COMM'N, amended 2010).

a presently-exercisable power if the property rights do not transfer until death.

Consider the situation of a widow who holds Blackacre in a life estate with a testamentary power of appointment. She has two children who will inherit all of her personal property under the default intestacy statutes of every jurisdiction. She does not have enough additional property to justify executing a will and going through probate. But, she has a life estate with a power in the family home. It would be simple for her to execute a beneficiary deed, naming her children as the beneficiaries to take the property at her death. Would the beneficiary deed qualify as a testamentary exercise of her power? The URPTODA states that it is non-testamentary. Yet the TOD deed would be a simpler way for her to exercise the power than through a will. The TOD deed is cheaper to execute than a will and ought to qualify as a testamentary exercise of the power because it takes effect at death. Yet the statute claims the transfer is non-testamentary. And using the TOD deed allows her to avoid probate, which she cannot do if she makes a will or dies intestate and fails to exercise the power.²²⁴ This uncertainty raises the question of whether courts would invalidate the transfer because the TOD deed is deemed to be non-testamentary or because the execution of the deed was deemed *inter vivos*. The reliance on the bright line between *inter vivos* and testamentary transfers, like the same bright line in the context of powers, implies that, as the statute is written, only presently exercisable powers can benefit from the URPTODA.

Moreover, the URPTODA assumes that the transferor has fee ownership of the real property. It would be an interesting question whether a transferor who only has a life estate with a testamentary power could even execute a TOD deed. One could presumably execute an enhanced-life-estate deed to the extent the testamentary power is general and not special,²²⁵ because the power to revoke would be equivalent to exercising the power, unless of course the general power is testamentary and not presently-exercisable.²²⁶

224. If she fails to exercise the power, the home will pass to the default takers, which may require reopening the probate of the donor's estate. Of course, if there are no default takers, then the home would pass to the two children by intestacy but would likely still require court supervision merely to effectuate transferring the title documents. See RESTATEMENT THIRD OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 19.22 (AM. LAW INST. 2011).

225. General powers of appointment allow the donee to exercise the power in the donee's favor, while a special power can be exercised only to benefit others besides the donee. Powers can also be exercisable immediately (presently-exercisable), in the future (*inter vivos*), or only at death (testamentary). What kind of power the donee has is relevant to whether a TOD deed could be used to exercise the power. See WRIGHT, *supra* note 114, at 275–76.

226. The differences between general and special powers could be important in this context. A donee with a general power can always exercise the power on her behalf. If the power is presently-exercisable, the donee could capture the property in fee and then dispose of it pursuant to a

We realize that pointing out these inconsistencies is a bit like accusing an apple of not being an orange. But the point here is that there is no reason a TOD deed or enhanced-life-estate deed has to be inconsistent with a life estate and a testamentary power. Both, however, can fall into cracks and fail to operate logically if we hew to the bright-line distinction between testamentary and inter vivos transfers. Of course, living people exercise testamentary powers to take effect after their death, just like the beneficiary designation of a TOD deed. But calling the TOD deed non-testamentary may invalidate efforts to use the deed form as a simple way to exercise a testamentary power.

Powers of appointment are an underutilized aspect of estate planning, but because the tax consequences of powers (whether general or special) can be consequential, any new estate planning tool should work seamlessly with powers. One could rightly question whether a transferor who holds a life estate with a testamentary power of appointment would even be able to execute a TOD real-estate deed, which presumes a power of revocation and, in most cases, the power to transfer fee ownership.²²⁷ But think how sensible it would be for that life tenant to not have to execute a will in order to exercise the testamentary power of appointment, especially since the TOD real-estate deed only becomes effective at death.²²⁸ But the simple definitional characterization of the TOD deed as non-testamentary could undermine this simple process when formalism supersedes intent.

Furthermore, the differences between the true TOD deed and an enhanced-life-estate deed could jeopardize efforts to use either to exercise a power of appointment. If a state allows a transferor to only use an enhanced-life-estate deed, which requires giving away a present interest in a vested or a contingent remainder, the deed may overstep the power of a life tenant with a testamentary power, even if it is a general testamentary power. Yet the whole purpose of the myriad will substitutes is to provide ways to avoid probate, avoid wills and avoid their attendant formalities, and make sensible procedures for the succession of property. To the extent the artificial divide between inter vivos and testamentary nomenclature and formalities could frustrate the transferor's intentions, the mechanism may offer promises it cannot keep.

beneficiary deed. But if the general power was testamentary, it could be exercised only in the donee's will or other testamentary instrument. The question we pose, of course, is whether a beneficiary deed should be considered a testamentary instrument for purposes of exercising a testamentary power.

227. The URPTODA does not specify that the transferor of a TOD deed must be an owner in fee. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT § 5 (UNIF. LAW COMM'N 2009).

228. By using a TOD deed, the life tenant with a power would not have to use a will that would require probate, and the life tenant can revoke the TOD deed freely during life. It is also simpler for the beneficiary who would not need to pursue probate and can have the title changed simply by filing a death certificate.

D. Creditors Rights

Despite the URPTODA expressly providing that no property rights transfer to the beneficiary of a TOD real-estate deed,²²⁹ and, therefore, creditors of the beneficiary would have no claim on the property until the death of the transferor, the same cannot be said of other forms of beneficiary deeds, such as the enhanced-life-estate deed. In states that use contingent remainders or executory interests to effectuate the TOD function, it would be difficult to argue that no property rights in fact passed to the remainderman. Thus, creditors would likely have access to the property even if they had to wait until the transferor actually died. Creditors of joint tenants and of tenants in common can usually attach the debtor's share of co-owned property, but creditors of tenants by the entirety generally cannot. And as *Sawada v. Endo*²³⁰ illustrated, creditors in some states can attach a future right of survivorship, even if they cannot attach the present estate of the tenancy by the entirety.²³¹ Under the URPTODA, creditors of the transferor can attach to real property held under a TOD deed, but general creditors of the transferor's estate cannot attach TOD property once it passes to the beneficiary unless the estate has insufficient assets to pay all of its debts.²³² But creditors of an enhanced-life-estate deed may only be able to attach to the life estate, unless the state's law permits a creditor to step into the shoes of the transferor and thus force the revocation of the remainder. In that event, the issues would be similar to those of creditor rights in discretionary or spendthrift trusts.²³³

Thus, differences between enhanced-life-estate deeds and true TOD deeds may result in different effects regarding creditors' rights. And, of course, a surviving spouse can be a creditor vis-à-vis an elective share. If a transferor used a beneficiary deed to avoid the elective share, whether the deed was an enhanced-life-estate deed or a true TOD deed might make a difference. In a state that gives a surviving spouse an elective share only on the decedent spouse's probate estate, it would seem that use of an enhanced-life-estate deed would preclude the surviving spouse from including the transferred real estate in the elective estate. But if the decedent spouse used a true TOD deed, in which the property transferred at death, the sur-

229. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 5 (UNIF. LAW COMM'N 2009).

230. 561 P.2d 1291 (Haw. 1977).

231. *Id.* at 1296–98.

232. UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 12, 13(b) (UNIF. LAW COMM'N 2009).

233. Spendthrift and discretionary trusts pose significant policy concerns when transferors can use them to avoid legal debts. Most states do not allow settlors to shield property from their own legal creditors, although most states allow spendthrift and discretionary provisions to shield the trust property from creditors of the beneficiary. See WRIGHT, *supra* note 114, at 533–45.

viving spouse would have a valid claim that such property should be included in the elective estate even though it passes via a will substitute.

Admittedly, all will substitutes have the potential for abuse, although those that require a present transfer are presumably less problematic because some control over the property was transferred *inter vivos*. Would a surviving spouse have a stronger claim or a weaker claim that an enhanced-life-estate deed was a fraud on the elective share than a TOD deed? Could creditors attach remainder interests or the transferor's interests in enhanced-life-estate or true TOD deeds? These questions are meant to suggest that, like so many aspects of beneficiary deeds, it matters for some creditor purposes whether the deed is deemed to pass an interest *inter vivos*, as with an enhanced-life-estate deed, or is deemed to pass an interest only at death. The URPTODA's provision that the property rights transfer at death but that the deed is non-testamentary can create problems for an elective share that relies only on the probate estate.²³⁴

It would seem that creditors of the transferor are likely better off in states that use the true TOD deed and worse off in states that use enhanced-life-estate deeds because, at most, they could only attach the life estate in the latter states. However, the corollary is likely true as well, in which creditors of beneficiaries of enhanced-life-estate deeds are better off than creditors of beneficiaries of TOD deeds. The result of the differential effects is that we are likely to see the same state variation with TODs as we have seen with spendthrift provisions in trusts, where states have been willing to give certain privileged creditors a right to pierce a spendthrift provision.²³⁵ The kind of technical parsing that the *Sawada* court did between creditor rights to attach the present estate and/or the future interest is likely to occur with all of these beneficiary deeds in the absence of clear statutory language indicating how TOD deeds affect creditors rights, especially creditors of the landowner and the beneficiary.²³⁶ While we advocate for

234. Elective share statutes come in many different forms, but most can be distilled to one of two basic types. The first gives the surviving spouse a statutory minimum of the decedent spouse's probate property only. The second gives the surviving spouse a statutory minimum in most or all of the decedent's spouse's property, even property that passed *inter vivos* or through a will substitute. States that follow the second model would include TOD deed property in the surviving spouse's elective estate because they don't distinguish between property passing through a will or a will substitute. But in states that follow the probate property model, the ambiguous characterization of TOD deed real property as non-testamentary but passing at death may require surviving spouses to litigate whether such property will be included or not. *See, e.g.*, CONN. GEN. STAT. § 45a-436(a) (2019); MASS. GEN. LAWS ch. 191, § 15 (2017); MD. CODE ANN., EST. & TRUSTS § 3-203(a) (West 2019).

235. RONALD CHESTER, GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 227 Creditors' Rights and Remedies (3d ed. 2005).

236. *See supra* text accompanying notes 230–231 (discussing *Sawada v. Endo*). In *Sawada*, the court discussed four different types of creditor protections under tenancies by the entirety that have profoundly different effects on heirs and creditors. *See Sawada*, 561 P.2d at 1294–95.

the adoption of beneficiary deeds, and certainly encourage states to adopt clear language regarding creditor rights, we caution against states relying on the courts to determine the extent of creditors' rights when those rights are likely to rise or fall on the basis of the inter vivos/testamentary divide.

E. Homestead

There are a few states, like California, Florida, and Minnesota, where there are restrictions on the ability of a decedent to devise homestead property, free from the claims of surviving spouses and/or minor children.²³⁷ But even beyond those few, beneficiary deeds may have unanticipated results when used to transfer homestead property. There are at least two issues that should be considered in the context of homestead.

In those states that limit the ability to devise homestead property, one issue that inevitably arises is whether a beneficiary deed designation would trump survivors' homestead rights because the deed is non-testamentary. Florida provides a good illustration. The Florida Constitution precludes decedents from devising their homestead to anyone if they have minor children, although they can devise it to their surviving spouse in fee if there are adult children or no children.²³⁸ If the decedent has minor children or does not devise the homestead outright to a surviving spouse, the property must descend by intestacy to the children and the spouse.²³⁹ Florida courts have held that a survivors' homestead rights can be defeated, however, if a homeowner uses a joint tenancy because upon the owner's death there is no homestead; it disappeared at death.²⁴⁰ Under the same theory that no property rights remain with the decedent at death under a joint tenancy, a court would likely rule the same way if a decedent executed an enhanced-life-estate deed of the homestead property.²⁴¹ But it would seem that the opposite would result if the decedent executed a true TOD deed. Because there would be no inter vivos transfer of property, the property would retain its homestead character at the decedent's death and thus the probate limitations might apply.

237. CAL. PROB. CODE ANN. §§ 6500–6615 (West 2009); FLA. STAT. § 732.401 (2018); MINN. STAT. ANN. § 524.2-402 (West 2008).

238. FLA. CONST. Art. 10, § 4(c) (amended 1998); FLA. STAT. § 732.401; FLA. STAT. § 732.4015 (2018).

239. FLA. STAT. § 732.401.

240. *Ostyn v. Olympic*, 455 So.2d 1137, 1138 (Fla. Dist. Ct. App. 1984).

241. See FLA. UNIF. TITLE STANDARDS ch. 6.10–.12 CMT. (FLA. BAR, Proposed Standards, 2019) (on file with authors) (“Although Lady Bird Deeds are used prevalently in Florida for various purposes among which is the avoidance of probate by the holder of the life estate, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice. The practitioner should thus be aware that this Standard and its guidance represents the consensus view of the Real Property, Probate, and Trust Law Section of the Florida Bar.”).

The second issue has to do with the creditor protections that pass to certain recipients of homestead property. If the property has to maintain its status as homestead through a narrowly defined transfer channel (intestacy or will), then the creditor protections might be lost, even if the beneficiary is a protected recipient. On the other hand, a well-drafted statute should provide homestead protections regardless of the method of transfer. Unfortunately, the poor drafting problem most likely lies with the narrowness of many homestead provisions written over a century ago, rather than with beneficiary deed statutes adopted in the last decade. This problem is exacerbated because the creditor protections of homestead are often sorely neglected in state probate codes.²⁴²

Other issues also might arise if homestead creditor protections require ownership of the homestead in situations where a transferor uses an enhanced-life-estate deed or a trust. All of this is not to say that beneficiary deeds are a bad idea; quite the contrary. Instead, we simply aim to point out how the designation of the beneficiary deed as either testamentary or inter vivos may conflict with certain homestead protections and yield unintended consequences. The solution is not to forego beneficiary deeds or homestead, but to make a conscious effort to harmonize all succession rights in a way that does not rely on the inter vivos/testamentary distinction.

F. Trust Owner as Transferor

Another legal uncertainty that often leads to litigation is who can be a grantor or a beneficiary for an effective beneficiary deed. The courts in Colorado have decided that a trust may not be a grantor because the language of their state law implies that the owner must be a natural person.²⁴³ The importance of the language used in the statute was also central to the 2011 Missouri case, *Delcour v. Rakestraw*.²⁴⁴ In that case, the Missouri Court of Appeals considered the language of the recently amended definition of “owner.”²⁴⁵ Prior to the amendment, the court in *Pippin v. Pippin*²⁴⁶

242. For instance, Maine protects homestead only up to \$30,000, ME. REV. STAT. ANN. tit. 18-A, § 2-401 (2009), which is quite inadequate to meaningfully protect the home. And, California provides for \$75,000 to \$175,000 homestead creditor protections in its civil procedure code, CAL. CIV. PROC. CODE § 704.730 (West 2018), but it also provides that a life estate or a term of years in the homestead may be granted to a surviving spouse or minor child, respectively, at the discretion of the court, with only a passing reference to the creditor protections in its probate code, CAL. PROB. CODE § 6520-6528 (West 1991).

243. *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 transfer of real property by a beneficiary deed shall be effective only ‘upon the death of the owner’ and ‘the owner must be a natural person and not an entity’”).

244. 340 S.W.3d 320 (Mo. App. 2011).

245. *Id.* at 322–23. The relevant definition reads: “‘Owner’, a person or persons having a right, exercisable alone or with others, regardless of the terminology used to refer to the owner in

invalidated a beneficiary deed executed by the owner to transfer upon the death of the owner and a non-owner to the beneficiaries.²⁴⁷ In 2005, the Missouri legislature amended the definition to resolve the issue of who constituted an “owner.”²⁴⁸ Even though the salient facts in both *Delcour* and *Pippin* were nearly identical—namely, that the transfer was not to occur until the death of both an owner and a non-owner—the court in *Delcour* held that “[t]he 2005 amendment does not affect *Pippin’s* application here or yield a different outcome.”²⁴⁹ These two cases illustrate the complexity involved in drafting the language of a statute to achieve the desired result. Even though the Missouri statute was amended purportedly to change the interpretation of who could be an owner for purposes of a beneficiary deed, the amendment failed to have that effect. Similarly, the URPTODA perpetuates the limitation that a TOD deed can only be executed by an individual person.²⁵⁰

But imagine how convoluted things might get when homestead property is transferred into trust, and then the trustee attempts to use a beneficiary deed to effectuate a transfer, especially if the trustee has a testamentary power of appointment and the beneficiaries predecease and their issue hope to take under the state’s anti-lapse statute. Although courts have had a longer time to develop precedents on homestead and trusts²⁵¹ than on beneficiary deeds in any of these contexts, the multiplication of uncertainty on top of indeterminacy could cause significant problems for the transferor who is simply looking for a straightforward way to manage real property.

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.” *Id.* (emphasis added) (quoting MO. REV. STAT. § 461.005(8) (1995) (as amended 2005)).

246. 154 S.W.3d 376 (Mo. App. 2004).

247. *Id.* at 381, 382.

248. MO. ANN. STAT. § 461.005(8) (West 2006); *see supra* note 245.

249. *Delcour*, 340 S.W.3d at 323 (reversing and remanding the case to the lower court for findings in conformity with their opinion).

250. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT § 2(7) (UNIF. LAW COMM’N 2009) (limiting the definition of a “transferor” to an “individual”).

251. *See* Seth Williams, Note, *Property Law—Homestead Exemption—A Beneficiary Interest Can Support a Homestead Exemption in Arkansas and a Look at Other Interests Sufficient to Support a Homestead Exemption*, 34 U. ARK. LITTLE ROCK L. REV. 173 (2011); *see also* Fitton v. Bank of Little Rock, 365 S.W.3d 888 (Ark. 2010) (citing related cases therein); *In re Estate of Sloan*, 496 S.W.3d 299 (Ct. App. Tx. 2016).

V. THE UNBRIDGEABLE(?) DIVIDE BETWEEN INTER VIVOS AND TESTAMENTARY TRANSFERS

Commentators,²⁵² judges,²⁵³ legislators,²⁵⁴ and ULC reporters²⁵⁵ have operated for centuries on the assumption that there is a fundamental distinction between inter vivos and testamentary transfers. Inter vivos transfers are made during the donor's lifetime and require delivery, at least to the extent delivery is feasible given the type of property.²⁵⁶ Testamentary transfers occur upon death and require either a valid will executed according to the state's will formalities or the estate passes according to the strict default rules of intestate succession. Property passing at death via a testamentary transfer must be probated. Inter vivos and testamentary transfers are treated differently for transfer-tax purposes,²⁵⁷ and no presumptive beneficiary has any right to receive a testamentary gift or enforce a contract to make a testamentary gift. The mental capacity to make inter vivos gifts is higher than to make testamentary gifts.²⁵⁸ Capital gains taxes, the step-up in basis, and who pays the taxes on gains in value can differ dramatically between inter vivos and testamentary gifts. There are countless differences in legal consequences between inter vivos and testamentary gifts beyond the formalistic requirement of a present transfer or execution in conformity with the will formalities.

The idea that there is a formal divide between inter vivos gifts and testamentary gifts, wherein a present property interest is transferred in the

252. 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).

253. See, e.g., *Miller v. Cothran*, 280 S.W.3d 580, 582–83 (Ark. Ct. App. 2008); *Bickers v. Shenandoah Val. Nat. Bank of Winchester*, 88 S.E.2d 889, 896–97 (Va. 1955).

254. Legislators who fail to amend probate codes that require the will formalities, which all states require, ultimately accede to the distinction between testamentary and inter vivos transfers. Some states, however, have adopted the UPC's dispensing power or harmless error doctrine, which allows wills to be probated even if the formalities have not been met. UNIF. PROB. CODE § 2-503 (1969) (UNIF. LAW COMM'N, amended 2010). These states are beginning to blur the line, but it still remains persistent in most states. See, e.g., N.J. STAT. ANN. § 3B:3-3 (West 2019); HAW. REV. STAT. ch. 560 (2019).

255. See UNIF. REAL PROP. TRANSFER ON DEATH ACT § 7 (UNIF. LAW COMM'N 2009) (commenting that because the transfer is deemed non-testamentary there is no need for the will formalities).

256. See *Gruen v. Gruen*, 496 N.E.2d 869 (N.Y. 1986), for an example of how constructive delivery is sufficient when a future interest in a chattel is made the subject of a lifetime give.

257. See Samuel R. Scarcello, *Transfer Taxes in Flux: A Comparison of Alternative Plans for Great Reform*, 107 NW. U. L. REV. 321, 328 (2012) (discussing different tax implications of gift and estate taxes).

258. See Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 86 (2014); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt. d (2003) ("Because an irrevocable gift depletes financial resources that the donor may yet need, the standard for mental capacity to make an irrevocable gift is higher than that for making a will.").

former during the donor's lifetime, and no property interests transfer in the latter, makes sense when we think of the timing of the transfer of the fundamental rights to dominion and control that accompany a gift. The property sticks either transfer during life of the donor or at the donor's death. And decedents who want to maintain absolute control up until death may certainly do so by making only testamentary gifts, and any property over which they retain that power will generally be deemed testamentary when it passes to successors.

But in the context of what property gets probated, and whether the will formalities are required, the distinction makes less sense. In a number of circumstances, the law has rejected the fine distinctions, relying more on legal fictions than on actual transfers or on who has dominion and control. Life insurance, POD/TOD accounts, and revocable standby trusts all push the envelope, highlighting the fiction that an inter vivos property interest has transferred even though the donor retains the full power to revoke. But the beneficiary real-estate deed seems to pose a much more substantial threat to maintenance of the divide than the other will substitutes. It seems to us that the beneficiary real-estate deed, in whichever form it takes, so profoundly challenges the juridical distinction that maybe it is time to admit that the emperor has no clothes. Are we not at a sufficiently mature point in our legal system that we can decide for ourselves what formalities we will require for the different mechanisms of property succession, dependent on the policy goals and needs of today's modern testators, without relying on an arbitrary set of distinctions that arose because of the unique crown prerogatives of landholding in feudal England?

Professor Doug Miller's 1991 article advocated for abolishing the formal distinctions between inter vivos and testamentary formalities when the UPC was reformed to permit the harmless-error doctrine.²⁵⁹ Instead of applying more Band-Aids to the broken probate system, he argued we should adopt a set of functional rules that apply regardless of whether the donative mechanism is a will or a will substitute.²⁶⁰ There is something refreshing about that view. To the extent we can protect donative intent and guarantee the authenticity of the expression, we can institute whatever forms and formalities we would like. The important point is that we would not need to legislate that a beneficiary deed is non-testamentary in order to avoid application of the will formalities requirements if we simply admitted that testamentary transfers can be effective if executed with any variety of formal requirements. We could also provide that not all property passing at death should require probate. Although some inter vivos transfers should

259. Miller, *Part Two*, *supra* note 14, at 717–19 (advocating a unified approach to the formalities of wills and will substitutes).

260. *Id.*

require probate, let us first think about the many ways in which certain laws have already rejected the formal distinctions or have worked around the technical rules to prevent donors from elevating form over substance and manipulating the juridical divide.

An obvious example is the IRC's inclusion in the gross taxable estate of property in revocable trusts, property transferred in the two years prior to death, and virtually any property over which the donor had a power of appointment or enjoyed a lifetime benefit.²⁶¹ The IRC recognizes that donors want the benefits of probate avoidance, easy revocability or ease of amending donative documents, and may want to avoid the testamentary formalities while still maintaining maximum control up until death. The IRC blurs the inter vivos/testamentary line not only with regard to the formalities but for those transfers that are not functionally inter vivos. With amendments to the transfer-tax regime to unify gift and estate taxes, one of the reasons for manipulating transfers has nearly disappeared. As a result, the IRC treats many technically inter vivos transfers as testamentary because the property functionally transfers at death.

Many states' elective-share statutes do the same by including non-probate property, property transferred inter vivos before death, and property over which the donor had a power of appointment, treating them all as essentially testamentary transfers.²⁶² The response of Florida and New York to will substitutes blurring the legal line has been to require that dispositive provisions of revocable trusts be executed according to the will formalities because they are essentially testamentary transfers.²⁶³

As Miller has also noted, the "relatively informal procedures for transferring property by means of the will substitutes and the relatively flexible approach of courts in giving them effect, makes the ritualistic emphasis on form when the transferor has elected to dispose of property by will seem unjust and irrational."²⁶⁴ Although we agree with Miller's argument that the disparity between the formalities of wills and will substitutes weighs in favor of a unified, functional set of formalities for all instruments of succession, regardless of type, we are making a somewhat different point in this Article. It is not just the fact of the formalities that cause problems, although the differences in formalities are often used to justify the differences in treatment and interpretation of different donative mechanisms. Rather, the juridical divide between inter vivos and testamentary itself causes prob-

261. I.R.C. § 2033 (2012).

262. See, e.g., FLA. STAT. § 732.2035 (2018); MINN. STAT. ANN. § 524.2-208 (West 1994); N.J. STAT. ANN. §§ 3B:8-1, -3 (West 2006); VA. CODE ANN. §§ 64.2-304, -305 (West 2012).

263. See FLA. STAT. § 736.0403(2)(b) (2018); N.Y. EST. POWERS & TRUSTS § 7-1.17(a) (McKinney 2010).

264. Miller, *Part One*, supra note 14, at 184–85 (footnote omitted).

lems when the tools and mechanisms of donative succession intentionally blur that line. So long as there is a line that provides that testamentary gifts are probated and non-testamentary gifts are not subject to probate, there are real-world implications that also make little sense.²⁶⁵

There are a number of ways we could deal with the situation. One would be to eliminate the heady differences between testamentary and inter vivos gifts, as the IRC has essentially done, and instead identify a set of formalities for execution of all donative documents. We could then require that all donative instruments that do not rely on certain formalities or on third party forms and interests would require probate. Or, we could eliminate some of the distinctions between testamentary and inter vivos transfers and rely, instead, solely on the relinquishment of some essential powers of dominion and control. If we could start at the beginning and establish a logical system for managing the succession of property at death, what would that look like? Every new tool, including the TOD real-estate deed or enhanced-life-estate deed, is an attempt to gain certain advantages in terms of probate avoidance or revocability in a legal system that still relies on arbitrary lines and differences established eight centuries ago when a property owner's greatest fear was losing his estate to his feudal lord in primer seisin if he died with an underage heir whose marriage rights fell into wardship. The world is so fundamentally different today that it seems only reasonable that we can redesign the legal holes and pegs to fit today's testators, rather than having to fit our family-planning needs into the legal categories of Coke's or Blackstone's day.

VI. CONCLUSION

The beneficiary real-estate deed is the newest will substitute, but it pushes the juridical binary of inter vivos and testamentary transfers into a truly incoherent dimension. The deed itself, whether in the form of a true TOD deed or an enhanced-life-estate deed, is an important addition to the estate planner's toolbox and is a valuable mechanism for a large swath of the population to transfer real property upon death smoothly and efficiently. But the mechanism itself distorts the boundaries between will substitutes and wills and should make us rethink the artificial distinction that we continue to carry forward from centuries-old feudal English land law. We anticipate that there will continue to be significant legal problems with this new tool precisely because of the distinction between inter vivos and testamentary transfers, which is fluid and malleable at times, and rigid and impenetrable at others. The lack of consistency will inevitably lead to confu-

265. Not only are there probate implications, but tax, trust, elective share implications, and intended beneficiaries might not get their intended bequests if TOD deeds fail.

sion, error, and litigation. The simple question of whether a beneficiary deed can be used by a life tenant with a testamentary power of appointment illustrates the problem, and it is not with the beneficiary deed itself, but rather with the adjectives we use to describe so many trusts and estates functions.

There are very important and valuable reasons for distinguishing between inter vivos and testamentary powers, but the nomenclature we use can impede effective estate planning in situations where the distinctions are merely ones of form. How simple it would have been if the URPTODA had provided that the TOD deed was testamentary in nature but was simply exempted from the will formalities because real-estate deeds have their own formal execution requirements. Instead, in continuing to reiterate the traditional discursive categories, the statute perpetuates a legal binary that is irrational and counterproductive in many situations. We can only wonder if this new will substitute will provide the final push to completely restructure the system of testamentary succession of property and replace it with a coherent and rational system that does not pay tribute to outdated formal categories that have lost their functional meaning. If it has become true that the only people who will suffer the consequences of the inter vivos/testamentary divide are those without access to sophisticated planners who can work around the arcane and outdated categories, then the system needs to be overhauled. When the inter vivos/testamentary binary becomes solely a trap for the unwary, and it can be easily drafted around, then we open ourselves to the legitimate critique that the law serves only to keep lawyers in business and does not serve the succession needs of clients.