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H.P. 553

House of Representatives, March 2, 2017

An Act To Enact the Uniform Real Property Transfer on Death Act

Reference to the Committee on Judiciary suggested and ordered printed.

Robert B. Hunt
ROBERT B. HUNT
Clerk

Presented by Representative MALABY of Hancock.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 18-A MRSA Art. 6, Pt. 4** is enacted to read:

3 **UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT (2009)**

4 **Prefatory Note**

5 One of the main innovations in the property law of the twentieth century has been the
6 development of asset-specific will substitutes for the transfer of property at death. By
7 these mechanisms, an owner may designate beneficiaries to receive the property at the
8 owner's death without waiting for probate and without the beneficiary designation
9 needing to comply with the witnessing requirements of wills. Examples of specific assets
10 that today routinely pass outside of probate include the proceeds of life insurance policies
11 and pension plans, securities registered in transfer on death (TOD) form, and funds held
12 in pay on death (POD) bank accounts.

13 Today, nonprobate transfers are widely accepted. The trend has largely focused on
14 assets that are personal property, such as the assets described in the preceding paragraph.
15 However, long-standing uniform law speaks more broadly. Section 6-101 of the Uniform
16 Probate Code (UPC) provides: "*A provision for a nonprobate transfer on death in an*
17 *insurance policy, contract of employment, bond, mortgage, promissory note, certificated*
18 *or uncertificated security, account agreement, custodial agreement, deposit agreement,*
19 *compensation plan, pension plan, individual retirement plan, employee benefit plan, trust,*
20 *conveyance, deed of gift, marital property agreement, or other written instrument of a*
21 *similar nature is nontestamentary"* (emphasis supplied).

22 A small but growing number of jurisdictions have implemented the principle of UPC
23 Section 6-101 by enacting statutes providing an asset-specific mechanism for the
24 nonprobate transfer of land. This is done by permitting owners of interests in real
25 property to execute and record a transfer on death (TOD) deed. By this deed, the owner
26 identifies the beneficiary or beneficiaries who will succeed to the property at the owner's
27 death. During the owner's lifetime, the beneficiaries have no interest in the property, and
28 the owner retains full power to transfer or encumber the property or to revoke the TOD
29 deed.

30 Thirteen states have enacted statutes authorizing TOD deeds. In the chronological
31 order of the statutes' enactment, the states are: Missouri (1989), Kansas (1997), Ohio
32 (2000), New Mexico (2001), Arizona (2002), Nevada (2003), Colorado (2004), Arkansas
33 (2005), Wisconsin (2006), Montana (2007), Oklahoma (2008), Minnesota (2008), and
34 Indiana (2009).

35 The time is ripe for a Uniform Act to facilitate this emerging form of nonprobate
36 transfer and to bring uniformity and clarity to its use and operation.

37 **PART 4**

38 **UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT**

1 transferor, then *Y* is a beneficiary and *X* is not. A further illustration comes into play if
2 Section 13 is made subject to the state's antilapse statute. If *X* fails to survive the
3 transferor but has a descendant, *Z*, who survives the transferor, the antilapse statute may
4 create a substitute gift in favor of *Z*. In such a case, the designated beneficiaries are *X* and
5 *Y*, but the beneficiaries are *Y* and *Z*.

6 Paragraph (3) provides a definition of a "joint owner" as an individual who owns
7 property with one or more other individuals with a right of survivorship. The term is used
8 in Sections 11 and 13.

9 Paragraph (4) is the standard Uniform Law Commission definition of a "person."

10 The effect of paragraph (5) is that the act applies to all interests in real property
11 located in this state that are transferable at the death of the owner.

12 Paragraph (6) provides that a "transfer on death deed" is a deed authorized under this
13 act. In some states with existing transfer on death deed legislation, the legislation has
14 instead used the term "beneficiary deed." The term "transfer on death deed" is preferred,
15 to be consistent with the transfer on death registration of securities. See Article 6, Part 3,
16 of the Uniform Probate Code, containing the Uniform TOD Security Registration Act.

17 Paragraph (7) limits the definition of a "transferor" to an individual. The term
18 "transferor" does not include a corporation, business trust, estate, trust, partnership,
19 limited liability company, association, joint venture, public corporation, government or
20 governmental subdivision, agency, or instrumentality, or any legal or commercial entity
21 other than an individual. The term also does not include an agent or other representative.
22 If a transfer on death deed is made by an agent on behalf of a principal or by a
23 conservator, guardian, or judge on behalf of a ward, the principal or ward is the
24 transferor. By way of analogy, see Uniform Trust Code (2000/2005) Section 103(15)
25 (defining "settlor") and the accompanying Comment (excluding an individual "acting as
26 the agent for the person who will be funding the trust"). The power of an agent to make or
27 revoke a transfer on death deed on behalf of a principal is determined by other law, such
28 as the Uniform Power of Attorney Act (2006) (UPC Article 5B), as indicated in the
29 Comments to Sections 9 and 11 (UPC Sections 6-409 and 6-411).

30 **§6-403. Applicability**

31 This Part applies to a transfer on death deed made before, on or after January 1, 2018
32 by a transferor dying on or after January 1, 2018.

33 **Comment**

34 This section provides that the act applies to a transfer on death deed made before, on,
35 or after the effective date of the act by a transferor dying on or after the effective date of
36 the act. This section is consistent with the Uniform Probate Code's provisions governing
37 transfer on death registration of securities. Those provisions "appl[y] to registrations of
38 securities in beneficiary form made before or after [effective date], by decedents dying on
39 or after [effective date]." UPC Section 6-311.

1 Donative Transfers) §10.1 that the donor's intention should be "given effect to the
2 maximum extent allowed by law." As the Restatement explains in Comment c to §10.1,
3 "American law curtails freedom of disposition only to the extent that the donor attempts
4 to make a disposition or achieve a purpose that is prohibited or restricted by an overriding
5 rule of law."

6 Notwithstanding this freedom of disposition, transferors are encouraged as a practical
7 matter to avoid formulating dispositions that would complicate title. Dispositions
8 containing conditions or class gifts, for example, may require a court proceeding to sort
9 out the beneficiaries' interests. Other estate planning mechanisms, such as trusts, may be
10 more appropriate in such cases.

11 **§6-406. Transfer on death deed revocable**

12 A transfer on death deed is revocable even if the deed or another instrument contains
13 a contrary provision.

14 **Comment**

15 A fundamental feature of a transfer on death deed under this act is that the transferor
16 retains the power to revoke the deed. Section 6 is framed as a mandatory rule, for two
17 reasons. First, the rule prevents an off-record instrument from affecting the revocability
18 of a transfer on death deed. Second, the rule protects the transferor who may wish later to
19 revoke the deed.

20 If the transferor promises to make the deed irrevocable or not to revoke the deed, the
21 promisee may have a remedy under other law if the promise is broken. The deed remains
22 revocable despite the promise.

23 **§6-407. Transfer on death deed nontestamentary**

24 A transfer on death deed is nontestamentary.

25 **Comment**

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

33 As the Comment to Uniform Probate Code Section 6-101 explains, because the mode
34 of transfer is declared to be nontestamentary, the instrument of transfer is not a will and
35 does not have to be executed in compliance with the formalities for wills, nor does the
36 instrument need to be probated.

37 Whether a document that is ineffective as a transfer on death deed (e.g., because it
38 has not been recorded before the transferor's death) should be given effect as a

1 testamentary instrument will depend on the applicable facts and on the wills law of the
2 jurisdiction. Section 2-503 of the Uniform Probate Code provides in pertinent part:
3 "Although a document ... was not executed in compliance with Section 2-502, the
4 document ... is treated as if it had been executed in compliance with that section if the
5 proponent of the document ... establishes by clear and convincing evidence that the
6 decedent intended the document ... to constitute ... (iii) an addition to or alteration of the
7 [decedent's] will"

8 **§6-408. Capacity of transferor**

9 The capacity required to make or revoke a transfer on death deed is the same as the
10 capacity required to make a will.

11 **Comment**

12 This section provides that the capacity required to make or revoke a transfer on death
13 deed, which is a revocable will substitute, is the same as the capacity required to make a
14 will. It is appropriate that a will and a transfer on death deed require the same level of
15 capacity, for both mechanisms are revocable and ambulatory, the latter term meaning that
16 they do not operate before the grantor's death. This approach is consistent with the
17 Restatement (Third) of Property (Wills and Other Donative Transfers) §8.1(b), which
18 applies the standard of testamentary capacity, and not the standard of capacity for inter
19 vivos gifts, to revocable will substitutes: "If the donative transfer is in the form of a will,
20 a revocable will substitute, or a revocable gift, the testator or donor must be capable of
21 knowing and understanding in a general way the nature and extent of his or her property,
22 the natural objects of his or her bounty, and the disposition that he or she is making of
23 that property, and must also be capable of relating these elements to one another and
24 forming an orderly desire regarding the disposition of the property." This section is also
25 consistent with Uniform Trust Code Section 601: "The capacity required to create,
26 amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee
27 of a revocable trust, is the same as that required to make a will."

28 A transfer on death deed is not affected if the transferor subsequently loses capacity.
29 On the ability of an agent under a power of attorney to make or revoke a transfer on death
30 deed, see the Comments to Sections 9 and 11.

31 **§6-409. Requirements**

32 A transfer on death deed:

33 **1. Essential elements and formalities.** Except as otherwise provided in subsection
34 2, must contain the essential elements and formalities of a properly recordable inter vivos
35 deed;

36 **2. Death of transferor.** Must state that the transfer to the designated beneficiary is
37 to occur at the transferor's death; and

38 **3. Recorded before transferor's death.** Must be recorded before the transferor's
39 death in the public records in the registry of deeds in the county where the property is
40 located.

1 **Comment**

2 Paragraph (1) requires a transfer on death deed to contain the same essential elements
3 and formalities, other than a present intention to convey, as are required for a properly
4 recordable inter vivos deed under state law. "Essential elements" is a term with a long
5 usage in the law of deeds of real property. The essential elements of a deed vary from one
6 state to another but commonly include the names of the grantor and grantee, a clause
7 transferring title, a description of the property transferred, and the grantor's signature. In
8 all states, the essential elements of a properly recordable deed include the requirement
9 that the deed be acknowledged by the grantor before a notary public or other individual
10 authorized by law to take acknowledgments. See Thompson on Real Property §92.04(c)
11 (observing that a "certificate of acknowledgment or attestation is universally required to
12 qualify an instrument for recordation"). In the context of transfer on death deeds, the
13 requirement of acknowledgment fulfills at least four functions. First, it cautions a
14 transferor that he or she is performing an act with legal consequences. Such caution is
15 important where, as here, the transferor does not experience the wrench of delivery
16 because the transfer occurs at death. Second, acknowledgment helps to prevent fraud.
17 Third, acknowledgment facilitates the recording of the deed. Fourth, acknowledgment
18 enables the rule in Section 11 that a later acknowledged deed prevails over an earlier
19 acknowledged deed.

20 Paragraph (2) emphasizes an important distinction between an inter vivos transfer and
21 a transfer on death. An inter vivos transfer reflects an intention to transfer, at the time of
22 the conveyance, an interest in property, either a present interest or a future interest. In
23 contrast, a transfer on death reflects an intention that the transfer occur at the transferor's
24 death. Under no circumstances should a transfer on death be given effect inter vivos; to
25 do so would violate the transferor's intention that the transfer occur at the transferor's
26 death.

27 Paragraph (3) requires a transfer on death deed to be recorded before the transferor's
28 death in the county (or other appropriate administrative division of a state, such as a
29 parish) where the land is located. If the property described in the deed is in more than one
30 county, the deed is effective only with respect to the property in the county or counties
31 where the deed is recorded. The requirement of recordation before death helps to prevent
32 fraud by ensuring that all steps necessary to the effective transfer on death deed are
33 completed during the transferor's lifetime. The requirement of recordation before death
34 also enables all parties to rely on the recording system.

35 An individual's agent may execute a transfer on death deed on the individual's behalf
36 to the extent permitted by other law, such as the Uniform Power of Attorney Act (2006).
37 This act does not define, but instead relies on other law to determine, the authority of an
38 agent.

39 **§6-410. Notice, delivery, acceptance, consideration not required**

40 A transfer on death deed is effective without:

41 1. Notice, delivery or acceptance. Notice or delivery to or acceptance by the
42 designated beneficiary during the transferor's life; or

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2. Consideration. Consideration.

Comment

This section makes it clear that a transfer on death deed is effective without notice or delivery to or acceptance by the beneficiary during the transferor's lifetime (paragraph (1)) and without consideration (paragraph (2)).

Paragraph (1) is consistent with the fundamental distinction under this act between a transfer on death deed and an inter vivos deed. Under the former, but not under the latter, the transfer occurs at the transferor's death. Therefore, there is no requirement of notice, delivery, or acceptance during the transferor's life. This does not mean that the beneficiary is required to accept the property. The beneficiary may disclaim the property, as explained in Section 14 and the accompanying Comment.

Paragraph (2) is consistent with the law of donative transfers. A deed need not be supported by consideration.

§6-411. Revocation by instrument authorized; revocation by act not permitted

1. Revocation by instrument. Subject to subsection 2, an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument:

- A. Is one of the following:
 - (1) A transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;
 - (2) An instrument of revocation that expressly revokes the deed or part of the deed; or
 - (3) An inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

B. Is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the registry of deeds in the county where the deed is recorded.

2. More than one transferor. If a transfer on death deed is made by more than one transferor:

- A. Revocation by a transferor does not affect the deed as to the interest of another transferor; and
- B. A deed of joint owners is revoked only if it is revoked by all of the living joint owners.

3. Revocation after recorded. After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

4. Inter vivos transfer. This section does not limit the effect of an inter vivos transfer of the property.

1 **Comment**

2 This section concerns revocation by instrument and revocation by act. On revocation
3 by change of circumstances, such as by divorce or homicide, see Section 13 and the
4 accompanying Comment.

5 Subsection (a) provides the exclusive methods of revoking, in whole or in part, a
6 recorded transfer on death deed by a subsequent instrument. Revocation by an instrument
7 not specified, such as the transferor's will, is not permitted.

8 The rule that a transfer on death deed may not be revoked by the transferor's
9 subsequent will is a departure from the Restatement (Third) of Property (Wills and Other
10 Donative Transfers) §7.2 comment e (see also the corresponding Reporter's Note), which
11 encourages the revocability of will substitutes by will. However, there is a sound reason
12 for the departure in the specific case of a transfer on death deed. A transfer on death deed
13 operates on real property, for which certainty of title is essential. This certainty would be
14 difficult, and in many cases impossible, to achieve if an off-record instrument, such as the
15 grantor's will, could revoke a recorded transfer on death deed. The rule in this act against
16 revocation by will is also consistent with the uniform acts governing multiple-party bank
17 accounts. See Uniform Probate Code Section 6-213(b) ("A right of survivorship arising
18 from the express terms of the account, Section 6-212, or a POD designation, may not be
19 altered by will.")

20 A recorded transfer on death deed may be revoked by instrument only by (1) a
21 subsequently acknowledged transfer on death deed, (2) a subsequently acknowledged
22 instrument of revocation, such as the form in Section 17, or (3) a subsequently
23 acknowledged inter vivos deed containing an express revocation clause. Consider the
24 following examples:

25 *Example 1.* *T* executes, acknowledges, and records a transfer on death deed for
26 Blackacre. Later, *T* executes, acknowledges, and records a second transfer on death deed
27 for Blackacre, containing an express revocation clause revoking "all my prior transfer on
28 death deeds concerning this property." The second deed revokes the first deed. The
29 revocation occurs when the second deed is recorded. (For the result if the second deed
30 had not contained the express revocation clause, see Example 5.)

31 *Example 2.* *T* executes, acknowledges, and records two transfer on death deeds for
32 Blackacre. Both deeds expressly revoke "all my prior transfer on death deeds concerning
33 this property." The dates of acknowledgment determine which deed revoked the other.
34 The first deed is acknowledged November 1; the second deed is acknowledged December
35 15. The second deed is the later acknowledged, so it revokes the first deed. The
36 revocation occurs when the second deed is recorded.

37 *Example 3.* *T* executes and acknowledges a transfer on death deed for Blackacre. *T*
38 later executes and acknowledges a revocation form. Both instruments are recorded.
39 Because the revocation form is acknowledged later than the deed, the form revokes the
40 deed. The revocation occurs when the form is recorded.

1 *Example 4.* *T* executes and acknowledges a transfer on death deed for Blackacre. *T*
2 later executes and acknowledges an inter vivos deed conveying Blackacre and expressly
3 revoking the transfer on death deed. Both instruments are recorded. Because the inter
4 vivos deed contains an express revocation provision and is acknowledged later than the
5 transfer on death deed, the inter vivos deed revokes the transfer on death deed. The
6 revocation occurs when the inter vivos deed is recorded. (For the result if the inter vivos
7 deed had not contained an express revocation clause, see the discussion below on
8 "ademption by extinction.")

9 The same rules apply whether the revocation is total or partial. In the previous
10 examples, suppose instead that the initial transfer on death deed provides for the transfer
11 of two parcels, Blackacre and Whiteacre, and that the subsequent instrument revokes the
12 transfer on death deed as to Blackacre. The subsequent instrument revokes the transfer on
13 death deed in part.

14 If the property described in the original deed is in more than one county, the
15 revocation is effective only with respect to the property in the county or counties where
16 the revoking deed or instrument is recorded.

17 Subsection (a)(1)(A) speaks of revocation "expressly or by inconsistency." This
18 provision references the well-established law of revocation by inconsistency of wills.
19 Consider the following examples:

20 *Example 5.* *T* executes, acknowledges, and records a transfer on death deed for
21 Blackacre naming *X* as the designated beneficiary. Later, *T* executes, acknowledges, and
22 records a transfer on death deed for the same property, Blackacre, containing no express
23 revocation of the earlier deed but naming *Y* as the designated beneficiary. Later, *T* dies.
24 The recording of the deed in favor of *Y* revokes the deed in favor of *X* by inconsistency.
25 At *T*'s death, *Y* is the owner of Blackacre.

26 *Example 6.* *T*, the owner of Blackacre in fee simple absolute, executes,
27 acknowledges, and records a transfer on death deed for Blackacre naming *X* as the
28 designated beneficiary. Later, *T* executes, acknowledges, and records a transfer on death
29 deed containing no express revocation of the earlier deed but naming *Y* as the designated
30 beneficiary of a life estate (or a mineral interest) in Blackacre. Later, *T* dies. The
31 recording of the deed in favor of *Y* partially revokes the deed in favor of *X* by
32 inconsistency. At *T*'s death, *Y* is the owner of a life estate (or a mineral interest) in
33 Blackacre, and *X* is the owner of the remainder.

34 The question is sometimes raised whether a recorded inter vivos deed *without an*
35 *express revocation clause* operates as a revocation of an earlier transfer on death deed.
36 The answer highlights the important distinction between "revocation" and "ademption by
37 extinction." See Atkinson on Wills §134. Revocation means that the instrument is
38 rendered void. Ademption by extinction means that the transfer of the property cannot
39 occur because the property is not owned by the transferor at death. The doctrines are
40 different.

41 In some instances, revocation and ademption have the same practical effect: the
42 designated beneficiary of the property receives nothing. Nothing in this section changes

1 that fact, as indicated in subsection (d). However, there are other instances where the
2 doctrines have differing effects. Consider the following illustration, drawn from the law
3 of wills.

4 *Example 7.* *T* executes a will devising Blackacre to *A*. Later, *T* becomes legally
5 incompetent, and *G* is appointed as *T*'s conservator. *G*, acting within the scope of his
6 authority, sells Blackacre to *B* for \$100,000. Later, *T* dies.

7 The law of wills provides that the devise to *A* is adeemed rather than revoked. This
8 means that *A* is not entitled to Blackacre but is entitled to a pecuniary devise in the
9 amount of \$100,000. See UPC Section 2-606(b); Atkinson on Wills §134; *Wasserman v.*
10 *Cohen*, 606 N.E.2d 901, 903 (Mass. 1993). The result is designed to effectuate *T*'s
11 presumed intention.

12 The Joint Editorial Board for Uniform Trust and Estate Acts has begun a
13 conversation on whether the Uniform Probate Code's provisions on ademption should be
14 extended to nonprobate transfers, thus harmonizing the treatment of wills and will
15 substitutes on this aspect of the law.

16 This act accepts the well-recognized distinction between revocation and ademption in
17 order to leave the door open for such future harmonization, which would effectuate the
18 presumed intention of nonprobate grantors.

19 Subsection (b) supplies rules governing revocation by instrument in the event of a
20 transfer on death deed made by multiple owners. Subsection (b)(1) provides that
21 revocation by a transferor does not affect a transfer on death deed as to the interest of
22 another transferor.

23 Subsection (b)(2) provides that a transfer on death deed of joint owners is revoked
24 only if it is revoked by all of the living joint owners. This rule is consistent with Uniform
25 Probate Code Section 6-306, which provides in pertinent part: "A registration of a
26 security in beneficiary form may be canceled or changed at any time by the sole owner or
27 all then surviving owners without the consent of the beneficiary." Subsection (b)(2)
28 applies only to a deed of joint owners. A joint tenant who severs the joint tenancy,
29 thereby destroying the right of survivorship, is no longer a joint owner.

30 Subsection (c) provides that a recorded transfer on death deed may not be revoked by
31 a revocatory act performed on the deed. Such an act includes burning, tearing, canceling,
32 obliterating, or destroying the deed or any part of it.

33 This act does not define, but instead looks to other law to determine, the authority of
34 an agent. An individual's agent may revoke a transfer on death deed on the individual's
35 behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act
36 (2006).

37 **§6-412. Effect of transfer on death deed during transferor's life**

38 During a transferor's life, a transfer on death deed does not:

1 not preclude the doctrine of after-acquired title. A warranty deed from a designated
2 beneficiary to a third party would operate to pass the beneficiary's title to the third party
3 after the transferor's death.

4 Paragraph (6): A transfer on death deed, during the transferor's lifetime, does not
5 make the property subject to claims or process of the designated beneficiary's creditors.
6 The deed has no more effect than a will.

7 If a transferor combines an inter vivos transfer of an interest in property (such as a
8 mineral interest) with a transfer on death of the remainder interest, the inter vivos transfer
9 may have present effect even though the transfer on death does not occur until the
10 transferor's death.

11 **§6-413. Effect of transfer on death deed at transferor's death**

12 **1. Upon death of transferor.** Except as otherwise provided in the transfer on death
13 deed, in this section or in section 2-508, 2-605, 2-803 or 2-805 or in Article 2, Part 2, on
14 the death of the transferor, the following rules apply to property that is the subject of a
15 transfer on death deed and owned by the transferor at death.

16 A. Subject to paragraph B, the interest in the property is transferred to the designated
17 beneficiary in accordance with the deed.

18 B. The interest of a designated beneficiary is contingent on the designated
19 beneficiary surviving the transferor. The interest of a designated beneficiary that fails
20 to survive the transferor lapses.

21 C. Subject to paragraph D, concurrent interests are transferred to the beneficiaries in
22 equal and undivided shares with no right of survivorship.

23 D. If the transferor has identified 2 or more designated beneficiaries to receive
24 concurrent interests in the property, the share of one that lapses or fails for any reason
25 is transferred to the other or to the others in proportion to the interest of each in the
26 remaining part of the property held concurrently.

27 **2. Subject to all interests.** Subject to Title 33, section 201, a beneficiary takes the
28 property subject to all conveyances, encumbrances, assignments, contracts, mortgages,
29 liens and other interests to which the property is subject at the transferor's death. For
30 purposes of this subsection and Title 33, section 201, the recording of the transfer on
31 death deed is deemed to have occurred at the transferor's death.

32 **3. Joint owner.** If a transferor is a joint owner and is:

33 A. Survived by one or more other joint owners, the property that is the subject of a
34 transfer on death deed belongs to the surviving joint owner or owners with right of
35 survivorship; or

36 B. The last surviving joint owner, the transfer on death deed is effective.

37 **4. No covenant or warranty of title.** A transfer on death deed transfers property
38 without covenant or warranty of title even if the deed contains a contrary provision.

1 **Comment**

2 Subsection (a) states four default rules, except as otherwise provided by the transfer
3 on death deed, by this section, or by other provisions of state law governing nonprobate
4 transfers. On this last, and the desirability of extending the probate rules governing
5 antilapse, revocation on divorce or homicide, survival and simultaneous death, and the
6 elective share of the surviving spouse to nonprobate instruments such as transfer on death
7 deeds, see the Legislative Note.

8 The four default rules established by subsection (a) are these. First, the property that
9 is the subject of an effective transfer on death deed and owned by the transferor at death
10 is transferred at the transferor's death to the designated beneficiaries as provided in the
11 deed. The rule implements the transferor's intention as described in the deed. Consider the
12 following example:

13 *Example 1.* *A* executes, acknowledges, and records a transfer on death deed for
14 Blackacre naming *X* as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails
15 to survive *A*. Both *X* and *Y* survive *A*. Blackacre is transferred to *X* at *A*'s death in
16 accordance with the provisions of the deed.

17 This default rule implements the fundamental principle that the provisions of the deed
18 control the disposition of the property, unless otherwise provided by state law.

19 The drafting committee approves of the result in *In re Estate of Roloff*, 143 P.3d 406
20 (Kan. Ct. App. 2006) (holding that crops should be transferred with the land under a
21 transfer on death deed because this result would be reached on the same facts with any
22 other deed).

23 The bracketed language at the beginning of subsection (a) enables a state to make the
24 default rules subject to other statutes, such as an antilapse statute or a statute providing
25 for revocation on divorce. Consider the following examples:

26 *Example 2.* *A* executes, acknowledges, and records a transfer on death deed for
27 Blackacre naming *X* as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails
28 to survive *A*. In fact, *X* and *Y* fail to survive *A*, who is survived only by *X*'s child, *Z*.
29 Assume that the state's antilapse statute applies to transfer on death deeds and creates a
30 substitute gift in *Z*. (For such a statute, see Uniform Probate Code Section 2-706.)
31 Blackacre is transferred to *Z* at *A*'s death in accordance with the provisions of the deed as
32 modified by the antilapse statute.

33 *Example 3.* *A* executes, acknowledges, and records a transfer on death deed for
34 Blackacre naming her spouse, *X*, as the primary beneficiary and *Y* as the alternate
35 beneficiary if *X* fails to survive *A*. Later, *A* and *X* divorce. Assume that the state's statute
36 on revocation by divorce applies to transfer on death deeds and revokes the designation in
37 favor of *X*, with the effect that the provisions of the transfer on death deed are given
38 effect as if *X* had disclaimed. (For such a statute, see Uniform Probate Code Section
39 2-804.) Assume further that the effect of the putative disclaimer is that *X* is treated as
40 having failed to survive *A*. (See the Uniform Disclaimer of Property Interests Act
41 (1999/2006) Section 6(a)(3)(B) (UPC Section 2-1106(a)(3)(B).) Blackacre is transferred

1 to *Y* at *A*'s death in accordance with the provisions of the deed as modified by the
2 revocation on divorce and disclaimer statutes.

3 Note that the property must be owned by the transferor at death. Property no longer
4 owned by the transferor at death cannot be transferred by a transfer on death deed, just as
5 it cannot be transferred by a will. This is the principle of ademption by extinction,
6 discussed in the Comment to Section 11.

7 In almost every instance, the transferor will own the property not only at death but
8 also when the transfer on death deed is executed, but the latter is not imperative. Consider
9 the following example. *H* and *W*, a married couple, hold Blackacre as tenants by the
10 entirety. *H* executes, acknowledges, and records a transfer on death deed for Blackacre in
11 favor of *X*. *W* later dies, at which point *H* owns Blackacre in fee simple absolute. Later, *H*
12 dies. Under the law of some states, there may be a question whether the transfer on death
13 deed is effective, given that *H* executed it when Blackacre was owned, not by *H* and *W*,
14 but by the marital entity. The correct answer is that the transfer on death deed is effective
15 at *H*'s death because Blackacre is owned by *H* at *H*'s death. See, e.g., *Mitchell v.*
16 *Wilmington Trust Co.*, 449 A.2d 1055 (Del. Ch. 1982) (mortgage granted by one tenant
17 by the entirety is not void upon execution but remains inchoate during the lives of both
18 spouses and becomes a valid lien if the spouse who executed the mortgage survives the
19 other spouse or if the spouses get divorced).

20 The second default rule established by subsection (a) is that the interest of a
21 designated beneficiary is contingent on surviving the transferor. This default rule treats
22 wills and will substitutes alike. The interest of a designated beneficiary who fails to
23 survive the transferor lapses. On the desirability of extending statutory antilapse
24 protection to will substitutes such as transfer on death deeds, see the Legislative Note.

25 The third default rule established by subsection (a) is that concurrent beneficiaries
26 receive equal and undivided interests with no right of survivorship among them. This
27 default rule is consistent with the general presumption in favor of tenancy in common.
28 See Powell on Real Property §51.02. The rule is also consistent with Uniform Probate
29 Code Section 6-212 governing multiple-party accounts and Section 6-307 governing the
30 transfer on death registration of securities.

31 The fourth and last default rule established by subsection (a) is that, in the event of
32 the lapse or failure of an interest to be held concurrently, the share that lapses or fails
33 passes proportionately to the surviving concurrent beneficiaries. Consider the following
34 example:

35 *Example 4.* *A* executes, acknowledges, and records a transfer on death deed for
36 Blackacre naming *X*, *Y*, and *Z* as the designated beneficiaries. *X* and *Y* survive *A*, but *Z*
37 fails to survive *A*. The transfer on death deed is effective and, in the absence of an
38 antilapse statute, transfers Blackacre to *X* and *Y*. This default rule is consistent with the
39 transferor's probable intention in the absence of an antilapse statute and also with
40 Uniform Probate Code Section 2-604(b) on the lapse of a residuary devise. On the
41 desirability of extending statutory antilapse protection to will substitutes such as transfer
42 on death deeds, see the Legislative Note.

1 Subsection (b) concerns the effect of transactions during the transferor's life. The
2 subsection states an intermediate rule between two extremes. One extreme would provide
3 that transactions during the transferor's life affect the beneficiary only if the transactions
4 are recorded before the transferor's death. This would unfairly disadvantage the
5 transferor's creditors and inter vivos transferees. The other extreme would provide that
6 transactions during the transferor's life always supersede the beneficiary's interest, even if
7 the recording act would provide otherwise. Between these two positions is the rule of
8 subsection (b).

9 Subsection (b) provides that the beneficiary's interest is subject to *all* conveyances,
10 encumbrances, assignments, contracts, mortgages, liens, and other interests to which the
11 property is subject at the transferor's death. "Liens" includes liens arising by operation of
12 law, such as state Medicaid liens.

13 The only exception to this rule arises when the state recording act so provides. The
14 state recording act will so provide only when two conditions are met: (1) the inter vivos
15 conveyance or encumbrance is unrecorded throughout the transferor's life (the legal
16 fiction in this subsection protects persons who transact with the transferor and record any
17 time before the transferor's death); and (2) the beneficiary is protected by the recording
18 act. These two conditions will be met only in rare instances. Most beneficiaries of transfer
19 on death deeds are gratuitous, whereas state recording acts typically protect only
20 purchasers for value. See Powell on Real Property §82.02.

21 Subsection (c) provides that the survivorship right of a joint owner takes precedence
22 over the transfer on death deed. This rule is consistent with the law of joint tenancy and
23 wills: the right of survivorship takes precedence over a provision in a joint tenant's will.

24 Subsection (d) states the mandatory rule that a transfer on death deed transfers the
25 property without covenant or warranty of title. The rule is mandatory for two reasons:
26 first, to prevent mishaps by uninformed grantors; and second, to recognize that a transfer
27 on death deed is a will substitute. The rule of this section is consistent with the
28 longstanding law of wills. As stated by Sir Edward Coke, "an express warranty cannot be
29 created by will." Coke on Littleton 386a.

30 **§6-414. Disclaimer**

31 A beneficiary may disclaim all or part of the beneficiary's interest as provided by
32 section 2-801.

33 **Comment**

34 A beneficiary of a transfer on death deed may disclaim the property interest the deed
35 attempts to transfer. While this section relies on other law, such as the Uniform
36 Disclaimer of Property Interests Act (1999/2006), to govern the disclaimer, two general
37 principles should be noted.

38 First, there is no need under the law of disclaimers to execute a disclaimer in
39 advance. During the transferor's life, a designated beneficiary has no interest in the

1 property. See Section 12. Nothing passes to the designated beneficiary while the
2 transferor is alive, hence there is no need to execute a disclaimer during that time.

3 Second, an effective disclaimer executed after the testator's death "relates back" to the
4 moment of the attempted transfer, here the death of the transferor. Because the disclaimer
5 "relates back," the beneficiary is regarded as never having had an interest in the
6 disclaimed property. The Uniform Disclaimer of Property Interests Act (1999/2006)
7 (UPC Article 2, Part 11) reaches this result, without using the language of relation back,
8 in UDPIA Section 6(b)(1): "The disclaimer takes effect as of the time the instrument
9 creating the interest becomes irrevocable" As the Comment to UDPIA Section 6
10 explains, "This Act continues the effect of the relation back doctrine, not by using the
11 specific words, but by directly stating what the relation back doctrine has been interpreted
12 to mean."

13 **§6-415. Liability for creditor claims and statutory allowances**

14 A beneficiary of a transfer on death deed is liable for an allowed claim against the
15 transferor's probate estate and statutory allowances to a surviving spouse and children to
16 the extent provided in section 6-107.

17 **Comment**

18 Alternative A defers to other law, such as Uniform Probate Code Section 6-102, to
19 establish the liability of a beneficiary of a transfer on death deed for creditor claims and
20 statutory allowances.

21 Uniform Probate Code (UPC) Section 6-102 was added in 1998 to establish the
22 principle that recipients of nonprobate transfers can be required to contribute to pay
23 allowed claims and statutory allowances to the extent the probate estate is insufficient.
24 The fundamental rule of liability is contained in UPC Section 6-102(b): "Except as
25 otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability
26 to any probate estate of the decedent for allowed claims against the decedent's probate
27 estate and statutory allowances to the decedent's spouse and children to the extent the
28 estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate
29 transferee may not exceed the value of nonprobate transfers received or controlled by that
30 transferee." The other provisions of UPC Section 6-102 implement this liability rule.

31 For states not favoring the comprehensive approach of UPC Section 6-102(b) or the
32 equivalent, Alternative B provides an in rem liability rule applying to transfer on death
33 deeds. The property transferred under a transfer on death deed is liable to the transferor's
34 probate estate for properly allowed claims and statutory allowances to the extent the
35 estate is insufficient.

36 One of the functions of probate is creditor protection. UPC Section 6-102, referenced
37 in Alternative A, attempts to provide comprehensive creditor protection within the realm
38 of nonprobate transfers. In addition, this act in Alternative B provides more creditor
39 protection than is typically available under current law. For many transferors, the transfer
40 on death deed will be used in lieu of joint tenancy with right of survivorship. Under the
41 usual law of joint tenancy, the unsecured creditors of a deceased joint tenant have no

1 recourse against the property or against the other joint tenant. Instead, the property passes
2 automatically to the survivor, free of the decedent's debts. See Comment 5 to UPC
3 Section 6-102. If the debts cannot be paid from the probate estate, the creditor is out of
4 luck. Under Alternative B, in contrast, the property transferred under a transfer on death
5 deed is liable to the probate estate for properly allowed claims and statutory allowances to
6 the extent the estate is insufficient.

7 **§6-416. Optional form of transfer on death deed**

8 The following form may be used to create a transfer on death deed. The other
9 sections of this Part govern the effect of this or any other instrument used to create a
10 transfer on death deed.

11 (front of form)

12 REVOCABLE TRANSFER ON DEATH DEED

13 NOTICE TO OWNER

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

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

17 IDENTIFYING INFORMATION

18 Owner or Owners Making This Deed:

19
20

21 Printed name.....Mailing address

22

23 Printed name.....Mailing address

24 Legal description of the property:

25

26 PRIMARY BENEFICIARY

27 I designate the following beneficiary if the beneficiary survives me.

28
29

30 Printed name.....Mailing address, if available

1 **§6-417. Optional form of revocation**

2 The following form may be used to create an instrument of revocation under this Part.
3 The other sections of this Part govern the effect of this or any other instrument used to
4 revoke a transfer on death deed.

5 (front of form)

6 **REVOCATION OF TRANSFER ON DEATH DEED**

7 **NOTICE TO OWNER**

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

11 **IDENTIFYING INFORMATION**

12 Owner or Owners of Property Making This Revocation:

13
14

15 Printed name.....Mailing address

16

17 Printed name.....Mailing address

18 Legal description of the property:

19

20 **REVOCATION**

21 I revoke all my previous transfers of this property by transfer on death deed.

22 **SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION**

23

24 (SEAL, if any).....

25 Signature.....Date.....

26

27 (SEAL, if any).....

28 Signature.....Date.....

