

MEMORANDUM

TO: Drafting Committee for Uniform TOD for Real Property Act
FROM: Thomas P. Gallanis*
DATE: February 14, 2007
RE: Overview of Project; Issues for First Meeting

This memorandum provides background information about the project to draft a Uniform Transfer-on-Death (TOD) for Real Property Act. The memorandum also identifies and discusses the major issues our Drafting Committee will want to address.

TABLE OF CONTENTS

BACKGROUND 3
ISSUES FOR THE DRAFTING COMMITTEE 4
A. OPERATIONAL ISSUES 4
1. Donor’s capacity 4
2. Execution formalities 5
3. Recordation 7
4. Delivery 8
5. Acceptance 9
6. Battle of recorded deeds 10
7. Effect of other instruments 11
8. Effect of co-ownership with right of survivorship 12
9. Effect of community property without right of survivorship 15
10. Effectuation of transfer 16
11. Proceedings to contest the transfer 18
12. Grounds for contest 19
13. Statute of limitations on contest 20
B. RIGHTS OF THE TRANSFEROR 20
1. Ownership interest retained until death 20
2. Revocability and revocation procedure 22
3. Revocation when property has multiple owners 24
4. Subsequent incapacity of owner; authority of agent to revoke 27
5. Ownership interest conveyed 28

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C. RIGHTS OF BENEFICIARY; WHO MAY BE A BENEFICIARY	31
1. Rights during grantor’s lifetime	31
2. Drafter of the TOD deed as the beneficiary?	32
3. Trustee of a trust as the beneficiary?	32
4. Minor or incapacitated beneficiary	33
5. Effect of divorce on the beneficiary designation	33
6. Effect of homicide on the beneficiary designation	35
7. Lapse and antilapse	37
8. Deed restrictions and conditions	41
9. Multiple beneficiaries	42
10. Covenants and warranties	46
11. Ademption and the proceeds of property	46
12. Disclaimers	49
D. RIGHTS OF FAMILY MEMBERS	50
1. Homestead	50
2. Probate protections for omitted spouses or children	51
3. The surviving spouse’s elective share	51
E. RIGHTS OF CREDITORS	52
1. During the transferor’s lifetime	52
2. After the transferor’s death	53
F. RIGHTS OF THIRD-PARTY PURCHASER	56
G. TAXATION	57
1. Income and transfer taxation	57
2. Property taxation and reassessment	58
H. MEDICAID ELIGIBILITY AND REIMBURSEMENT	58
1. Eligibility	58
2. Reimbursement	58
I. IMPLEMENTATION OF THE REVOCABLE TOD DEED	59
1. Statutory form	59
2. Other methods of transfer	65
3. Retroactivity	66
APPENDIX	67
STATE STATUTES	67
Arizona	67
Arkansas	70
California Recommended	73
Colorado	90
Kansas	95
Missouri	97
Nevada	118
New Mexico	120
Ohio	122
Wisconsin	125
UNIFORM PROBATE CODE EXCERPTS	147
Article 1: §1-201(4), (18)	147
Article 2: Parts 7 and 8	148
Article 2, §2-1106 (from Uniform Disclaimers of Property Interests Act)	162
UNIFORM NONPROBATE TRANSFERS ON DEATH ACT	163

BACKGROUND

It used to be true that the will was the only mechanism for specifying beneficiaries to receive interests in real or personal property at the owner's death.¹ Wills require the burdensome formality of attestation and must be probated, a process requiring expense and often significant delay.

One of the main innovations in the property law of the twentieth century was the development of will substitutes for the transfer of property at death. By these mechanisms, an owner may designate beneficiaries to receive the property at the owner's death without waiting for probate and without the beneficiary designation needing to comply with the witnessing requirements of wills. Examples of assets that today routinely pass outside of probate include the proceeds of life insurance policies and pension plans, as well as securities registered in transfer-on-death (TOD) form and funds held in pay-on-death (POD) bank accounts. NCCUSL has been a leader in the promulgation of laws authorizing such nonprobate transfers and in harmonizing the substantive rules governing deathtime transfers whether in or out of probate.

Today, nonprobate transfers are widely accepted. The trend has largely focused on assets that are personal property, such as the assets described in the preceding paragraph. In a small but emerging number of jurisdictions, however, the benefits of nonprobate transfers have been extended to land. This is done by permitting land to be registered in transfer-on-death (TOD) form. By this registration, the owner identifies the beneficiary or beneficiaries who will succeed to the land at the owner's death. During the owner's lifetime, the beneficiaries have no interest in the land, and the owner retains full power to revoke or amend the beneficiary designation.

Nine states currently authorize the TOD registration of land. In the chronological order of the statutes' enactment, the states are: Missouri (1989), Kansas (1997), Ohio (2000), New Mexico (2001), Arizona (2002), Nevada (2003), Colorado (2004), Arkansas (2005), and Wisconsin (2006).

A tenth state, California, directed its Law Revision Commission to determine whether to follow suit and, if yes, to prepare a proposed statute. The Commission has produced a detailed and comprehensive study, including a draft statute. This study is available at <http://clrc.ca.gov/pub/Printed-Reports/CLRC-Pub226.pdf>.

The aim of our Drafting Committee is to produce a Uniform TOD for Real Property Act, to be promulgated as a stand-alone act and to be incorporated within the Uniform Probate Code's Article 6 on nonprobate transfers.

¹By referring to the transfer of ownership at death, this paragraph excludes co-ownership arrangements such as joint tenancy and tenancy by the entirety in which a present interest is shared by the co-tenants during lifetime.

This memorandum identifies the major issues and provides the relevant statutory language from the various states. The memorandum deliberately does not take a position on any issue. The structure of the memorandum follows the comprehensive outline of the California Law Revision Commission report. An appendix contains the complete statutes of the states authorizing TOD deeds, including the proposed language in California. The appendix also includes excerpts from Articles 1 and 2 of the Uniform Probate Code and the full text and comments of the Uniform Nonprobate Transfers on Death Act (1989), which is a free-standing version of the Uniform Probate Code's Article 6 on nonprobate transfers.

ISSUES FOR THE DRAFTING COMMITTEE

A. OPERATIONAL ISSUES

1. Donor's capacity

Should the standard of capacity required of the grantor be the lower standard for wills or the higher standard for inter vivos transfers?

In the nine jurisdictions with existing TOD deed statutes, none of the statutes addresses this question. The only jurisdiction with case law on point is Missouri, where a Court of Appeals decision held that the capacity required to execute a TOD deed is the same as that required to execute a will. *Jolly v. Clarkson*, 157 S.W.3d 290, 293 (Mo. App. 2005).

This is also the position taken by the Restatement (Third) of Property §8.1, which provides that the capacity to execute a revocable nonprobate transfer is the same as that required to execute a will:

“(a) A person must have mental capacity in order to make or revoke a donative transfer.

(b) If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

(c) If the donative transfer is in the form of an irrevocable gift, the donor must have the mental capacity necessary to make or revoke a will and must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor.”

The California Law Revision Commission takes the same approach, providing that the standard of capacity for the TOD deed is the same as that for a will.

California Recommended §5620: “An owner of real property who has testamentary capacity may make a revocable transfer on death deed of the property.”

The comment to this section refers to California Probate §6100.5, which defines the standard for determining testamentary capacity:

“(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true: (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual’s property, or (C) remember and understand the individual’s relations to living descendants, spouse, and parents, and those whose interests are affected by the will. (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual’s devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

(b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.

(c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.”

2. Execution formalities

What formalities (other than recordation, on which see A.3 below) should be required of a validly executed TOD deed?

The California proposal requires the grantor to sign, date, and acknowledge the TOD deed.

California Recommended § 5624:

“(a) Except as provided in subdivision (b), a revocable TOD deed is not effective unless the transferor signs and dates the deed and acknowledges the deed before a notary public.

(b) A revocable transfer on death deed may be signed and dated in the transferor’s name by a person other than the transferor at the transferor’s direction and in the transferor’s presence but shall be acknowledged by the transferor.”

The Arkansas TOD deed statute does not specify execution formalities other than to say that the deed must “compl[y] with other applicable laws” (Arkansas §18-12-608(h)). Other Arkansas law requires all deeds to be signed by the grantor and attested by two witnesses:

Arkansas §18.12.104: “Deeds and instruments of writing for the conveyance of real estate shall be executed in the presence of two (2) disinterested witnesses or, in default thereof, shall be acknowledged by the grantor in the presence of two (2) such witnesses, who shall then subscribe the deed or instrument in writing for the conveyance of the real estate. When the witnesses do not subscribe the deed or instrument of writing as described in this section at the time of the execution thereof, the date of their subscribing it shall be stated with their signatures.”

Arizona, Kansas, Missouri, New Mexico, Nevada, and Ohio require signature and acknowledgment.

Arizona §33-405: “A beneficiary deed is valid only if the deed is executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner or the last surviving owner.”

Arizona § 33-401(B): “Every deed or conveyance of real property must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments.”

Kansas §59-3501(a): “An interest in real estate may be titled in transfer-on-death, TOD, form by recording a deed signed by the record owner of such interest”

Kansas §59-3502: “An interest in real estate is titled in transfer-on-death form by executing, acknowledging and recording in the office of the register of deeds in the county where the real estate is located, prior to the death of the owner, a deed in substantially the following form:....”

Missouri §461.025(1): “A deed that conveys an interest in real property to a grantee designated by the owner, that expressly states that the deed is not to take effect until the death of the owner, transfers the interest provided to the designated grantee beneficiary, effective on death of the owner, if the deed is executed and filed of record”

Missouri §442.130: “All deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed by the party granting the same, or by his lawful agent, and shall be acknowledged or proved or certified in the manner herein prescribed.”

Missouri §442.150: “The proof or acknowledgment of every conveyance or instrument in writing affecting real estate ... shall be taken by some one of the following courts or officers: (1) If acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, or a notary public”

New Mexico §45-6-401(A): “An interest in real property may be titled in transfer on death form by recording a deed signed and acknowledged by the record owner of the interest”

Nevada §111.109(6): “A deed created pursuant to subsection 1 is valid only if executed and recorded as provided by law”

Nevada §111.105: “Conveyances of lands, or of any estate or interest therein, may be made by deed, signed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved, and recorded, as directed in this chapter.”

Ohio §5302.22(A): “A deed conveying any interest in real property, and in substance following the form set forth in this division, when duly executed in accordance with Chapter 5301”

Ohio §5301.01(A): “A deed ... shall be signed by the grantor The signing shall be acknowledged by the grantor ... before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgment and subscribe the official’s name to the certificate of the acknowledgment.”

Colorado’s statute does not specify the formalities required. However, Colorado law provides that TOD deeds may be acknowledged, which would provide prima facie evidence of proper execution.

Colorado §15-15-406: “A beneficiary deed or a revocation of a beneficiary deed shall be subject to the requirements of section 38-35-109 [on recording] and may be acknowledged in accordance with section 38-35-101.” (§38-35-101 provides that acknowledgment provides prima facie evidence of proper execution.)

The position of Wisconsin law is unclear. The standard rules on execution formalities for deeds are contained in Wisconsin §§706.02 and 706.05 (requiring both signature and acknowledgment). However, Wisconsin §706.01(2) states that “Excluded from the operation of this chapter are transactions which an interest in land is affected: ... (bm) By nonprobate transfer on death under sec. 705.15.” Section 705.15 is the separate section on TOD deeds, and it does refer to the grantor “executing and recording” a deed. See §705.15(2). But that section does not itself define any execution requirements.

3. Recordation

Must the TOD deed be recorded and, if so, when?

All state TOD deed statutes except Wisconsin’s and Ohio’s specify that the TOD deed must be recorded before the grantor’s death. Wisconsin’s statute provides that the deed must be recorded but is silent about whether it must occur before the grantor’s death. The Ohio statute is also silent about timing, but a recent Court of Appeals decision held that the recording must occur before the grantor’s death. See *In re Estate of Scott*, 842 N.E.2d 1071, 1073 (Ohio App. 2005).

Arizona § 33-405: “A beneficiary deed is valid only if the deed is executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner or the last surviving owner.”

Arkansas §18-12-608(c)(1): “A beneficiary deed is valid only if the beneficiary deed is executed before the death of the owner or the last surviving owner and is recorded before the death of the owner as provided by law in the office of the county in which the real property is located.”

California Recommended §5626(a): “A revocable transfer on death deed is not effective unless the deed is recorded before the transferor’s death.” The Comment provides that a deed is considered recorded for purposes of this section when it is deposited for record with the county recorder. Also, an agent or other person authorized by the transferor may record the instrument.

Colorado §15-15-402: “Title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner’s death, a beneficiary deed signed by the owner of such interest, as grantor, designating a grantee-beneficiary of the interest.”

Kansas §59-3502: “An interest in real estate is titled in transfer-on-death form by executing, acknowledging and recording in the officer of the register of deeds in the county where the real estate is located, prior to the death of the owner, a deed.”

Missouri §461.025(1): “A deed that conveys an interest in real property to a grantee designated by the owner ... transfers the interest provided to the the designated grantee beneficiary, effective on the death of the owner, if the deed is executed and filed of record with the recorder of deeds in the city or county or counties in which the real property is situated prior to the death of the owner.”

New Mexico §45-6-401(C): “An interest in real property is titled in transfer on death form by executing, acknowledging and recording in the office of the county clerk in the county where the property is located, prior to the death of the owner, a deed in substantially the following form....”

Nevada §111.109(6): “A deed created pursuant to subsection 1 is valid only if executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner or the death of the last surviving owner.”

Compare with the Ohio and Wisconsin statutes, which are silent about timing.

Ohio §5302.22(A): “A deed ... when duly executed in accordance with Chapter 5301 of the Revised Code and recorded in the office of the county recorder....” See *In re Estate of Scott*, 842 N.E.2d 1071, 1073 (Ohio App. 2005) (interpreting the statute to require recording before the grantor’s death).

Wisconsin §705.15(2): “A TOD beneficiary designation is not effective unless the deed on which the designation is made is recorded.”

4. Delivery

The black-letter law of inter vivos transfers requires intent, delivery, and acceptance. Is delivery required of a TOD deed?

Three states (California, Missouri, and Ohio) explicitly address the delivery requirement, providing that delivery is not required. In addition, four states (Arizona, Colorado, Kansas, and New Mexico) do not speak in terms of “delivery” but provide that notice to the beneficiary is not required.

California Recommended §5626(b): “The transferor is not required to deliver a revocable transfer on death deed to the beneficiary during the transferor’s life.”

Missouri §461.025(1): “A beneficiary deed need not be supported by consideration or be delivered to the grantee beneficiary.”

Ohio §5302.22(B): “A deed conveying an interest in real property that includes a transfer on death beneficiary designation need not be supported by consideration and need not be delivered to the transfer on death beneficiary to be effective.”

Compare with the following states, speaking in terms of “notice”:

Arizona §33-405(I): “The signature, consent, or agreement of or notice to a grantee beneficiary of a beneficiary deed is not required for any purpose during the lifetime of the owner.”

Colorado §15-15-402(2): “The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required.”

Kansas §59-3501(b): “The signature, consent, or agreement of or notice to a grantee beneficiary of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.”

New Mexico §45-6-401(B): “The signature, consent, or agreement of or notice to a grantee beneficiary of a transfer on death deed is not required for any purpose during the lifetime of the record owner.”

5. Acceptance

Following from the preceding discussion of delivery: what about acceptance? Must the beneficiary of a TOD deed accept the deed during the grantor’s lifetime?

Five states (Arizona, California, Colorado, Kansas, and New Mexico), provide that the beneficiary is not required to accept the deed during the grantor’s lifetime. The other states are silent on this precise question of acceptance, but see A.4 above on the related question of delivery or notice.

Arizona §33-405(I): “The signature, consent, or agreement of or notice to a grantee beneficiary of a beneficiary deed is not required for any purpose during the lifetime of the owner.”

California Recommended §5626(c): “The beneficiary is not required to accept a revocable transfer on death deed from the transferor during the transferor’s life.”

Colorado §15-15-402(2): “The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required.”

Kansas §59-3501(b): “The signature, consent, or agreement of or notice to a grantee beneficiary of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.”

New Mexico §45-6-401(B): “The signature, consent or agreement of or notice to a grantee beneficiary of a transfer on death deed is not required for any purpose during the lifetime of the record owner.”

6. Battle of recorded deeds

What happens if a grantor has executed and recorded more than one TOD deed concerning the same property?

There are two rules that have been adopted to resolve this problem. One rule provides that the last executed, not the last recorded, deed prevails. Three states, Arkansas, California, and Colorado, adopt this rule.

Arkansas §18-12-608(e): “If an owner executes more than one (1) beneficiary deed concerning the same property, the recorded beneficiary deed that is last signed before the owner’s death is the effective beneficiary deed.”

California Recommended §5628(a): “If a revocable transfer on death deed is recorded for the same property for which another revocable transfer on death deed is recorded, the later executed deed is the operative instrument and its recordation revokes the earlier executed deed.”

Colorado §15-15-405(3): “The most recently executed beneficiary deed or revocation of all beneficiary deeds or revocations that have been recorded prior to the owner’s death shall control regardless of the order of recording.”

The second rule provides that the last recorded deed prevails. Three states, Arizona, Nevada, and Wisconsin, adopt this rule.

Arizona §33-405(G): “If an owner executed and records more than one beneficiary deed concerning the same real property, the last beneficiary deed that is recorded before the owner’s death is the effective beneficiary deed.”

Nevada §111.109(5): “If an owner of an interest in real property who creates a deed pursuant to subsection 1 executes and records more than one deed concerning the same real property, the deed that is last recorded before the death of the owner is the effective deed.”

Wisconsin §705.15(3): “The recording of a deed that designates a TOD beneficiary or no beneficiary revokes any designation made in a previously recorded deed relating to the same property interest.”

The four other states (Kansas, Missouri, New Mexico, and Ohio) have ambiguous statutes that do not clearly adopt either rule.

Kansas §3503(b): “A designation of the grantee beneficiary may be changed at any time prior to the death of the record owner, by executing, acknowledging and recording a subsequent transfer-on-death deed in accordance with K.S.A. 2004 Supp. 59-3502. ... A subsequent transfer-on-death beneficiary designation revokes all prior designations of grantee beneficiary or beneficiaries by such record owner for such interest in real estate.”

Missouri §461.033(6): “The effective date of revocation or change in a beneficiary designation shall be determined in the same manner as the effective date of a beneficiary designation.” [Yet the effective date is the owner’s death, see §461.025(1).]

Missouri §461.033(2): “A subsequent beneficiary designation revokes a prior beneficiary designation unless the subsequent beneficiary designation expressly provides otherwise.”

New Mexico §45-6-401(E): “A designation of the grantee beneficiary may be changed by the record owner at any time prior to the death of the record owner, by the record owner executing, acknowledging, and recording a subsequent transfer on death deed. ... A subsequent transfer on death beneficiary designation revokes a prior designation to the extent there is a conflict between the two designations.”

Ohio §5302.23(B)(4): “The designation in a deed of any transfer on death beneficiary may be revoked or changed at any time ... by the owner of the interest by executing in accordance with Chapter 5301 of the Revised Code and recording a deed conveying the grantor’s entire, separate interest in the real property”

7. Effect of other instruments

a. A will

What effect, if any, does a will executed by the grantor have on the grantor’s TOD deed? Six states (Arizona, Arkansas, California, Colorado, Kansas, Missouri, and New Mexico) provide by statute that a will has no effect; it cannot revoke or modify a transfer on death deed. This rule is consistent with the Uniform Nonprobate Transfers on Death Act’s rules governing multiple-party bank accounts.

Arizona §33-405(J): “A beneficiary deed that is executed, acknowledged, and recorded in accordance with this section is not revoked by provisions of a will.”

Arkansas §18-12-608(d)(4): “A beneficiary deed that complies with this section may not be revoked, altered, or amended by the provisions of the owner’s will.”

California Recommended §5660: “If a revocable transfer on death deed recorded before the transferor’s death and another instrument both purport to dispose of the same property: (a) If the other instrument is not recorded before the transferor’s death, the revocable transfer on death deed is the operative instrument. ...”

Colorado §15-15-405(4): “A beneficiary deed that complies with the requirements of this part 4 may not be revoked, altered, or amended by the provisions of the will of the owner.”

Kansas §59-3503(c): “A transfer on death deed executed, acknowledged, and recorded in accordance with this act may not be revoked by the provisions of a will.”

New Mexico §45-6-401(F): “A transfer on death deed executed, acknowledged, and recorded in accordance with this section is not revoked by the provisions of a will.”

Compare these provisions with Uniform Nonprobate Transfers on Death Act §213 (Uniform Probate Code §6-213) on multiple-party bank accounts.

UPC §6-213(b): “A right of survivorship arising from the express terms of the account, Section 6-212, or a POD designation, may not be altered by will.”

Missouri’s statute adopts a different rule: a will can revoke or modify a TOD deed if the TOD deed expressly permits it.

Missouri §461.033(4): “A beneficiary designation may not be revoked or changed by provisions of a will unless the beneficiary designation expressly grants the owner the right to revoke or change a beneficiary designation by will.”

Three remaining three states (Nevada, Ohio, and Wisconsin) are silent on the question.

b. A trust instrument

The California Law Revision Commission considered a question not answered under any of the existing statutes: what document governs the property if it is the subject of a TOD deed and also a trust instrument? The CLRC concluded that the answer should depend in the first instance on whether the trust instrument was recorded before the grantor’s death; if the trust instrument was not so recorded, the TOD deed should govern. However, if the trust instrument was so recorded, then the question depends on whether the trust is revocable or irrevocable. If the trust instrument was recorded before the grantor’s death and the trust is revocable, the later executed of the two documents should govern (this rule is consistent with the California rule in A.6 above). But if the trust instrument was so recorded and the trust is irrevocable, the trust instrument, not the TOD deed, should govern.

California Recommended §5660: “If a revocable transfer on death deed recorded before the transferor’s death and another instrument both purport to dispose of the same property:

(a) If the other instrument is not recorded before the transferor’s death, the revocable transfer on death deed is the operative instrument.

(b) If the other instrument is recorded before the transferor’s death and makes a revocable disposition of the property, the later executed of the revocable transfer on death deed or the other instrument is the later instrument.

(c) If the other instrument is recorded before the grantor’s death and makes an irrevocable disposition of the property, the other instrument and not the revocable transfer on death deed is the operative instrument.”

8. Effect of co-ownership with right of survivorship

Suppose that the property has multiple owners in a form of co-ownership that carries with it a right of survivorship (e.g., joint tenancy or community property with right of survivorship). Suppose further that a co-owner executes and records a TOD deed. Should the

survivorship right trump the beneficiary designation, or should the beneficiary designation trump the survivorship right?

The question does not arise in Ohio, where the TOD deed is limited to grantors who own “as a sole owner or as a tenant in common.” Ohio §5302.22(B).

The eight other states with existing statutes provide that the survivorship right trumps the beneficiary designation. Put differently: the TOD deed is valid only if the grantor is the last surviving co-owner.

Arizona § 33-405(D): “If real property is owned as joint tenants with the right of survivorship or as community property with the right of survivorship, a deed that conveys an interest in the real property to a grantee beneficiary designated by all of the then surviving owners and that expressly states that the deed is effective on the death of the last surviving owner transfers the interest to the designated grantee beneficiary effective on the death of the last surviving owner. If a beneficiary deed is executed by fewer than all of the owners of real property owned as joint tenants with right of survivorship or community property with right of survivorship, the beneficiary deed is valid if the last surviving owner is one of the persons who executes the beneficiary deed. If the last surviving owner did not execute the beneficiary deed, the transfer shall lapse and the deed is void. An estate in joint tenancy with right of survivorship or community property with right of survivorship is not affected by the execution of a beneficiary deed that is executed by fewer than all of the owners of the real property, and the rights of a surviving joint tenant with right of survivorship or a surviving spouse in community property with right of survivorship shall prevail over a grantee beneficiary named in a beneficiary deed.”

Arkansas §18-12-608(b):

“(1) If real property is owned as a tenancy by the entirety or as a joint tenancy with the right of survivorship, a beneficiary deed that conveys an interest in the real property to a grantee designated by all of the then surviving owners and that expressly states the beneficiary deed is not to take effect until the death of the last surviving owner transfers the interest to the designated grantee beneficiary effective upon the death of the last surviving owner.

(2) (A) If a beneficiary deed is executed by fewer than all of the owners of real property owned as a tenancy by the entirety or as joint tenants with right of survivorship, the beneficiary deed is valid if the last surviving owner is a person who executed the beneficiary deed. (B) If the last surviving owner did not execute the beneficiary deed, the beneficiary deed is invalid.”

Colorado §15-15-408(1): “A joint tenant of an interest in real property may use the procedures described in this part 4 to transfer his or her interest effective upon the death of such joint tenant. However, title to the interest shall vest in the designated grantee-beneficiary only if the joint-tenant grantor is the last to die of all the joint tenants of such interest. If a joint tenant-grantor is not the last joint tenant to die, the beneficiary deed shall not be effective, and the beneficiary deed shall not make the grantee-beneficiary an owner in joint tenancy with the surviving joint tenant or tenants. A beneficiary deed shall not sever a joint tenancy.”

Kansas §59-3505(a): “A record joint owner of an interest in real estate may use the procedures in this act to transfer such interest in transfer-on-death form. However, title to such interest shall vest in the designated grantee beneficiary or beneficiaries only if such record joint owner is the last to die of all the record joint owners of such interest. A deed in transfer-on-death form shall not sever a joint tenancy.”

Missouri §461.031(2): “On death of one of two or more joint owners, property with respect to which a beneficiary designation has been made belongs to the surviving joint owner or owners, and the right of survivorship continues as between two or more surviving owners.”

New Mexico §45-6-401(G): “A joint tenancy in real property is not effected [sic] by a transfer on death deed, and the rights of a surviving joint tenant shall prevail over a grantee beneficiary named in a transfer on death deed. If a joint tenant has executed a transfer on death deed, and if that joint tenant is the last surviving joint tenant, then the transfer on death deed is effective on that joint tenant’s death.”

Nevada §111.109(3): “If the owner of the real property which is the subject of a deed created pursuant to subsection 1 holds the interest in the property as a joint tenant with right of survivorship or as community property with the right of survivorship and: (a) The deed includes a conveyance of the interest from each of the other owners, the deed becomes effective on the date of the death of the last surviving owner; or (b) The deed does not include a conveyance of the interest from each of the other owners, the deed becomes effective on the date of the death of the owner who created the deed only if the owner who conveyed his interest in real property to the grantee is the last surviving owner.”

Wisconsin §705.15(1): “An interest in real property that is solely owned, owned by spouses as survivorship marital property, or owned by 2 or more persons as joint tenants may be transferred without probate to a designated TOD beneficiary as provided in this section on the death of the sole owner or the last to die of the multiple owners.”

The California proposal endorses the opposite rule: namely, that the TOD deed severs the co-ownership, and the beneficiary designation is effective to pass the grantor’s interest in the property to the beneficiary.

California Recommended §5664: “Unless the deed otherwise provides, if an owner of property held in joint tenancy makes a revocable transfer on death deed of the property: (a) The death of the transferor severs the joint tenancy as to the interest of the transferor. (b) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the joint tenancy.”

California Recommended §5668(b): “Unless the deed otherwise provides, if an owner of community property with right of survivorship makes a revocable transfer on death deed of the property: (1) The death of the transferor terminates the right of survivorship in the same manner as severance of a joint tenancy under Section 5664. (2) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the community property with right of survivorship.”

9. Effect of community property without right of survivorship

Suppose that the property is owned by the grantor and the grantor's spouse as community property without an automatic right of survivorship? Can the grantor execute a TOD deed passing at death his one-half interest in the property, or is the consent of the grantor's spouse required? None of the TOD deed statutes addresses directly this question, but general principles of community property law authorize each spouse to transfer at death one-half of the community property without the consent of the other spouse. See, for example, the following statutes.

Arizona §14-3101(A): "... Upon the death of a person, his separate property and his share of community property devolves to the persons to whom the property is devised in his last will"

California Probate §100(a): "Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent."

California Probate §5020: "A provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse (1) is not effective as to the *nonconsenting* spouse's interest in the property" (emphasis supplied).

Nevada §123.250(1): "Except as provided in subsection 2, upon the death of either husband or wife: (a) An undivided one-half interest in the community property is the property of the surviving spouse and his or her sole separate property. ..."

New Mexico §45-3-101(B): "On the death of a person, his separate property and his share of community property devolves: (1) to the persons to whom the property is devised by his last will"

Wisconsin §766.31(3): "Each spouse has a present undivided one-half interest in each item of marital property 2. The surviving spouse and the successor to the decedent's share of marital property may enter into an agreement providing that some or all of the marital property will be divided based on aggregate value rather than divided item by item. ..."

What happens if the grantor's spouse wishes to consent to the TOD deed, thereby transferring the entire interest in the community property to the beneficiary? None of the existing TOD statutes addresses precisely this question, but the California Law Revision Commission recommends that, in such an event, the spouse's consent must be recorded.

California Recommended §5666:

"(a) Chapter 2 (commencing with Section 5010) of Part 1 applies to a revocable transfer on death deed of community property.

(b) For the purpose and application of Chapter 2 (commencing with Section 5010) of Part 1 to a revocable transfer on death deed of community property, written consent to the deed, revocation of written consent to the deed, or modification of the deed, is ineffective unless

recorded within the time required by that chapter for execution or service of the written consent, revocation, or modification.”

[Note that ‘Chapter 2 ... of Part 1’ does not provide a time-frame for the execution of the consent; it does speak to the time-frame of revocations and modifications. On the modification or revocation of the spouse’s consent, see B.3. below. – TPG]

10. Effectuation of transfer

With the transfer effective only at the owner’s death, how is the fact of death to be proved, and to whom?

Four states (California, Colorado, Nevada, and Ohio) require an affidavit and a certificate of death to be filed in the county. Nevada additionally requires a declaration of the property’s value.

California Recommended §5680(a): “The beneficiary may establish the fact of the transferor’s death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2. For the purpose of this subdivision, the beneficiary is a person empowered by statute to act on behalf of the transferor or the transferor’s estate within the meaning of Section 103526 of the Health and Safety Code.”

California Probate §210: “If title to real property is affected by the death of a person, any person may record in the county in which the property is located any of the following documents establishing the fact of the death: (a) An affidavit of death executed by a person having knowledge of the facts. The affidavit shall include a particular description of the real property and an attested or certified copy of a record of the death made and filed in a designated public office as required by law. (b) A certified copy of a court order that determines the fact of death made pursuant to Chapter 1 (commencing with Section 200) or pursuant to another statute that provides for a determination of the fact of death.”

Colorado §15-15-413: “Proof of the death of the owner or a grantee-beneficiary shall be established in the same manner as for proving the death of a joint tenant.”

Colorado §38-31-102(1): “A certificate of death or a certified copy thereof of a person who is a joint tenant may be placed of record with the county clerk and recorder of the county in which the real property affected by the joint tenancy is located, together with a supplementary affidavit. The supplementary affidavit, which shall be properly sworn to or affirmed by a person of legal age having personal knowledge of the facts and having no record interest in the real property, shall include the legal description of the real property and a statement that the person referred to in the certificate was at the time of death the owner of a joint tenancy interest in the real property. When recorded, the original certificate and supplementary affidavit, or certified copies thereof, shall be accepted in all courts of the state of Colorado as prima facie proof of the death of the joint tenant. The certificate and supplementary affidavit provided for in this section may also be used to provide proof of the death of a life tenant or any other person whose record interest in real property terminates upon the death of such person to the same extent as a joint tenant as provided in this section.”

Nevada §111.109(8): “ Upon the death of the last grantor of a deed created pursuant to subsection 1, a declaration of value of real property pursuant to NRS 375.060 and a copy of the death certificate of each grantor must be attached to a Death of Grantor Affidavit and recorded in the office of the county recorder where the deed was recorded. The Death of Grantor Affidavit must be in substantially the following form:”

Ohio §5302.22(C): “Upon the death of any individual who owns real property or an interest in real property that is subject to a transfer on death beneficiary designation made under a transfer on death deed as provided in this section, the deceased owner’s interest shall be transferred only to the transfer on death beneficiaries who are identified in the deed by name and who survive the deceased owner or that are in existence on the date of death of the deceased owner. The transfer of the deceased owner’s interest shall be recorded by presenting to the county auditor and filing with the county recorder an affidavit, accompanied by a certified copy of a death certificate for the deceased owner. The affidavit shall recite the name and address of each designated transfer on death beneficiary who survived the deceased owner or that is in existence on the date of the deceased owner’s death, the date of the deceased owner’s death, a description of the subject real property or interest in real property, and the names of each designated transfer on death beneficiary who has not survived the deceased owner or that is not in existence on the date of the deceased owner’s death. The affidavit shall be accompanied by a certified copy of a death certificate for each designated transfer on death beneficiary who has not survived the deceased owner. The county recorder shall make an index reference to any affidavit so filed in the record of deeds.”

Missouri’s statute requires “proof of death,” which is defined elsewhere in Missouri law to “include[] a death certificate or record or report that is prima facie proof of death under section 427.290.” Missouri §461.005(11).

Missouri §461.062(15): “A written request pursuant to subdivision (14) of this subsection shall be accompanied by the following:

(a) Any certificate or instrument evidencing ownership of the contract, account, security or property;

(b) Proof of death of the owner and any nonsurviving beneficiary;

(c) An inheritance tax waiver from states that require it;

(d) Where the request is made by a legal representative, a certified copy of the court order appointing the legal representative; and

(e) Such other proof of entitlement as the transferring entity may require.

Missouri §461.005(11): “‘Proof of death’ includes a death certificate or record or report that is prima facie proof of death under section 427.290.”

The Arkansas statute does not provide a procedure for effectuating the transfer, but it does entitle certain third parties to require the beneficiary “to present reasonable evidence that the owner who executed the beneficiary deed is deceased and the owner did not execute and record a revocation of the beneficiary deed prior to the owner’s death.” Arkansas §18-12-608(f).

Compare with the Uniform Nonprobate Transfers on Death Act (Uniform Probate Code Article 6), which refers to “proof of death” without elaboration about what proof should entail.

UPC §6-223: “A financial institution, on request, may pay sums on deposit in an account with a POD designation to: ... (2) the beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties”

UPC §6-307: “On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. ...”

The statutes in Arizona, Kansas, New Mexico, and Wisconsin are silent on the question.

11. Proceedings to contest the transfer

Only four states (California, Colorado, Missouri and Wisconsin) address any part of the proceedings to contest a transfer on death deed. California provides the most extensive treatment of the proceedings, including requirements for notice and recording of a lis pendens. Colorado addresses the requirements for the beneficiary of an unrecorded TOD deed to assert an interest. Missouri law provides that a party can petition to contest but does not define the logistics of the process. Wisconsin addresses the enforceability of penalty clauses for contests.

California Recommended §5690:

“(a) The transferor’s personal representative or an interested person may, under Part 19 (commencing with Section 850) of Division 2, contest the validity of a transfer of property by a revocable transfer on death deed.

(b) The proper county for a contest proceeding is the proper county for proceedings concerning administration of the transferor’s estate, whether or not proceedings concerning administration of the transferor’s estate have been commenced at the time of contest.

(c) On commencement of a contest proceeding, the contestant may record a lis pendens in the county in which the revocable transfer on death deed is recorded.”

California Recommended §5692:

“(a) A contest proceeding may not be commenced before the transferor’s death.

(b) A contest proceeding shall be commenced within the earlier of the following times:

(1) Three years after the transferor’s death.

(2) One year after the beneficiary establishes the fact of the transferor’s death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.”

California Recommended §5694: “If the court in a contest proceeding determines that a transfer of property by a revocable transfer on death deed is invalid, the court shall order the following relief:

(a) If the proceeding was commenced and a lis pendens recorded within 90 days after the transferor’s death, the court shall void the deed and order the transfer of the property to the person entitled to it.

(b) If the proceeding was commenced more than 90 days after the transferor’s death, the court shall grant appropriate relief but the court order shall not affect the rights in the property of

a purchaser or encumbrancer for value and in good faith acquired before commencement of the proceeding and recordation of a lis pendens.”

Colorado §15-15-407(3)(a): “A person having an interest described in subsection (2) of this section whose interest is not recorded in the records of the office of the clerk and recorder of the county in which the property is located at the time of the death of the owner, shall record evidence or a notice of the interest in the property not later than four months after the death of the owner. The notice shall name the person asserting the interest, describe the real property, and describe the nature of the interest asserted.”

Missouri §461.054(3): “On petition of any interested person or the transferring entity, the trier of fact shall determine whether a beneficiary designation or a revocation of a beneficiary designation is void by reason of subsection 1 of this section or whether subsection 2 of this section applies to prevent any person from receiving any benefit of the nonprobate transfer. The trier of fact may mitigate the effect of subsection 1 or 2 on any person as the trier of fact determines justice requires. Any party may demand a jury trial.”

Wisconsin §854.19: “A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing instrument may not be enforced if the court determines that the interested person had probable cause for instituting the proceedings.”

12. Grounds for contest

Only three statutes on TOD deeds address any grounds for contest: California, Colorado, and Missouri.

Comment to California Recommended §5690: “... Grounds for contest may include but not are not limited to lack of capacity of the transferor (Section 5620), improper execution or recordation (Sections 5622-5624), invalidating cause for consent to transfer of community property (Section 5015), and transfer to a disqualified person (Section 21350). See also Section 5696 (fraud, undue influence, duress, mistake, or other invalidating cause).”

California Recommended §5696: “Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a transfer of property by a revocable transfer on death deed.”

Colorado §15-15-411(2): “Nothing in this section shall be construed to bar an action to recover property or value received as the result of fraud.”

Missouri §461.054:

“1. A beneficiary designation or a revocation of a beneficiary designation that is procured by fraud, duress or undue influence is void.

2. A beneficiary who willfully and unlawfully causes or participates with another in causing the death of the owner, or the insured individual under a life insurance policy or certificate, is disqualified from receiving any benefit of a nonprobate transfer from the owner or

any proceeds payable as a result of the death of an individual insured under a life insurance policy or certificate. The beneficiary designation shall be given effect as if the disqualified beneficiary had disclaimed it. The fact that a beneficiary willfully and unlawfully caused or participated with another in causing the death of the owner may be established by a criminal conviction or guilty plea, after the right of direct appeal has been exhausted, or determined in a proceeding pursuant to subsection 3 of this section using a preponderance of the evidence standard.”

In *Groh v. Ballard*, 965 S.W.2d 872, 874 (Mo. App. 1998), a Missouri Court of Appeals held that this list of grounds for contest (fraud, duress, undue influence, and homicide) was exhaustive and did not include claims such as unilateral mistake.

13. Statute of limitations on contest

Only two statutes on TOD deeds (California and Colorado) address the statute of limitations for contesting a deed. Both states provide that the interested party must contest within the earlier of two events: (1) three years after the owner’s death or (2) one year after the proof of death is recorded.

California Recommended §5692(b): “A contest proceeding shall be commenced within the earlier of the following times: (1) Three years after the transferor’s death. (2) One year after the beneficiary establishes the fact of the transferor’s death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.”

Colorado §15-15-411(1): “Unless previously adjudicated or otherwise barred, the claim of a claimant to recover from a grantee-beneficiary who is liable to pay the claim, and the right of an heir or devisee or of a personal representative acting on behalf of an heir or devisee, to recover property from a grantee-beneficiary or the value thereof from a grantee-beneficiary is forever barred as follows: (a) A claim by a creditor of the owner is forever barred at one year after the owner’s death. (b) Any other claimant or an heir or devisee is forever barred at the earlier of the following: (I) Three years after the owner’s death; or (II) One year after the time of recording the proof of death of the owner in the office of the clerk and recorder in the county in which the legal property is located.”

B. RIGHTS OF THE TRANSFEROR

1. Ownership interest retained until death

All ten states provide that the grantor retains full ownership over the property until the grantor’s death. Conversely, the beneficiary obtains no rights in the property until the grantor’s death. This is also consistent with the Uniform Nonprobate Transfers on Death Act (Uniform Probate Code Article 6).

Arizona §33-405(A): “A deed that conveys an interest in real property, including any debt secured by a lien on real property, to a grantee beneficiary designated by the owner and that expressly states that the deed is effective on the death of the owner transfers the interest to the

designated grantee beneficiary effective on the death of the owner subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime."

Arkansas §18-12-608(a)(1):

"(A) A beneficiary deed is a deed that conveys an interest in real property, including any debt secured by a lien on real property, to a grantee designated by the owner and that expressly states that the deed is not to take effect until the death of the owner.

(B)(i) A beneficiary deed transfers the interest to the designated grantee beneficiary effective upon the death of the owner, subject to: (a) All conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, oil, gas, or mineral leases, and other encumbrances made by the owner or to which the real property was subject at the time of the owner's death, whether or not the conveyance or encumbrance was created before or after the execution of the beneficiary deed; and (b) A claim for the amount of federal or state benefits that could have been recovered by the Department of Health and Human Services from the estate of the grantor under § 20-76-436 but for the transfer under the beneficiary deed.

(ii) No legal or equitable interest shall vest in the grantee until the death of the owner prior to revocation of the beneficiary deed."

California Recommended §5650: "During the transferor's life, execution and recordation of a revocable transfer on death deed:

(a) Does not affect the ownership rights of the transferor, and the transferor or the transferor's agent or other fiduciary may convey, assign, contract, encumber, or otherwise deal with the property, and the property is subject to process of the transferor's creditors, as if no revocable transfer on death deed were executed or recorded.

(b) Does not create any legal or equitable right in the beneficiary, and the property is not subject to process of the beneficiary's creditors.

(c) Does not transfer or convey any right, title, or interest in the property."

Colorado §15-15-402(3): "During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property without the joinder, signature, consent, or agreement of, or notice to, the grantee-beneficiary for any purpose."

Kansas §59-3504(a): "Title to the interest in real estate recorded in transfer-on-death form shall vest in the designated grantee beneficiary or beneficiaries on the death of the record owner."

Missouri §461.031(1): "Prior to the death of the owner, a beneficiary shall have no rights in the property by reason of the beneficiary designation and the signature or agreement of the beneficiary shall not be required for any transaction respecting the property."

New Mexico §45-6-401(A): "An interest in real property may be titled in transfer on death form by recording a deed signed and acknowledged by the record owner of the interest and

designating a grantee beneficiary or beneficiaries of the interest. The deed transfers ownership of that interest upon the death of the owner.”

Nevada §111.109(1): “The owner of an interest in real property may create a deed that conveys his interest in real property to a grantee which becomes effective upon the death of the owner. Such a conveyance is subject to liens on the property in existence on the date of the death of the owner.”

Ohio §5302.23(B)(3): “The designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a person designated as a transfer on death beneficiary has no interest in the real property until the death of the owner of the interest.”

Wisconsin §705.15(3): “The designation of a TOD beneficiary on a deed does not affect ownership of the property until the owner’s death.”

Compare with the Uniform Nonprobate Transfers on Death Act (Uniform Probate Code Article 6), which also provides that the the owner of property with a TOD or POD designation retains ownership until death.

UPC §6-211(b): “A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.”

UPC §6-306: “The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner’s death.”

2. Revocability and revocation procedure

All ten states provide that the TOD deed is revocable, and that the grantor may revoke a TOD deed by executing and recording a subsequent instrument.

Arizona §33-405(F): “A beneficiary deed may be revoked at any time by the owner or, if there is more than one owner, by any of the owners who executed the beneficiary deed. To be effective, the revocation must be executed and recorded as provided by law in the office of the county recorder of the county in which the real property is located before the death of the owner who executes the revocation. If the real property is owned as joint tenants with right of survivorship or community property with right of survivorship and if the revocation is not executed by all the owners, the revocation is not effective unless executed by the last surviving owner.”

Arkansas §18-12-608(d):

“(1) A beneficiary deed may be revoked at any time by the owner or, if there is more than one (1) owner, by any of the owners who executed the beneficiary deed.

(2) To be effective, the revocation shall be: (A) Executed before the death of the owner who executes the revocation; and (B) Recorded in the office of the county recorder of the county in which the real property is located before the death of the owner as provided by law.

(3) If the revocation is not executed by all the owners, the revocation is not effective unless executed by the last surviving owner and recorded before the death of the last surviving owner.”

California Recommended §5630:

“(a) A transferor who has testamentary capacity may revoke a revocable transfer on death deed at any time.

(b) Revocation of a revocable transfer on death deed is effective notwithstanding a provision in the deed that purports to make the deed irrevocable.”²

California Recommended §5632:

“(a) An instrument revoking a revocable transfer on death deed shall be executed and recorded before the transferor’s death in the same manner as execution and recordation of a revocable transfer on death deed.

(b) Joinder, consent, or agreement of, or notice to, the beneficiary is not required for revocation of a revocable transfer on death deed.”

Colorado §15-15-401(1): “An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. The joinder, signature, consent, agreement of, or notice to, the grantee-beneficiary is not required for the revocation to be effective.”

Kansas §59-3503:

“(a) A designation of the grantee beneficiary may be revoked at any time prior to the death of the record owner, by executing, acknowledging and recording in the office of the register of deeds in the county where the real estate is located an instrument describing the interest revoking the designation. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required.

(b) A designation of the grantee beneficiary may be changed at any time prior to the death of the record owner, by executing, acknowledging and recording a subsequent transfer-on-death deed in accordance with K.S.A. 2004 Supp. 59-3502. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required. A subsequent transfer-on-death beneficiary designation revokes all prior designations of grantee beneficiary or beneficiaries by such record owner for such interest in real estate.”

Missouri §461.033:

“1. A beneficiary designation may be revoked or changed in whole or in part during the lifetime of the owner. A revocation or change of a beneficiary designation involving property of joint owners may only be made with the agreement of all owners then living.

2. A subsequent beneficiary designation revokes a prior beneficiary designation unless the subsequent beneficiary designation expressly provides otherwise.

3. A revocation or change in a beneficiary designation shall comply with the terms of the governing instrument, the rules of the transferring entity and the applicable law.”

² This language is designed to respond to situations where the language of the TOD deed purports to make the transfer irrevocable, or revocable only under specified conditions. See, e.g., *Bolz v. Hartfield*, 41 S.W.3d 566 (Mo. App. 2001) (“This deed is hereby expressly made irrevocable and not subject to change unless ... Grantor suffers a financial emergency which requires sale of this property to cure the financial emergency.”)

New Mexico §45-6-401(D): “A designation of the grantee beneficiary may be revoked by the record owner at any time prior to the death of the record owner, by the record owner executing, acknowledging and recording in the office of the county clerk in the county where the real property is located an instrument describing the interest and revoking the designation. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required.”

Nevada § 111.109(7): “A deed created pursuant to subsection 1 may be revoked at any time by the owner or, if there is more than one owner, by any of the owners who created the deed. The revocation is valid only if executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner who executes the revocation. If the property is held as joint tenants with right of survivorship or as community property with the right of survivorship and the revocation is not executed by all of the owners, the revocation does not become effective unless the revocation is executed and recorded by the last surviving owner.”

Ohio §5302.23(B)(4): “The designation in a deed of any transfer on death beneficiary may be revoked or changed at any time, without the consent of that designated transfer on death beneficiary, by the owner of the interest by executing in accordance with Chapter 5301 of the Revised Code and recording a deed conveying the grantor’s entire, separate interest in the real property to one or more persons, including the grantor, with or without the designation of another transfer on death beneficiary.”

Wisconsin §705.15(3): “The designation of a TOD beneficiary on a deed does not affect ownership of the property until the owner’s death. The designation may be canceled or changed at any time by the sole owner or all then surviving owners, without the consent of the beneficiary, by executing and recording another deed that designates a different beneficiary or no beneficiary. The recording of a deed that designates a TOD beneficiary or no beneficiary revokes any designation made in a previously recorded deed relating to the same property interest.”

3. Revocation when property has multiple owners

What rules should govern the revocation of a TOD deed when the property has multiple owners?

The Arizona and Nevada statutes provide that if the property is held by multiple owners without a right of survivorship, one co-owner can revoke the TOD deed. However, if the property is held with a right of survivorship (e.g., joint tenancy or community property with right of survivorship), the revocation is effective only if executed by all co-owners or the last to die of the co-owners. The Arkansas statute seems to reach the same result but is not worded as clearly.

Arizona §33-405(F): “A beneficiary deed may be revoked at any time by the owner or, if there is more than one owner, by any of the owners who executed the beneficiary deed. To be effective, the revocation must be executed and recorded as provided by law in the office of the

county recorder of the county in which the real property is located before the death of the owner who executes the revocation. If the real property is owned as joint tenants with right of survivorship or community property with right of survivorship and if the revocation is not executed by all the owners, the revocation is not effective unless executed by the last surviving owner.”

Nevada §111.109(7): “A deed created pursuant to subsection 1 may be revoked at any time by the owner or, if there is more than one owner, by any of the owners who created the deed. The revocation is valid only if executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner who executes the revocation. If the property is held as joint tenants with right of survivorship or as community property with the right of survivorship and the revocation is not executed by all of the owners, the revocation does not become effective unless the revocation is executed and recorded by the last surviving owner.”

Compare with Arkansas §18-12-608(d):

“(1) A beneficiary deed may be revoked at any time by the owner or, if there is more than one (1) owner, by any of the owners who executed the beneficiary deed.

(2) To be effective, the revocation shall be: (A) Executed before the death of the owner who executes the revocation; and (B) Recorded in the office of the county recorder of the county in which the real property is located before the death of the owner as provided by law.

(3) If the revocation is not executed by all the owners, the revocation is not effective unless executed by the last surviving owner and recorded before the death of the last surviving owner.”

Missouri’s statute adopts a slightly different position with respect to property co-owned with a right of survivorship: a TOD deed for such property must be revoked by all co-owners then living. Wisconsin also appears to adopt this approach.

Missouri §461.033(1): “A beneficiary designation may be revoked or changed in whole or in part during the lifetime of the owner. A revocation or change of a beneficiary designation involving property of joint owners may only be made with the agreement of all owners then living.”

Wisconsin §705.15(3): “The designation of a TOD beneficiary on a deed does not affect ownership of the property until the owner’s death. The designation may be canceled or changed at any time by the sole owner or all then surviving owners,....”

The California proposal provides that one co-owner can revoke a TOD deed as to his or her interest in the property whether the property is or is not owned with a right of survivorship. This accords with California’s unique treatment of the effect of TOD deeds for property held with a right of survivorship (see A.8 above).

California Recommended §5662: “Except as otherwise provided in this part, if coowners of property join in a revocable transfer on death deed of the property:

(a) The property interest of a coowner passes to the beneficiary on the death of that coowner.

(b) A coowner may revoke the transfer on death deed as to the interest of that coowner. The revocation does not affect the transfer on death deed as to the interest of another coowner.”

California’s probate statutes on community property (outside the TOD deed statute) provide guidelines for the modification or revocation of a spouse’s consent to the nonprobate transfer of community property.

California Probate §5023(b):

“If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person’s spouse and thereafter executes a modification of the provision for transfer of the property without written consent of the spouse, the modification is effective as to the person’s interest in the community property and has the following effect on the spouse’s interest in the community property:

(1) If the person executes the modification during the spouse’s lifetime, the modification revokes the spouse’s previous written consent to the provision for transfer of the property.

(2) If the person executes the modification after the spouse’s death, the modification does not affect the spouse’s previous written consent to the provision for transfer of the property, and the spouse’s interest in the community property is subject to the nonprobate transfer on death as consented to by the spouse.

(3) If a written expression of intent of a party in the provision for transfer of the property or in the written consent to the provision for transfer of the property authorizes the person to execute a modification after the spouse’s death, the spouse’s interest in the community property is deemed transferred to the married person on the spouse’s death, and the modification is effective as to both the person’s and the spouse’s interests in the community property.”

California Probate §5030:

“(a) A spouse’s written consent to a provision for a nonprobate transfer of community property on death is revocable during the marriage.

(b) On termination of the marriage by dissolution or on legal separation, the written consent is revocable and the community property is subject to division under Division 7 (commencing with Section 2500) of the Family Code or other disposition on order within the jurisdiction of the court.

(c) On the death of either spouse, the written consent is irrevocable.”

California Probate §5031:

“(a) If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person’s spouse, the consenting spouse may revoke the consent by a writing, including a will, that identifies the provision for transfer of the property being revoked, and that is served on the married person before the married person’s death.

(b) Revocation of a spouse’s written consent to a provision for a nonprobate transfer of community property on death does not affect the authority of the holder of the property to transfer the property in compliance with the provision for transfer of the property to the extent provided in Section 5003.”

California Probate §5032: “On revocation of a spouse’s written consent to a nonprobate transfer of community property on death, the property passes in the same manner as if the consent had not been given.”

The Ohio TOD deed statute can only be used for property held as sole owner or tenant in common, so issues of joint tenancy (or other forms of coownership with a right of survivorship) do not arise.

Ohio §5302.22(A): “A deed conveying any interest in real property, and in substance following the form set forth in this division, ... , creates a present interest as sole owner or as a tenant in common in the grantee and creates a transfer on death interest in the beneficiary or beneficiaries. ...”

Ohio §5302.23(B)(4): “The designation in a deed of any transfer on death beneficiary may be revoked or changed at any time, without the consent of that designated transfer on death beneficiary, by the owner of the interest by executing ... and recording a deed conveying the grantor’s entire, separate interest in the real property”

The statutes of the remaining three states (Colorado, Kansas, and New Mexico) do not address issues of revocation when the property has multiple owners.

4. Subsequent incapacity of owner; authority of agent to revoke

Only two states, California and Missouri, address the authority of an agent to revoke a TOD deed. Both states provide that the agent does not have the authority to revoke the deed unless explicitly authorized in the power of attorney. This is consistent with the position taken in the new Uniform Power of Attorney Act (2006).

California Probate §4624, as amended by the California Law Revision Commission proposal: “A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power of attorney: ... (c) Make or revoke a gift of the principal’s property in trust, by revocable transfer on death deed, or otherwise.”

Missouri §461.035(1): “An attorney in fact, custodian, conservator or other agent may not make, revoke or change a beneficiary designation unless the document establishing the agent’s right to act, or a court order, expressly authorizes such action and such action complies with the terms of the governing instrument, the rules of the transferring entity and applicable law.”

Compare Uniform Power of Attorney Act §201(a) (2006): “An agent under a power of attorney may do the following on behalf of the principal or with the principal’s property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: ... (4) create or change a beneficiary designation. ...”

5. Ownership interest conveyed

a. Less than the grantor's whole interest?

Can the grantor convey less than his or her entire interest in the property? California provides that the answer is no; the deed must convey the transferor's interest.

Ohio does not answer directly but provides that "any fractional interest" may be transferred.

All other states are silent on the question.

California Recommended §5652(a): "A revocable transfer on death deed transfers all of the transferor's interest in the property to the beneficiary on the transferor's death. A revocable interest on death deed that purports to transfer less than all of the transferor's interest in the property is void, and the instrument does not transfer the property on the transferor's death."

Ohio §5302.23(B)(5): "A fee simple title or any fractional interest in a fee simple title may be subjected to a transfer on death beneficiary designation."

b. Limitations created during the grantor's life

All ten states provide that the property passes to the beneficiary subject to limitations created during the grantor's life.

Arizona §33-405(A): "A deed that conveys an interest in real property, including any debt secured by a lien on real property, to a grantee beneficiary designated by the owner and that expressly states that the deed is effective on the death of the owner transfers the interest to the designated grantee beneficiary effective on the death of the owner subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime."

Arkansas §18-12-608(a)(1)(B)(i): "A beneficiary deed transfers the interest to the designated grantee beneficiary effective upon the death of the owner, subject to:

(a) All conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, oil, gas, or mineral leases, and other encumbrances made by the owner or to which the real property was subject at the time of the owner's death, whether or not the conveyance or encumbrance was created before or after the execution of the beneficiary deed; and

(b) A claim for the amount of federal or state benefits that could have been recovered by the Department of Health and Human Services from the estate of the grantor under § 20-76-436 but for the transfer under the beneficiary deed."

California Recommended §5652(c): "Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor's interest that is of record at the transferor's death, including but not limited to a lien, encumbrance, easement, lease, or other instrument affecting the transferor's interest, whether recorded before or after recordation of the revocable

transfer on death deed. The holder of rights under that instrument may enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed.”

Colorado §15-15-407(2): “A grantee-beneficiary of a beneficiary deed takes title to the owner’s interest in the real property conveyed by the beneficiary deed at the death of the owner subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests, affecting title to the property, whether created before or after the recording of the beneficiary deed, or to which the owner was subject during the owner’s lifetime including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust, or other lien. The grantee-beneficiary also takes title subject to any interest in the property of which the grantee-beneficiary has either actual or constructive notice.”

Kansas §59-3504(b): “Grantee beneficiaries of a transfer-on-death deed take the record owner’s interest in the real estate at death subject to all conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the record owner’s lifetime including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust or lien, claims of the state of Kansas for medical assistance, as defined in K.S.A. 39-702, and amendments thereto, pursuant to subsection (g)(2) of K.S.A. 39-709, and amendments thereto, and to any interest conveyed by the record owner that is less than all of the record owner’s interest in the property.”

Missouri §461.039: “A beneficiary of a nonprobate transfer takes the owner’s interest in the property at death subject to all conveyances, assignments, contracts, setoffs, licenses, easements, liens and security interests made by the owner or to which the owner was subject during the owner’s lifetime.”

New Mexico §45-6-401(I): “Grantee beneficiaries of a transfer on death deed take the record owner’s interest in the real estate at death subject to all conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the record owner’s lifetime and to any interest conveyed by the record owner that is less than all of the record owner’s interest in the property.”

Nevada §111.109(1): “The owner of an interest in real property may create a deed that conveys his interest in real property to a grantee which becomes effective upon the death of the owner. Such a conveyance is subject to liens on the property in existence on the date of the death of the owner.”

Ohio §5302.23(B)(6): “Designated transfer on death beneficiary takes only the interest that the deceased owner or owners held on the date of death, subject to all encumbrances, reservations, and exceptions.”

Wisconsin §705.15(4): “On the death of the sole owner or the last to die of multiple owners, ownership of the interest in the real property passes, subject to any lien or other encumbrance, to the designated TOD beneficiary or beneficiaries “

c. What kind of interests can be transferred?

It is clear that a grantor who owns in fee simple can use a TOD deed. What about grantors who own less than fee simple?

California answers this question expansively, providing that the statute applies to any interest in real property that is both transferable on the death of the owner and recordable.

California Recommended §5610: “‘Real property’ means the fee or an interest in real property. The term includes but is not limited to any of the following interests in real property: (a) A leasehold. (b) An interest in a common interest development within the meaning of Section 1351 of the Civil Code. (c) An easement, license, permit or other right in property to the extent the right is both (1) a recordable interest in property and (2) transferable on the death of the owner of the right.”

In Arizona, Arkansas, Colorado, Kansas, Missouri, Nevada, New Mexico, and Wisconsin, the relevant statutes speak only of “an interest in real property.”³ Yet there are implied limitations: the states require a recorded deed (see A.3 above) and provide that the interest passes only at the death of the grantor (see B.1 above). Thus, it appears that these states contemplate the same two limitations imposed by California law.

The outlier states are Ohio and Wisconsin, where the TOD deed is more limited. In Ohio, the statute is limited to legal interests in fee simple or fractional interests therein. In Wisconsin, the statute is limited to interests owned solely, or as marital survivorship property, or in joint tenancy (thereby excluding interests held in tenancy in common).

Ohio §5302.23(B)(5): “A fee simple title or any fractional interest in fee simple title may be subjected to a transfer on death beneficiary designation.”

Wisconsin §705.15(1): “An interest in real property that is solely owned, owned by spouses as survivorship marital property, or owned by 2 or more persons as joint tenants may be transferred without probate to a designated TOD beneficiary as provided in this section on the death of the sole owner or last to die of the multiple owners.”

³ See Arizona §33-405(A) (referring to “an interest in real property”); Arkansas §§18-12-608(a)(1)(A) (referring to “an interest in real property, including any debt secured by a lien on real property), 18-12-608(a)(1) (referring to a “legal or equitable interest” vesting in the grantee at the owner’s death); Colorado §§15-15-401(1), 15-15-402(1) (both referring to “an interest in real property”); Kansas §59-3501(a) (referring to “[a]n interest in real estate”); Missouri §461.025(1) (referring to “an interest in real property”); Nevada §111.109(1) (referring to an “owner of an interest in real property”); New Mexico §45-6-401(A) (referring to “[a]n interest in real property”).

C. RIGHTS OF A BENEFICIARY; WHO MAY BE A BENEFICIARY

1. Rights during grantor's lifetime

In all ten states, the beneficiary has no interest or right in the property during the grantor's lifetime. Five states (Arkansas, California, Colorado, Missouri, and Ohio) say this explicitly. The other states do so impliedly, by providing that the transfer is effective at the grantor's death.

Arkansas §18-12-608(a)(1)(B)(ii): “No legal or equitable interest shall vest in the grantee until the death of the owner prior to revocation of the beneficiary deed.”

California Recommended §5650: “During the transferor's life, execution and recordation of a revocable transfer on death deed: ... (b) Does not create any legal or equitable right to the beneficiary, and the property is not subject to process of beneficiary's creditors.”

Colorado §15-15-402(3): “During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property without the joinder, signature, consent, or agreement of, or notice to, the grantee-beneficiary for any purpose.”

Missouri §461.031(1): “Prior to the death of the owner, a beneficiary shall have no rights in the property by reason of the beneficiary designation and the signature or agreement of the beneficiary shall not be required for any transaction respecting the property.”

Ohio §5302.23(B)(3): “The designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a person designated as a transfer on death beneficiary has no interest in the real property until the death of the owner of the interest.”

Compare with the states providing that the TOD deed is effective at the grantor's death.

Arizona §33-405(A): “A deed that conveys an interest in real property, including any debt secured by a lien on real property, to a grantee beneficiary designated by the owner and that expressly states that the deed is effective on the death of the owner transfers the interest to the designated grantee beneficiary effective on the death of the owner subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime.”

Kansas §59-3504(a): “Title to the interest in real estate recorded in transfer-on-death form shall vest in the designated grantee beneficiary or beneficiaries on the death of the record owner.”

New Mexico §45-6-401(A): “An interest in real property may be titled in transfer on death form by recording a deed signed and acknowledged by the record owner of the interest and

designating a grantee beneficiary or beneficiaries of the interest. The deed transfers ownership of that interest upon the death of the owner.”

Nevada §111.109(1): “The owner of an interest in real property may create a deed that conveys his interest in real property to a grantee which becomes effective upon the death of the owner. Such a conveyance is subject to liens on the property in existence on the date of the death of the owner.”

Wisconsin §705.15(3): “The designation of a TOD beneficiary on a deed does not affect ownership of the property until the owner’s death.”

Also compare with the Nonprobate Transfers on Death Act (Uniform Probate Code, Article 6), which provides that the owner of a property with a TOD or POD designation retains ownership until death.

UPC §6-211(c): “A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.”

UPC §6-306: “The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner’s death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.”

2. Drafter of the TOD deed as the beneficiary?

Can the person drafting the TOD deed be named as the beneficiary? Only one state, California, addresses this question, but does so in two general provisions of the probate code (outside the TOD deed statute itself).

California Probate §21350(a)(1): “Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following: (1) The person who drafted the instrument. ...”

3. Trustee of a trust as the beneficiary?

Can the trustee of a trust be named as the beneficiary of a TOD deed?

Four states (Arizona, Arkansas, California, and Missouri) provide in their TOD deed statutes that a trustee of a trust can be the beneficiary of a TOD deed even if the trust is revocable. The other six state statutes are silent on the issue.

Arizona §33-405(E): “A beneficiary deed may be used to transfer an interest in real property to the trustee of a trust even if the trust is revocable.”

Arkansas §18-12-608(c)(2): “A beneficiary deed may be used to transfer an interest in real property to a trust estate even if the trust is revocable.”

California Recommended §5622(d): “The transferor may name as beneficiary the trustee of a trust even if the trust is revocable.”

Missouri §461.025(1): “A beneficiary deed may be used to transfer an interest in real property to a trust estate, regardless of such trust’s revocability.”

4. Minor or incapacitated beneficiary

Only one of the state’s TOD deed statutes (Missouri) addresses the possibility that a minor or incapacitated person might be named as beneficiary. The Missouri statute provides that, in such event, the state’s general rules governing transfers to minors or appointments of guardians apply. This is in line with the view of the California Law Revision Commission, which states in its report that “[t]he general California statutes on appointment of a guardian or conservator to manage property for a minor or otherwise incapacitated person are adequate to handle the situation” (pp. 171-172).

Missouri §461.062(3)(13): “If a transferring entity is required to make a nonprobate transfer to a minor or a disabled adult the transfer may be made pursuant to the Missouri transfers to minors law, chapter 404, R.S.Mo., the Missouri personal custodian law, chapter 404, R.S.Mo., or a similar law of another state.”

5. Effect of divorce on the beneficiary designation

What happens if the TOD deed names the grantor’s spouse (or a relative of the grantor’s spouse) as a beneficiary, and the grantor and spouse become divorced?

The Uniform Probate Code handles this situation in Article 2, not in Article 6. UPC §2-804 provides that the divorce revokes a revocable beneficiary designation naming the spouse or a relative of the spouse, and the instrument takes effect as if the spouse or relative had disclaimed the interest. Arizona, Colorado, and New Mexico have adopted the UPC’s approach and language.

UPC §2-804:

“(b) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual’s former spouse,

(d) Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section”

Essentially the same language appears in *Arizona §14-2804*, *Colorado §15-11-804*, and *New Mexico §45-2-804*.

Missouri and Wisconsin adopt the UPC's approach, but using different language.

Missouri §461.051:

“1. If, after an owner makes a beneficiary designation, the owner's marriage is dissolved or annulled, any provision of the beneficiary designation in favor of the owner's former spouse or a relative of the owner's former spouse is revoked on the date the marriage is dissolved or annulled, whether or not the beneficiary designation refers to marital status. The beneficiary designation shall be given effect as if the former spouse or relative of the former spouse had disclaimed the revoked provision.

2. Subsection 1 of this section does not apply to a provision of a beneficiary designation that has been made irrevocable, or revocable only with the spouse's consent, or that is made after the marriage was dissolved, or that expressly states that marriage dissolution shall not affect the designation of a spouse or relative of a spouse as beneficiary. ...”

Wisconsin §845.15:

“(3) Except as provided in subs. (5) and (6), a divorce, annulment or similar event does all of the following:

(a) Revokes any revocable disposition of property made by the decedent to the former spouse or a relative of the former spouse in a governing instrument. ...

(4) Except as provided in subs. (5) and (6), provisions of a governing instrument that are revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions

(5) (am) This section does not apply if any of the following applies:

1. The express terms of a governing instrument provide otherwise. ...

(bm) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

(6) The effect of a judgment of annulment, divorce or legal separation on marital property agreements under §766.58 is governed by §767.375(1).”

California law (outside the TOD deed recommended statute) revokes nonprobate transfers to the former spouse but does not extend the revocation to relatives of the former spouse. The effect of the revocation is that the former spouse is treated as having predeceased the grantor.

Ca. Probate §5600:

“(a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in any of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(3) A court order that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor's death.

(c) Where a nonprobate transfer fails by operation of this section, the instrument making the nonprobate transfer shall be treated as it would if the former spouse failed to survive the transferor. ...”

The Arkansas TOD deed statute provides that, in the event of a divorce, the TOD deed is to be treated as a revocable trust. But Arkansas law does not seem to have a statute governing revocation on divorce in revocable trusts.

Arkansas §18-12-608(g)(3): “In the event of a bankruptcy or divorce, a beneficiary deed shall be treated as a revocable trust.”

Kansas has a statute governing revocation on divorce in wills (Kansas §59-610) but not other instruments. Nevada has statutes governing revocation on divorce in wills (Nevada §133.115) and revocable trusts (Nevada §163.565) Ohio has statutes governing revocation on divorce in wills (Ohio §2107.33) and in beneficiary designations arising by in life insurance policies, POD accounts and other contracts (Ohio §5815.33). None of these statutes covers a TOD deed.

6. Effect of homicide on the beneficiary designation

What happens if the TOD deed beneficiary kills the grantor?

The Uniform Probate Code handles this situation in Article 2, not in Article 6. UPC §2-803 provides that a revocable beneficiary designation in favor of the killer is revoked and the property passes as if the killer had disclaimed the interest.

UPC §2-803:

“(c) The felonious and intentional killing of the decedent: (1) revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument,

(e) Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section”

The same language appears in *Arizona §14-2803*, *Colorado §15-11-803*, and *New Mexico §45-2-803*.

Missouri and Wisconsin adopt the UPC's approach, but using different language.

Missouri §461.054(2): “A beneficiary who willfully and unlawfully causes or participates with another in causing the death of the owner, or the insured individual under a life

insurance policy or certificate, is disqualified from receiving any benefit of a nonprobate transfer from the owner or any proceeds payable as a result of the death of an individual insured under a life insurance policy or certificate. The beneficiary designation shall be given effect as if the disqualified beneficiary had disclaimed it. The fact that a beneficiary willfully and unlawfully caused or participated with another in causing the death of the owner may be established by a criminal conviction or guilty plea, after the right of direct appeal has been exhausted, or determined in a proceeding pursuant to subsection 3 of this section using a preponderance of the evidence standard.”

Wisconsin §864.14:

“(2) Except as provided in sub. (6), the unlawful and intentional killing of the decedent does all of the following: (a) Revokes a provision in a governing instrument that, by reason of the decedent’s death, does any of the following: 1. Transfers or appoints property to the killer. ...

(3) Except as provided in sub. (6), provisions of a governing instrument that are revoked by this section are given effect as if the killer disclaimed all revoked provisions”

California law (outside the TOD deed recommended statute) revokes nonprobate transfers to the killer, creating the legal fiction that the killer predeceased the grantor.

California Probate §250, as amended by the California Law Revision Commission proposal:

“(a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following: (4) Any property of the decedent under Part 5 (~~commencing with Section 5700~~) of Division 5 (commencing with Section 5000).”

(b) In the cases covered by subdivision (a): (1) The property interest or benefit referred to in paragraph (1) of subdivision (a) passes as if the killer had predeceased the decedent and Section 21110 does not apply. ...”

Kansas, Nevada and Ohio follow the California approach.

Kansas §59-513: “No person convicted of feloniously killing, or procuring the killing of, another person shall inherit or take by will by intestate succession, as a surviving joint tenant, as a beneficiary under a trust or otherwise from such other person any portion of the estate or property in which the decedent had an interest. When any person kills or causes the killing of such person’s spouse, and then takes such person’s own life, the estates and property of both persons shall be disposed of as if their deaths were simultaneous pursuant to the provisions of K.S.A. 58-708 to 58-718 inclusive, and amendments thereto.”

Nevada §41B.310:

“1. Except as otherwise provided in NRS 41B.320, a killer of a decedent forfeits any appointment, nomination, power, right, property, interest or benefit that, pursuant to the provisions of a governing instrument executed by the decedent or any other person, accrues or devolves to the killer based upon the death of the decedent. ...

3. If a killer of a decedent forfeits any appointment, nomination, power, right, property, interest or benefit pursuant to this section, the provisions of each governing instrument affected by the forfeiture must be treated as if the killer had predeceased the decedent.”

Ohio §2105.19(A): “Except as provided in division (C) of this section, no person who is convicted of, pleads guilty to, or is found not guilty by reason of insanity of a violation of or complicity in the violation of section 2903.10, 2903.02, or 2903.03 of the Revised or of an existing or former law of any other state, the United States, or a foreign nation, substantially equivalent to a violation of or complicity in the violation of any of these sections, no person who is indicted for a violation of or complicity in the violation of any of those sections or laws and subsequently is adjudicated incompetent to stand trial on that charge, and no juvenile who is found to be a delinquent child by reason of committing an act that, if committed by an adult, would be a violation of or complicity in the violation of any of those sections or laws, shall in any way benefit by the death. All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent’s death, shall pass or be paid or distributed as if the person who caused the death of the decedent had predeceased the decedent.”

Arkansas’ general statutes only discuss the effect of murder between spouses, but there are statements in case law that would support a broader application of the slayer rule. See, e.g., *Smith v. Dean*, 290 S.W.2d 439, 439 (Ark. 1956) (“Apart from statute, however, it is a familiar principle of law that one who wrongfully kills another is not permitted to share in the other’s estate, to collect insurance on his life, or otherwise to profit from the crime.”).

Arkansas §28-11-204: “Whenever a spouse shall kill or slay his or her spouse and the killing or slaying would under the law constitute murder, either in the first or second degree, and that spouse shall be convicted of murder for the killing or slaying, in either the first or second degree, the one so convicted shall not be endowed in the real or personal estate of the decedent spouse so killed or slain.”

7. Lapse and antilapse

a. Lapse: a requirement of survivorship?

Is the beneficiary designation in a TOD deed subject to a requirement of survival?

Six state statutes (California, Kansas, Missouri, New Mexico, Ohio, and Wisconsin) require the beneficiary to survive the grantor.

California Probate §21109(a): “A transferee who fails to survive the transferor of an at-death transfer or until any future time required by the instrument does not take under the instrument.”

Kansas §59-3504(c): “If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.”

Missouri §461.042(1): “An individual who is a beneficiary of a nonprobate transfer shall not be entitled to a transfer unless the individual survives the owner by one hundred twenty hours.”

New Mexico §45-6-401(K): “If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.”

Ohio §5302.23(B)(1): “An interest of a deceased owner shall be transferred to the transfer on death beneficiaries who are identified in the deed by name and who survive the deceased owner or that are in existence on the date of the deceased owner’s death. ...”

Wisconsin §705.15(4): “On the death of the sole owner or the last to die of multiple owners, ownership of the interest in the real property passes, subject to any lien or encumbrance, to the designated TOD beneficiary or beneficiaries who survive all owners and to any predeceased beneficiary’s issue who would take under s. 854.06(3). If no beneficiary or predeceased beneficiary’s issue who would take under s. 854.06(3) survives the death of all owners, the interest in the real property passes to the estate of the deceased sole owner or the estate of the last to die of the multiple owners.”

Wisconsin §854.03(1): “Except as provided in sub. (5), if property is transferred to an individual under a statute or under a provision in a governing instrument that requires the individual to survive an event and it is not established that the individual survived the event by at least 120 hours, the individual is considered to have predeceased the event.”

Colorado’s TOD deed statute requires survival if there are multiple beneficiaries but is ambiguous about whether a sole beneficiary would be required to survive.

Colorado §15-15-407(5): “The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries.”

The TOD deed statutes in Arizona, Arkansas, and Nevada are silent on the question.

Note that, under uniform law, survival is defined to mean survival by 120 hours, unless the governing instrument provides otherwise. This is the position taken in the Uniform Probate Code’s Article 2 and repeated in the Uniform Simultaneous Death Act.

UPC §2-702(b): “Except as provided in subsection (d), for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event.”

b. Antilapse

If a beneficiary named in the TOD deed fails to meet a requirement of survival but leaves descendants who do meet the requirement of survival, should an antilapse statute apply to create a substitute gift in those surviving descendants?

The Uniform Probate Code handles issues of antilapse in Article 2, not Article 6. Section 2-706 provides antilapse protection for beneficiary designations. Section 2-707 provides antilapse protection for future interests in trust. (Section 2-707 does not apply to legal future interests, so as to permit the legal life tenant and remainderman to join in giving good title for the sale of the land. See UPC §2-707 cmt.)

The UPC's antilapse provisions are long and are reproduced fully in the Appendix. Here, we reproduce the heart of §2-706, which is subsection (b).

UPC §2-706(b): "If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:

(1) Except as provided in paragraph (4), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(2) Except as provided in paragraph (4), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled, had all of them survived the decedent, passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship, such as in a beneficiary designation to an individual "if he survives me," or in a beneficiary designation to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative beneficiary designation only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take."

One state (Arizona) has adopted the UPC's antilapse provisions. See Arizona §§ 14-2706, 14-2707. Three states (California, Missouri, and Wisconsin) provide in their general statutes (meaning, outside of the TOD deed legislation) that antilapse protection would extend to the beneficiary designations in the TOD deed. Four states (Colorado, Kansas, New Mexico, and Ohio) specifically provide to the contrary: antilapse statutes do not apply to the TOD deed. The remaining two states (Arkansas and Nevada) have antilapse statutes that apply only to wills, not to nonprobate transfers. See Arkansas §28-26-104(2); Nevada §133.200.

Consider first the states in which general statutes extend antilapse protection to TOD deeds.

California Probate §21110(a): "Subject to subdivision (b), if a transferee is dead when the instrument is executed, or fails or is treated as failing to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place in the manner provided in Section 240. ..."

Missouri §461.045(1): "Whenever a person designated as beneficiary of a nonprobate transfer is a lineal descendant of the owner, and the beneficiary is deceased at the time the beneficiary designation is made or does not survive the owner, or is treated as not surviving the owner, the nonsurviving beneficiary's share shall belong to that beneficiary's lineal descendants per stirpes who survive the owner, to take in place of and in substitution for the nonsurviving beneficiary, the same as the beneficiary would have taken if the beneficiary had survived. This subsection shall not apply to a beneficiary designation with the notation 'no LDPS' after a beneficiary's name or other words negating an intention to direct the transfer to the lineal descendant substitutes of a nonsurviving beneficiary."

Wisconsin §705.15(4): "On the death of the sole owner or the last to die of multiple owners, ownership of the interest in the real property passes, subject to any lien or other encumbrance, to the designated TOD beneficiary or beneficiaries who survive all owners and to any predeceased beneficiary's issue who would take under §854.06(3) If no beneficiary or predeceased beneficiary's issue who would take under §854.06(3) survives the death of all owners, the interest in the real property passes to the estate of the deceased sole owner or the estate of the last to die of the multiple owners."

Wisconsin §854.06(3): "Subject to sub. (4), if a transferee under a provision described in sub. (2) does not survive the decedent but has issue who do survive, the issue of the transferee take the transfer per stirpes, as provided in §854.04(1)."

Compare with the four jurisdictions in which the TOD deed statutes provide or imply that antilapse protection shall not apply.

Colorado §15-15-407(5): "The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries."

Kansas §59-3504(c): “If a grantee beneficiary dies prior to the death of the record owner and an alternate grantee beneficiary has not been designated on the deed, the transfer shall lapse.”

New Mexico §45-6-401(K): “If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.”

Ohio §5302.23(B)(1): “... If a transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of the deceased owner’s death, and the deceased owner has designated one or more persons as contingent transfer on death beneficiaries as provided in division (B)(2) of this section, the designated contingent transfer on death beneficiaries shall take the same interest that would have passed to the transfer on death beneficiary had that transfer on death beneficiary survived the deceased owner or been in existence on the date of the deceased owner’s death. If none of the designated transfer on death beneficiaries survives the deceased owner or is in existence on the date of the deceased owner’s death and no contingent transfer on death beneficiaries have been designated or have survived the deceased owner, the interest of the deceased owner shall be distributed as part of the probate estate of the deceased owner of the interest.”

8. Deed restrictions and conditions

Can the TOD deed contain restrictions or conditions on the beneficiary’s interest?

The California Law Revision Commission’s position is that deeds with restrictions or conditions should be discouraged, because “[a] conditional grant would complicate interpretation of the instrument, require reference to off-record information, and cause a title company to refuse to issue title insurance absent a court determination of ownership” (p. 174).

Missouri’s statute is silent on the issue, but a Court of Appeals decision illustrates the use of conditions in a TOD deed. See *Bolz v. Hatfield*, 41 S.W.3d 566, 569 (Mo. App. 2001) (grantor declared TOD deed to be irrevocable unless the beneficiary failed to pay the property taxes or unless the grantor suffered a financial emergency requiring the sale of the land).

Two states (Arizona and Arkansas) mention conditions in their TOD deed statutes, but only about the interest of a successor beneficiary.

Arizona §33-405(C): “A beneficiary deed may designate a successor grantee beneficiary. If the beneficiary deed designates a successor grantee beneficiary, the deed shall state the condition on which the interest of the successor grantee beneficiary would vest.”

Arkansas §18-12-608(3): “(A) The owner may designate a successor grantee beneficiary under a beneficiary deed. (B) The condition upon which the interest of the successor grantee vests shall be included in the beneficiary deed.”

9. Multiple beneficiaries

What happens if the grantor wishes to name multiple beneficiaries? The answer depends on what is meant by ‘multiple beneficiaries.’ We need to consider four separate aspects of this question: (a) primary and alternate beneficiaries, (b) concurrent beneficiaries, (c) present and future beneficial interests, and (d) beneficiaries designated not by name but rather by class.

a. Primary and alternate beneficiaries

Eight states (Arizona, Arkansas, California, Colorado, Kansas, Missouri, New Mexico, and Ohio) expressly authorize an alternate beneficiary to be named in case the primary beneficiary fails to survive the grantor. Wisconsin impliedly recognizes an alternate beneficiary by providing in the general nonprobate transfers law that antilapse protection will not apply if there is a named alternate beneficiary who survives the grantor. Nevada’s TOD deed statute is silent on the issue.

Arizona §33-405(C): “A beneficiary deed may designate a successor grantee beneficiary. If the beneficiary deed designates a successor grantee beneficiary, the deed shall state the condition on which the interest of the successor grantee beneficiary would vest.”

Arkansas §18-12-608(a)(3): “(A) The owner may designate a successor grantee beneficiary under a beneficiary deed. (B) The condition upon which the interest of the successor grantee vests shall be included in the beneficiary deed.”

California Recommended §5622(b): “The transferor may name an alternate beneficiary to take property if a named beneficiary fails to survive the transferor.”

Colorado §15-15-401(5): “‘Successor grantee-beneficiary’ means the person or entity designated in a beneficiary deed to receive an interest in the property if the primary grantee-beneficiary does not survive the owner.”

Kansas §59-3504(c): “If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.”

Missouri §461.062(3): “A beneficiary designation may designate one or more primary beneficiaries and one or more contingent beneficiaries.”

New Mexico §45-6-401(K): “If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.”

Ohio §5302.23(B)(2): “A transfer on death deed may contain a designation of one or more persons as contingent transfer on death beneficiaries, who shall take the interest of the deceased owner that would otherwise have passed to the designated transfer on death beneficiary

if that named designated transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of death of the deceased owner. Persons designated as contingent transfer on death beneficiaries shall be identified in the deed by name.”

Compare the Wisconsin statute on nonprobate transfers and antilapse:

Wisconsin §854.06(4): “Subsection (3) does not apply if any of the following applies: ...
(2) The governing instrument designates one or more persons, classes, or groups of people as contingent transferees, in which case those transferees take in preference to those under sub. (3).
...”

b. Concurrent beneficiaries

Can the grantor name multiple beneficiaries to take the property concurrently? If so, is there a presumption that the beneficiaries hold as tenants in common, or as co-owners with right of survivorship? Additionally, are the shares of the concurrent beneficiaries presumed to be equal?

All ten states permit multiple beneficiaries to hold the property concurrently. Arizona, Arkansas, and Nevada expressly authorize the grantor to use any form of co-tenancy permitted by state law. California provides a rebuttable presumption that the co-tenancy is tenancy in common. Ohio seems to mandate the use of tenancy in common. California and Missouri provide a rebuttable presumption that the shares of co-tenants are equal.

Arizona §33-405(B): “A beneficiary deed may designate multiple grantees who take title as joint tenants with right of survivorship, tenants in common, a husband and wife as community property or as community property with right of survivorship, or any other tenancy that is valid under the laws of this state.”

Arkansas §18-12-608(a)(2): “(A) The owner may designate multiple grantees under a beneficiary deed. (B) Multiple grantees may be joint tenants with right of survivorship, tenants in common, holders of a tenancy by the entirety, or any other tenancy that is otherwise valid under the laws of this state.”

California Recommended §5622(c): “The transferor may name more than one beneficiary or alternate beneficiary. Unless the instrument otherwise provides, beneficiaries take the property as tenants in common, in equal shares.” (The last three words were added by California Law Revision Commission Memorandum 2007-1, at page 6.)

Colorado §15-15-401(3): “‘Grantee-beneficiary’ means one or more persons or entities capable of holding title to real property designated in a beneficiary deed to receive an interest in real property upon the death of the owner. ...”

Kansas §59-3501(a): “An interest in real estate may be titled in transfer-on-death, TOD form by recording a deed signed by the record owner of such interest, designating a grantee beneficiary *or beneficiaries* of the interest. ...” (emphasis supplied).

Missouri §461.062(5): “Unless a different percentage or fractional share is stated for each beneficiary, surviving multiple primary beneficiaries or multiple contingent beneficiaries share equally. When a percentage or fractional share is designated for multiple beneficiaries, either primary or contingent, surviving beneficiaries share in the proportion that their designated shares bear to each other.”

Missouri §461.062(6): “Provision for a transfer of unequal shares to multiple beneficiaries for property registered in beneficiary form may be expressed in the registration by a number preceding the name of each beneficiary that represents a percentage share of the property to be transferred to that beneficiary. The number representing a percentage share need not be followed by the word ‘percent’ or a percent sign.”

New Mexico §45-6-401(A): “An interest in real property may be titled in transfer on death form by recording a deed signed and acknowledged by the record owner of the interest and designating a grantee beneficiary *or beneficiaries* of the interest. ...” (emphasis supplied).

Nevada §111.109(2): “The owner of an interest in real property who creates a deed pursuant to subsection 1 may designate in the deed:

(a) Multiple grantees who will take title to the property upon his death as joint tenants with right of survivorship, tenants in common, husband and wife as community property, community property with right of survivorship or any other tenancy that is recognized in this state.

(b) A grantee or multiple grantees who will take title to the property upon his death as the sole and separate property of the grantee or grantees without the necessity of the filing of a quitclaim deed or disclaimer by the spouse of any grantee.”

Ohio §5302.23(B)(1): “... If there is a designation of more than one transfer on death beneficiary, the beneficiaries shall take title in the interest in equal shares as tenants in common. ...”

Wisconsin §705.15(2): “A TOD beneficiary may be designated on a deed that evidences ownership of the property interest in the owner or owners by including the words “transfer on death” or “pay on death,” or the abbreviation ‘TOD’ or ‘POD,’ after the name of the owner or owners of the property and before the name of the beneficiary *or beneficiaries*. ...” (emphasis supplied).

c. Present and future beneficial interests

Can a grantor use the TOD deed to divide the property into present and future beneficial interests? The only statute to address this question is California’s, which permits the grantor to divide the property into a life estate and a remainder.

California Recommended §5642, Comment: “... The form provided in this section enables the transferor to condition passage of the property to the beneficiary on a life estate in the transferor’s surviving spouse. ... The option provided in this form should not be read to

preclude a transferor from making a revocable TOD deed subject to a life estate in a person other than the surviving spouse, or from imposing conditions on the life estate. ...”

California Recommended §5652(b): “A revocable transfer on death deed may condition the beneficiary’s right to the property on an intervening life estate, but may not otherwise create a future interest in a beneficiary.”

d. Class gifts

Must the beneficiaries be named individuals, or can the grantor create beneficial interests in a class (e.g., “children” or “descendants”)?

Only four state statutes address this question. The TOD deed statutes in California, Ohio, and Wisconsin are limited to beneficiaries identified by name. In contrast, Missouri’s nonprobate transfer statute refers to, hence authorizes, class gifts in favor of a named person’s children and in favor of the lineal descendants per stirpes of a named primary beneficiary; but whether other class gifts are permitted under Missouri’s statute is unclear.

California Recommended §5622(a): “The transferor shall identify the beneficiary by name in a revocable transfer on death deed.”

Ohio §5302.22(B): “Any person who, under the Revised Code or the common law of this state, owns real property or any interest in real property as a sole owner or as a tenant in common may create an interest in the real property transferable on death by executing and recording a deed as provided in this section conveying the person’s entire, separate interest in the real property to one or more individuals, including the grantor, and designating one or more other persons, identified in the deed by name, as transfer on death beneficiaries.”

Ohio §5302.23(B)(2): “Persons designated as contingent transfer on death beneficiaries shall be identified in the deed by name.”

Wisconsin §705.15(2): “A TOD beneficiary may be designated on a deed that evidences ownership of the property interest in the owner or owners by including the words “transfer on death” or “pay on death,” or the abbreviation ‘TOD’ or ‘POD,’ after the name of the owner or owners of the property and before the name of the beneficiary or beneficiaries. ...”

Compare with the Missouri statute referring to, hence authorizing, certain class gifts.

Missouri §461.045(2): “A beneficiary designation may provide that the share of any beneficiary ... who does not survive the owner, shall belong to that beneficiary’s lineal descendants who survive the owner, by including after the name of the beneficiary the words ‘and lineal descendants per stirpes’ or the abbreviation ‘LDPS.’”

Missouri §461.059(2): “A beneficiary designation designating the children of the owner or any other person as a class and not by name shall include all children of the person, whether born or adopted before or after the beneficiary designation is made.”

10. Covenants and warranties

Only two state statutes address the topic of covenants and warranties in TOD deeds. California law provides that there is never a covenant or warranty while Colorado provides that there is one if the language of the deed so provides.

California Recommended §5652(d): “Notwithstanding a contrary provision in the deed, a revocable transfer on death deed transfers the property without covenant or warranty of title.”

Colorado §15-15-404(2): “Unless the owner designates otherwise in a beneficiary deed, a beneficiary deed shall not be deemed to contain any warranties of title and shall have the same force and effect as a conveyance made using a bargain and sale deed.”

11. Ademption and the proceeds of property

What happens if the land is not owned by the grantor at death, perhaps because it has been condemned? Is the beneficiary designation adeemed, or is the beneficiary entitled to the proceeds of the property?

The Uniform Probate Code’s provision on ademption (§2-606) applies only to wills. The California Law Revision Commission’s report states (at page 180) that California’s statutes on ademption would apply to TOD deeds. Of the states with existing TOD deed legislation, only Missouri and Wisconsin address the issue and do so in their general provisions governing nonprobate transfers.

California Probate §21133: “A recipient of an at-death transfer of a specific gift has a right to the property specifically given, to the extent the property is owned by the transferor at the time the gift takes effect in possession or enjoyment, and all of the following:

(a) Any balance of the purchase price (together with any security agreement) owing from a purchaser to the transferor at the time the gift takes effect in possession or enjoyment by reason of sale of the property.

(b) Any amount of an eminent domain award for the taking of the property unpaid at the time the gift takes effect in possession or enjoyment.

(c) Any proceeds unpaid at the time the gift takes effect in possession or enjoyment on fire or casualty insurance on or other recovery for injury to the property.

(d) Property owned by the transferor at the time the gift takes effect in possession or enjoyment and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically given obligation.”

California Probate §21134:

“(a) Except as otherwise provided in this section, if after the execution of the instrument of gift specifically given property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, the transferee of the specific gift has the right to a general pecuniary gift equal to the net sale price of, or the amount of the unpaid loan on, the property.

(b) Except as otherwise provided in this section, if an eminent domain award for the taking of specifically given property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if the proceeds on fire or casualty insurance on, or recovery for injury to, specifically gifted property are paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the recipient of the specific gift has the right to a general pecuniary gift equal to the eminent domain award or the insurance proceeds or recovery.

(c) For the purpose of the references in this section to a conservator, this section does not apply if, after the sale, mortgage, condemnation, fire, or casualty, or recovery, the conservatorship is terminated and the transferor survives the termination by one year.

(d) For the purpose of the references in this section to an agent acting with the authority of a durable power of attorney for an incapacitated principal, (1) “incapacitated principal” means a principal who is an incapacitated person, (2) no adjudication of incapacity before death is necessary, and (3) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

(e) The right of the transferee of the specific gift under this section shall be reduced by any right the transferee has under Section 21133.”

Missouri §461.037: “In the event property subject to a beneficiary designation is lost, destroyed, damaged or involuntarily converted during the owner’s lifetime, the beneficiary succeeds to any right with respect to the loss, destruction, damage or involuntary conversion which the owner would have had if the owner had survived, but has no interest in any payment or substitute property received by the owner during the owner’s lifetime.”

Wisconsin §854.08:

“(1) The common law doctrine of ademption by extinction, as it might otherwise apply to the situations governed by this section, is abolished.

(2) (a) Subject to sub. (6), if property that is the subject of a specific gift is sold by the person who executed the governing instrument within 2 years of the persons death, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any balance of the purchase price unpaid at the time of death, including any security interest in the property and interest accruing before death, together with the incidents of the specific gift.

2. A general pecuniary transfer equivalent to the amount of the purchase price paid to, or for the benefit of, the person within one year of the seller’s death.

(b) Acceptance of a promissory note of the purchaser or a 3rd party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the person who executed the governing instrument or by a trustee under a revocable living trust created by the person is a sale by the person for purposes of this section.

(3) Subject to sub. (6), if insured property that is the subject of a specific gift is destroyed, damaged, lost, stolen or otherwise subject to any casualty compensable by insurance, the specific beneficiary has the right to the following amounts, if available under the governing instrument, reduced by any amount expended or incurred to restore or repair the property:

(a) Any insurance proceeds paid with respect to the property after the decedent's death, together with the incidents of the specific gift.

(b) A general pecuniary transfer equivalent to any insurance proceeds paid to, or for the benefit of, the decedent within one year of the decedent's death.

(4) (a) Subject to sub. (6), if property that is the subject of a specific gift is taken by condemnation prior to the death of the person who executed the governing instrument, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any amount of the condemnation award unpaid at the time of death.

2. A general pecuniary transfer equivalent to the amount of an award paid to, or for the benefit of, the person who executed the governing instrument within one year of that person's death.

(b) In the event of an appeal in a condemnation proceeding, the award is, for purposes of this section, limited to the amount established on the appeal. Acceptance of an agreed price or a jurisdictional offer is a sale under sub. (2)

(5) (a) In this subsection, "agent" means an agent under a durable power of attorney, as defined in s. 243.07 (1) (a)

(b) Subject to pars. (c) and (d) and sub. (6), if property that is the subject of a specific gift is sold or mortgaged by a guardian, conservator, or agent of the person who executed the governing instrument, or if a condemnation award or insurance proceeds are paid to a guardian, conservator, or agent, the specific beneficiary has the right to a general pecuniary transfer equivalent to the proceeds of the sale, mortgage, condemnation award, or insurance proceeds, reduced by any amount expended or incurred to restore or repair the property or to reduce the indebtedness on the mortgage, if the funds are available under the governing instrument.

(c) Paragraph (b) does not apply with respect to a guardian or conservator if, subsequent to the sale, mortgage, award, or receipt of insurance proceeds, the person who executed the governing instrument is adjudicated competent and survives such adjudication for a period of one year; but in such event the rights of the specific beneficiary shall be determined as though the proceeds were paid to the owner under sub. (2), (3), or (4)

(d) Paragraph (b) does not apply with respect to an agent if the person who executed the governing instrument is competent at the time of the sale, mortgage, award, or receipt of insurance proceeds but in such event the rights of the specific beneficiary shall be determined as though the proceeds were paid to the owner under sub. (2), (3), or (4)

(6) (ag) This section is inapplicable if the person who executed the governing instrument gives property during the person's lifetime to the specific beneficiary with the intent of satisfying the specific gift and the requirement under s. 854.09 (1) is satisfied.

(ar) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

(b) If part of the property that is the subject of the specific gift is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property is not affected by this section; but this section applies to the part affected by the destruction, damage, sale or condemnation.

(c) The amount that the specific beneficiary receives under subs. (2) to (5) is reduced by any expenses of the sale, by the expenses of collection of the proceeds of insurance, sale, or

condemnation award and by any amount by which the income tax of the decedent or the decedent's estate is increased because of items covered by this section. Expenses include legal fees paid or incurred."

12. Disclaimers

The law of disclaimers is the subject of a separate Uniform Disclaimer of Property Interests Act, incorporated into the Uniform Probate Code as Article 2, Part 11. The heart of the UDPIA is §6(b) (UPC §2-1106(b)).

UPC §2-1106(b): "Except for a disclaimer governed by Section 2-1107 or 2-1108, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in paragraph (2), the following rules apply:

(A) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(B) If the disclaimant is an individual, except as otherwise provided in subparagraphs (C) and (D), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(C) If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(D) If the disclaimed interest would pass to the disclaimant's estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died at the time of distribution. However, if the transferor's surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment."

Missouri's and Wisconsin's general nonprobate transfers laws similarly provide that the effect of disclaimer is the legal fiction of predecease.

Missouri §461.048: "If a beneficiary of a nonprobate transfer disclaims in whole or in part the nonprobate transfer in the manner provided by law, then with respect to the disclaimed transfer, the disclaimant is treated as having predeceased the owner unless the beneficiary designation provides otherwise; but the possibility that a beneficiary or descendant may disclaim a transfer shall not require any transferring entity to withhold making the transfer in the normal course of business."

Wisconsin §854.13(7)(a): "Subject to pars. (bm) and (c) and subs. (8), (9), and (10), unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the decedent. ..."

The only statute on TOD deeds that addresses the topic of disclaimers is that of Colorado, which provides merely that the beneficiary may disclaim "by any method provided by law."

Colorado §15-15-414: "A grantee-beneficiary may refuse to accept all or any part of the real property interest described in a beneficiary deed. A grantee-beneficiary may disclaim all or any part of the real property interest described in a beneficiary deed by any method provided by law. If a grantee-beneficiary refuses to accept or disclaims any real property interest, the grantee-beneficiary shall have no liability by reason of being designated as a grantee-beneficiary under this part 4."

D. RIGHTS OF FAMILY MEMBERS

1. Homestead

How does a TOD deed interact with provisions of a state's probate code granting the surviving spouse or minor children rights in the homestead? Sometimes homestead rights are framed in terms of a right of occupancy for a specified period; however, in states adopting the Uniform Probate Code, the homestead allowance is a right to a specified sum of money. (See UPC §2-402.)

The California Law Revision Commission report concludes that, because the homestead right is limited to the probate estate, it should not apply to property passing under a TOD deed (see pages 181-182).

It must be noted that the Uniform Nonprobate Transfers on Death Act (Uniform Probate Code, Article 6) establishes the rule that nonprobate transfers are liable for probate exemptions and allowances to the extent that the probate estate is insufficient. The general laws of Arizona, Colorado, Missouri, and New Mexico follow this rule.

UPC §6-102(b): "Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent's probate estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a

nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.”

Essentially the same language appears in *Arizona §14-6102(A)*, *Colorado §15-15-103(2)*, and *New Mexico §45-6-102(B)*.

The same rule, with different wording, appears in Missouri’s nonprobate transfer law.

Missouri §461.300(1): “Each recipient of a recoverable transfer of a decedent’s property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge the statutory allowances to the decedent’s surviving spouse and dependent children, and claims remaining unpaid after application of the decedent’s estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or inheritance or other transfer taxes imposed by reason of the decedent’s death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. No proceeding may be brought under this section when the deficiency described in this subsection is solely attributable to costs and expenses of administration.”

The one TOD deed statute to address the question is New Mexico’s, which provides that the deed is ineffective to the extent needed to pay claims and allowances.

New Mexico §45-6-401(J): “If the assets of the estate are insufficient, a transfer resulting from a transfer on death deed is not effective against the estate of a deceased party to the extent needed to pay any claims against the estate and the statutory allowances to the surviving spouse and children.”

Colorado had a similar provision in its TOD deed statute (§15-15-409), but the section has recently been repealed in favor of the general provision in §15-15-103 quoted above. See Colorado Laws 2006, ch. 114, §29, effective July 1, 2006.

2. Probate protections for omitted spouses or children

To what extent, if any, should probate protections for omitted spouses and children extend to a TOD deed? The Uniform Probate Code’s provisions apply only to wills. (See UPC §2-301 on omitted spouses, §2-302 on omitted children.) The two states to address the issue (California and Missouri) reach the same result.

California Law Revision Commission Report, page 183: “[T]he omitted spouse and child provisions should not extend to a revocable TOD deed.”

Missouri §461.059(1): “No law intended to protect a spouse or child from unintentional disinheritance by the will of a testator shall apply to a nonprobate transfer.”

3. The surviving spouse’s elective share

To what extent should the property transferred by a TOD deed be subject to the elective share rights of the grantor’s surviving spouse? The answer to this question depends on whether a jurisdiction extends the elective share to nonprobate transfers. This is uniformly addressed in the state’s elective share statute, not in the TOD deed statute. For present purposes, it is sufficient to

observe that the Uniform Probate Code's existing language would include property transferred by a TOD deed in the elective share's augmented estate.

UPC §2-205: "The value of the augmented estate includes the value of the decedent's nonprobate transfers to others in the amount provided respectively for each type of transfer: (1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of: (i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. ... (iii) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. ..."

UPC §2-201(6): "'Presently exercisable general power of appointment' ... includes a power to revoke or invade the principal of a trust or other property arrangement."

UPC §2-206: "... the value of the augmented estate includes the value of the decedent's nonprobate transfers to the decedent's surviving spouse ..., including: ... (3) all other property that would have been included in the augmented estate under Section 2-205(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse"

E. RIGHTS OF CREDITORS

1. During the transferor's lifetime

What are the rights of creditors to the property during the lifetime of the transferor? In analyzing this question, it is helpful to recall two fundamental principles accepted in all TOD deed jurisdictions. First, the transferor retains full ownership of the property during lifetime (see B.1 above). Second, the beneficiary receives no interest in the property before the transferor's death (see C.1 above). With these two principles in place, it follows that the rights of creditors are not changed in any way during the transferor's lifetime merely because the transferor executes and records a TOD deed. The property is still fully subject to the transferor's creditors and in no way subject to the beneficiary's creditors.

The two state statutes that address the question of creditors' rights during the transferor's lifetime (California and Ohio) accord with this position.

California Recommended §5650: "During the transferor's life, execution and recordation of a revocable transfer on death deed:

(a) Does not affect the ownership rights of the transferor, and the transferor or the transferor's agent or other fiduciary may convey, assign, contract, encumber, or otherwise deal with the property, and the property is subject to process of the transferor's creditors, as if no revocable transfer on death deed were executed or recorded.

(b) Does not create any legal or equitable right in the beneficiary, and the property is not subject to process of the beneficiary's creditors. ..."

Ohio §5302.23(B)(7): "No rights of any lienholder, including, but not limited to, any mortgagee, judgment creditor, or mechanic's lien holder, shall be affected by the designation of a transfer on death beneficiary pursuant to this section and section 5302.22 of the Revised Code. If any lienholder takes action to enforce the lien, by foreclosure or otherwise through a court proceeding, it is not necessary to join the transfer on death beneficiary as a party defendant in the

action unless the transfer on death beneficiary has another interest in the real property that is currently vested.”

2. After the transferor’s death

To what extent, after the transferor’s death, is the beneficiary (meaning, the property) liable for the debts of the transferor?

The Uniform Nonprobate Transfers on Death Act (Uniform Probate Code Article 6) provides that the beneficiary of a nonprobate transfer is liable if the probate estate is insufficient to cover the debts of the grantor. However, the beneficiary is liable only up to the value of the nonprobate transfer.

UPC §6-102:

“(a) In this section, “nonprobate transfer” means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.

(b) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate that estate and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order of priority:

(1) a transferee designated in the decedent’s will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;

(3) other nonprobate transferees, in proportion to the values received.

(d) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devised under it.

(e) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

(f) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State, whether or not the transferee is located in this State.

(g) A proceeding under this section may not be commenced unless the personal representative of the decedent’s estate has received a written demand for the proceeding from the

surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(h) A proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.

(i) Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:

(1) Payment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(2) A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary

Provisions based on UPC §6-102 appear in *Arizona §14-6102*, *Colorado §15-15-103*, and *New Mexico §45-6-102*. Note also that the New Mexico statute has a specific section within its provisions on TOD deeds:

New Mexico §45-6-401(J): "If the assets of the estate are insufficient, a transfer resulting from a transfer on death deed is not effective against the estate of a deceased party to the extent needed to pay any claims against the estate and the statutory allowances to the surviving spouse and children."

Colorado had a similar provision within its TOD deed statute (§15-15-409), but the section has recently been repealed in favor of the general provision in §15-15-103 cited above. See Colorado Laws 2006, ch. 114, §29, effective July 1, 2006.

Other states reaching essentially the same result -- the beneficiary is liable up to the value of the property received -- are California, Missouri, and Wisconsin.

California Recommended §5670: "Notwithstanding any other statute governing priorities among creditors, a creditor of the transferor whose right is evidenced at the time of the transferor's death by an encumbrance or lien of record on property transferred by a revocable transfer on death deed has priority over a creditor of the beneficiary, regardless of whether the beneficiary's obligation was created before or after the transferor's death and regardless of whether the obligation is secured or unsecured, voluntary or involuntary, recorded or unrecorded."

California Recommended §5672: “Each beneficiary is personally liable to the extent provided in Section 5674 for the unsecured debts of the transferor. Any such debt may be enforced against the beneficiary in the same manner as it could have been enforced against the transferor if the transferor had not died. In any action based on the debt, the beneficiary may assert any defense, cross-complaint, or setoff that would have been available to the transferor if the transferor had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.”

California Recommended §5674:

“(a) A beneficiary is not liable under Section 5672 if proceedings for the administration of the transferor’s estate are commenced and the beneficiary satisfies the requirements of Section 5676.

(b) The aggregate of the personal liability of a beneficiary under Section 5672 shall not exceed the sum of the following:

(1) The fair market value at the time of the transferor’s death of the property received by the beneficiary pursuant to the revocable transfer on death deed, less the amount of any liens and encumbrances on the property at that time.

(2) The net income the beneficiary received from the property.

(3) If the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this paragraph, “fair market value of the property” has the same meaning as defined in paragraph (2) of subdivision (a) of Section 5676.”

California Recommended §5676:

(a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the transferor’s estate are commenced each beneficiary is liable for:

(1) The restitution to the transferor’s estate of the property the beneficiary received pursuant to the revocable transfer on death deed if the beneficiary still has the property, together with (A) the net income the beneficiary received from the property and (B) if the beneficiary encumbered the property after the transferor’s death, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the transferor’s estate of the fair market value of the property if the beneficiary no longer has the property, together with (A) the net income the beneficiary received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the “fair market value of the property” is the fair market value, determined as of the time of the disposition of the property, of the property the beneficiary received pursuant to the revocable transfer on death deed, less the amount of any liens and encumbrances on the property at the time of the transferor’s death.

(b) Subject to subdivision (c), if proceedings for the administration of the transferor’s estate are commenced and a beneficiary made a significant improvement to the property received by the beneficiary pursuant to the revocable transfer on death deed, the beneficiary is liable for whichever of the following the transferor’s estate elects:

(1) The restitution of the property, as improved, to the estate of the transferor upon the condition that the estate reimburse the beneficiary for (A) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (B) the amount paid by the beneficiary for principal and interest on any liens or encumbrances that were on the property at the time of the transferor's death.

(2) The restoration to the transferor's estate of the fair market value of the property, determined as of the time of the transferor's death, less the amount of any liens and 1 encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the time of the transferor's death.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the beneficiary to satisfy a liability under Section 5672.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the transferor. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of creditors of the transferor.

(e) An action to enforce the liability under this section is forever barred three years after the transferor's death. The three-year period specified in this subdivision is not tolled for any reason."

Missouri §461.300(1): "Each recipient of a recoverable transfer of a decedent's property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge the statutory allowances to the decedent's surviving spouse and dependent children, and claims remaining unpaid after application of the decedent's estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or inheritance or other transfer taxes imposed by reason of the decedent's death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. No proceeding may be brought under this section when the deficiency described in this subsection is solely attributable to costs and expenses of administration."

Wisconsin §854.25(1): "A person who, not for value, receives property to which the person is not entitled under this chapter shall return the property. If the property is not returned, the recipient shall be personally liable for the value of the property to the person who is entitled to it under this chapter, regardless of whether the recipient has the property, its proceeds or property acquired with the property or its proceeds."

F. RIGHTS OF THIRD-PARTY PURCHASER

If a third party purchases the property in good faith from the beneficiary, should the bona fide purchaser take the property free of any adverse claims? Four states (California, Colorado, Missouri, and Wisconsin) answer this question, all in the affirmative.

California Recommended §5682: "A person acting in good faith and for a valuable consideration with the beneficiary of a revocable transfer on death deed of real property for

which an affidavit of death is recorded under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2 has the same rights and protections as the person would have if the beneficiary had been named as a distributee of the property in an order for distribution of the transferor's estate that had become final."

Colorado §15-15-410:

"(1) Subject to the rights of claimants under section 15-15-407(2), if the property acquired by a grantee-beneficiary or a security interest therein is acquired for value and without notice by a purchaser from, or lender to, a grantee-beneficiary, the purchaser or lender shall take title free of rights of an interested person in the deceased owner's estate and shall not incur personal liability to the estate or to any interested person.

(2) For purposes of this section, any recorded instrument evidencing a transfer to a purchaser from, or lender to, a grantee-beneficiary on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that the transfer was made for value. Any such sale or loan by the grantee-beneficiary shall not relieve the grantee-beneficiary of the obligation to the personal representative of the deceased owner's estate under section 15-15-409." [Note that section 15-15-409 has been repealed. --TPG]

Missouri §461.067(3): "A purchaser for value of property or a lender who acquires a security interest in the property from a beneficiary of a nonprobate transfer after the death of the owner, in good faith, takes the property free of any claims of or liability to the owner's estate, creditors of the owner's estate, persons claiming rights as beneficiaries under the nonprobate transfer or heirs of the owner's estate, in absence of actual knowledge that the transfer was improper or that the information in an affidavit, if any, provided pursuant to subdivision (14) of subsection 3 of section 461.062 is not true; and, a purchaser or lender for value shall have no duty to verify sworn information relating to the nonprobate transfer. The protection provided by this subsection applies to information that relates to the ownership interest of the beneficiary in the property and the beneficiary's right to sell, encumber and transfer good title to a purchaser or lender and does not relieve a purchaser or lender from the notice imparted by instruments of record respecting the property."

Wisconsin §854.24: "A person who purchases property for value or who receives property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this chapter to return the property nor liable under this chapter for the value of the property, unless the person has notice as described in s. 854.23(3)."

G. TAXATION

1. Income and transfer taxation

None of the TOD deed statutes addresses the income or transfer tax consequences of a TOD deed. This is because a revocable TOD deed has no present effect. Income and transfer tax consequences arise only at the grantor's death, and these would be the same as prescribed by state or federal law for any comparable death-time transfer.

2. Property taxation and reassessment

California's proposed TOD deed statute is the only one that addresses the issue of property taxation, providing that the property will be taxed and reassessed when it passes to the beneficiary, not when the grantor executes and records the TOD deed.

California Recommended §5656: “For the purpose of application of the property taxation and documentary transfer tax provisions of the Revenue and Taxation Code:

(a) Execution and recordation of, or revocation of, a revocable transfer on death deed of real property is not a change in ownership of the property and does not require declaration or payment of a documentary transfer tax or filing of a preliminary change of ownership report.

(b) Transfer of real property on the death of the transferor by a revocable transfer on death deed is a change in ownership of the property.”

H. MEDICAID ELIGIBILITY AND REIMBURSEMENT

1. Eligibility

Only two states (California and Colorado) address whether a TOD deed affects the grantor's eligibility for Medicaid. In California, the TOD deed does not affect eligibility. Conversely, in Colorado the TOD deed does affect eligibility.

California Recommended §5654(a): “For the purpose of determination of eligibility for health care under Chapter 7 (commencing with Section 14000) or Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code, execution and recordation of a revocable transfer on death deed is not a lifetime transfer of the property.”

Colorado §15-15-403: “No person who is an applicant for or recipient of medical assistance for which it would be permissible for the department of health care policy and financing to assert a claim pursuant to section 25.5-4-301 or 25.5-4-302, C.R.S., shall be entitled to such medical assistance if the person has in effect a beneficiary deed. Notwithstanding the provisions of section 15-15-402(1), the execution of a beneficiary deed by an applicant for or recipient of medical assistance as described in this section shall cause the property to be considered a countable resource in accordance with section 25.5-4-302 (6), C.R.S., and applicable rules.”

2. Reimbursement

Three states (Arkansas, California, and Nevada) address whether the property subject to a TOD deed is subject to claims for reimbursement from the state for Medicaid expenditures made on the grantor's behalf. All three states provide that the property is subject to these claims for reimbursement.

Arkansas §18-12-608 (a)(1)(B)(i): “A beneficiary deed transfers the interest to the designated grantee beneficiary effective upon the death of the owner, subject to: ...

(b) A claim for the amount of federal or state benefits that could have been recovered by the Department of Health and Human Services from the estate of the grantor under § 20-76-436 but for the transfer under the beneficiary deed.”

California Recommended §5654(b): “For the purpose of a claim of the Department of Health Services under Section 14009.5 of the Welfare and Institutions Code, property transferred by a revocable transfer on death deed is a part of the estate of the decedent, and the beneficiary is a recipient of the property by distribution or survival.”

Nevada §111.109(9): “The provisions of this section must not be construed to limit the recovery of benefits paid for Medicaid.”

I. IMPLEMENTATION OF THE TOD DEED

1. Statutory forms

a. Execution

Every state except two (Missouri and Wisconsin) provides a statutory form for execution. None of the forms is mandatory as long as the grantor executes a deed that is substantially similar to the form given.

Arizona §33-405(K):

“Beneficiary Deed

I (we) _____ (owner) hereby convey to _____ (grantee beneficiary) effective on my (our) death the following described real property:
(Legal description)

If a grantee beneficiary predeceases the owner, the conveyance to that grantee beneficiary shall either (choose one):

Become null and void.

Become part of the estate of the grantee beneficiary.

(Signature of grantor(s))
(acknowledgment).

Arkansas §18-12-608(h):

“Beneficiary Deed

CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

I (we) hereby convey to _____ (grantee) effective on my (our) death the following described real property:
(Legal description)

(Signature of grantor(s))
(acknowledgment).”

California Recommended §5642:

Revocable Transfer on Death (TOD) Deed

Recording Requested By:

When Recorded Mail This Deed To

Name:

Address:

Assessor’s Parcel Number:

Space Above for Recorder’s Use

This deed is exempt from documentary transfer tax under Rev. & Tax. Code §11930.

This deed is exempt from preliminary change of ownership report under Rev. & Tax. Code §480.3.

Notice to Owner. This deed may have significant and unintended consequences for your estate plan; you should consult a professional before using it.

- This deed MUST be recorded before you die in order to be effective.
- You may revoke this deed by recording another instrument before you die.
- The property conveyed by this deed may be liable for reimbursement of the state for Medi-Cal expenditures.
- If you hold this property in joint tenancy or as community property with right of survivorship, this deed will pass your interest in the property to the beneficiary and not to a surviving coowner. You may choose to make the beneficiary’s right subject to a life estate in your surviving spouse.

- If you do not want these results, you should not use this form.

Notice to Beneficiary. This deed does not transfer ownership of the property to you until the owner dies, and you acquire no rights in the property until then. The owner may revoke this deed at any time.

• When the owner dies you should record evidence of death under Probate Code Section 210 and you must (1) file the change in ownership notice required by Revenue and Taxation Code Section 480 and (2) notify the Department of Health Services if required by Probate Code Section 215.

• You should file a claim for reassessment exclusion under Revenue and Taxation Code Section 63.1, if applicable.

• If you do not wish to receive the property, you may disclaim it under Probate Code Section 275.

IDENTIFYING INFORMATION

Owner(s) of Property Who Join in this Deed:

Address or Other Description of Property:

Name(s) of Beneficiary(ies):

TRANSFER ON DEATH

I transfer all my interest in the described property to the named beneficiary on my death. If I name more than one beneficiary, the beneficiaries shall take equal shares as tenants in common. If a named beneficiary dies before me, the share that would otherwise go to that beneficiary shall pass in accordance with applicable provisions of the California Probate Code.

If I sign here, I choose to make the beneficiary's right to the described property subject to a life estate in my surviving spouse. Signature(s) of owner(s) who make this choice:

This revocable TOD deed revokes any previous revocable TOD deed I have made for the described property. This deed is revocable at any time before my death.

SIGNATURE AND DATE

Signature(s) of Owner(s) Who Join in this Deed:

Date: _____

ACKNOWLEDGMENT

State of California)

County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that by his/her/their signature(s) on the instrument the person(s) executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

Colorado §15-15-404(1):

BENEFICIARY DEED

(§ § 15-15-401 et seq., Colorado Revised Statutes)

CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

_____, as grantor

(Name of grantor)

Designates _____ as

(Name of grantee-beneficiary)

grantee-beneficiary whose address is _____ (Note to Assessor and Treasurer: This address is for identification purposes only, all notices and tax statements should continue to be sent to grantor.)

(Optional) [or if grantee-beneficiary fails to survive grantor, grantor designates _____, as (Name of successor grantee-beneficiary)]

successor grantee-beneficiary whose address is _____] and grantor transfers, sells, and conveys on grantor's death to the grantee-beneficiary, the following described real property located in the County of _____, State of Colorado:

(insert legal description here)

Known and numbered as _____

THIS BENEFICIARY DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE GRANTOR. IT REVOKES ALL PRIOR BENEFICIARY DEEDS BY THIS GRANTOR FOR THIS REAL PROPERTY EVEN IF THIS BENEFICIARY DEED FAILS TO CONVEY ALL OF THE GRANTOR'S INTEREST IN THIS REAL PROPERTY.

WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY DISQUALIFY THE GRANTOR FROM BEING DETERMINED ELIGIBLE FOR, OR FROM RECEIVING, MEDICAID UNDER TITLE 26, COLORADO REVISED STATUTES.

WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY NOT AVOID PROBATE.

Executed this _____.

(Date)

(Grantor)

Kansas §59-3502:

(Name of owner) _____ as owner transfers on death to (name of beneficiary) _____, as grantee beneficiary, the following described interest in real estate: (here insert description of the interest in real estate). THIS TRANSFER ON DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY THIS OWNER FOR THIS INTEREST IN REAL ESTATE.

New Mexico §45-6-401(C):

TRANSFER ON DEATH DEED

(Name of owner) as owner transfers on death to _____
(name of beneficiary), as grantee beneficiary, the following described interest in real property. THIS TRANSFER ON DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY THIS OWNER FOR THIS INTEREST IN REAL PROPERTY.

(description)

Witness _____ hand _____ and seal _____ this _____ day of 20 _____

(Seal)

(Here add acknowledgment(s)).

Nevada §111.109(6):

I (We) _____ (owner) hereby convey to _____ (grantee), effective on my (our) death, the following described property: (Legal Description)
THIS DEED IS REVOCABLE. THIS DEED DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE GRANTOR. THIS DEED REVOKES ALL PRIOR DEEDS BY

THE GRANTOR WHICH CONVEY THE SAME REAL PROPERTY PURSUANT TO SUBSECTION 1 OF NRS 111.109 REGARDLESS OF WHETHER THE PRIOR DEEDS FAILED TO CONVEY THE GRANTOR'S ENTIRE INTEREST IN THE SAME REAL PROPERTY.

(Signature of Grantor)

Ohio §5302.22(A):

Transfer on Death Deed

_____ (marital status), of _____ County, _____ (for valuable consideration paid, if any), grant(s) (with covenants, if any), to _____ whose tax mailing address is _____, transfer on death to _____, beneficiary(s), the following real property: (Description of land or interest in land and encumbrances, reservations, and exceptions, if any.)
Prior instrument reference: _____
_____, wife (husband) of the grantor, releases all rights of dower therein.
Executed this _____ day of _____.

(Signature of Grantor)

(Execution in accordance with Chapter 5301 of the Revised Code)

b. Revocation

Five states (Arizona, Arkansas, California, Colorado, and Nevada) provide statutory forms for the revocation of a TOD deed. In no case is the form mandatory.

Arizona §33-405(L):

Revocation of Beneficiary Deed

The undersigned hereby revokes the beneficiary deed recorded on _____ (date), in docket or book _____, at page _____, or instrument number _____, records of _____ county, Arizona.
Dated: _____

Signature
(acknowledgment)

Arkansas §18-12-608(i):

Revocation of Beneficiary Deed

CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

The undersigned hereby revokes the beneficiary deed recorded on _____ (date), in docket or book _____, at page _____, or instrument number _____, records of _____ County, Arkansas.
Dated: _____

Signature
(acknowledgment)

California Recommended §5644:

REVOCATION OF REVOCABLE TRANSFER ON DEATH (TOD) DEED

[California Probate Code Section 5600]

Recording Requested By:

When Recorded Mail This Deed To

Name:

Address:

Assessor's Parcel Number:

Space Above For Recorder's Use

This deed revocation is exempt from documentary transfer tax under Rev. & Tax. Code §11930.

This deed revocation is exempt from preliminary change of ownership report under Rev. & Tax. Code §480.3.

Notice to Owner. This revocation MUST be recorded before you die in order to be effective. This revocation is effective only as to the interests of owners who join in this revocation.

IDENTIFYING INFORMATION

Owner(s) of Property Who Join in This Revocation

Address or Other Description of Property:

Recording Information for Revocable TOD Deed:

County: _____

Date of Recordation: _____

Book and Page or Series Number: _____

REVOCATION

I revoke the described revocable TOD deed.

SIGNATURE AND DATE

Signature(s) of Owner(s) Who Join in this Revocation:

Date: _____

ACKNOWLEDGMENT

State of California)

County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that by his/her/their signature(s) on the instrument the person(s) executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

Colorado §15-15-405(1):

REVOCATION OF BENEFICIARY DEED

(§§15-15-401 et seq., Colorado Revised Statutes)

CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

_____, as grantor, hereby

(Name of grantor)

REVOKES all beneficiary deeds concerning the following described real property located in the County of _____, State of Colorado:

(insert legal description here)

Known and numbered as _____

Executed this _____

(Date)

(Grantor)

Nevada §111.109(7):

REVOCATION OF DEED

The undersigned hereby revokes the deed recorded on _____ (date), in docket or book _____, at page _____, or _____ instrument number _____, records of _____ County, Nevada

(Date)

(Signature)

2. Other methods of transfer

The four states that address the question (Arizona, Arkansas, California, and Missouri) all provide that the TOD deed legislation does not preclude other forms of transfer that postpone enjoyment of property until after the grantor’s death.

Arizona §33-405(H): “This section does not prohibit other methods of conveying property that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner. This section does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.”

Arkansas §18-12-608(g)(1): “This section does not prohibit other methods of conveying property that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner.”

California Recommended §5602:

“(a) This part does not preclude use of any other method of conveying real property that is permitted by law and that has the effect of postponing enjoyment of the property until the death of the owner.

(b) This part does not invalidate a deed of real property, otherwise effective to convey title to the property, that is not recorded until after the death of the owner.”

Missouri §461.025(2): “This section does not preclude other methods of conveyancing that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner. This section does not invalidate any deed, otherwise effective by law to convey title to the interest and estates therein provided, that is not recorded until after the death of the owner.”

3. Retroactivity

To what extent, if any, should a TOD deed statute apply retroactively?

The two TOD deed statutes to address the issue (California and Colorado) provide that the statutes apply to transferors dying on or after the effective date, irrespective of when the TOD deed was executed and recorded.

California Recommended §5600(a): “This part applies to a revocable transfer on death deed made by a transferor who dies on or after January 1, 2008, whether the deed was executed or recorded before, on, or after January 1, 2008.”

Colorado §15-15-415: “The provisions of this part 4 shall apply to beneficiary deeds executed by owners who die on or after the effective date of House Bill 04-1048, as enacted at the second regular session of the sixty-fourth general assembly.”

This approach is consistent with the treatment of TOD registrations of securities in the Uniform Nonprobate Transfers on Death Act §405(d) (Uniform Probate Code §6-311).

UPC §6-311: “This part applies to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date].”

APPENDIX

STATE STATUTES

Arizona

§ 33-405. Beneficiary deeds; recording; definitions.

A. A deed that conveys an interest in real property, including any debt secured by a lien on real property, to a grantee beneficiary designated by the owner and that expressly states that the deed is effective on the death of the owner transfers the interest to the designated grantee beneficiary effective on the death of the owner subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime.

B. A beneficiary deed may designate multiple grantees who take title as joint tenants with right of survivorship, tenants in common, a husband and wife as community property or as community property with right of survivorship, or any other tenancy that is valid under the laws of this state.

C. A beneficiary deed may designate a successor grantee beneficiary. If the beneficiary deed designates a successor grantee beneficiary, the deed shall state the condition on which the interest of the successor grantee beneficiary would vest.

D. If real property is owned as joint tenants with the right of survivorship or as community property with the right of survivorship, a deed that conveys an interest in the real property to a grantee beneficiary designated by all of the then surviving owners and that expressly states that the deed is effective on the death of the last surviving owner transfers the interest to the designated grantee beneficiary effective on the death of the last surviving owner. If a beneficiary deed is executed by fewer than all of the owners of real property owned as joint tenants with right of survivorship or community property with right of survivorship, the beneficiary deed is valid if the last surviving owner is one of the persons who executes the beneficiary deed. If the last surviving owner did not execute the beneficiary deed, the transfer shall lapse and the deed is void. An estate in joint tenancy with right of survivorship or community property with right of survivorship is not affected by the execution of a beneficiary deed that is executed by fewer than all of the owners of the real property and the rights of a surviving joint tenant with right of survivorship or a surviving spouse in community property with right of survivorship shall prevail over a grantee beneficiary named in a beneficiary deed.

E. A beneficiary deed is valid only if the deed is executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner or the last surviving owner. A beneficiary deed may be used to transfer an interest in real property to the trustee of a trust even if the trust is revocable.

F. A beneficiary deed may be revoked at any time by the owner or, if there is more than one owner, by any of the owners who executed the beneficiary deed. To be effective, the revocation must be executed and recorded as provided by law in the office of the county recorder of the county in which the real property is located before the death of the owner who executes the revocation. If the real property is owned as joint tenants with right of survivorship or community property with right of survivorship and if the revocation is not executed by all the owners, the revocation is not effective unless executed by the last surviving owner.

G. If an owner executes and records more than one beneficiary deed concerning the same real property, the last beneficiary deed that is recorded before the owner's death is the effective beneficiary deed.

H. This section does not prohibit other methods of conveying property that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner. This section does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.

I. The signature, consent or agreement of or notice to a grantee beneficiary of a beneficiary deed is not required for any purpose during the lifetime of the owner.

J. A beneficiary deed that is executed, acknowledged and recorded in accordance with this section is not revoked by the provisions of a will.

K. A beneficiary deed is sufficient if it complies with other applicable laws and if it is in substantially the following form:

Beneficiary Deed

I (we) _____ (owner) hereby convey to _____ (grantee beneficiary) effective on my (our) death the following described real property:

(Legal description)

If a grantee beneficiary predeceases the owner, the conveyance to that grantee beneficiary shall either (choose one):

Become null and void.

Become part of the estate of the grantee beneficiary.

(Signature of grantor(s))

(acknowledgment).

L. The instrument of revocation shall be sufficient if it complies with other applicable laws and is in substantially the following form:

Revocation of Beneficiary Deed

The undersigned hereby revokes the beneficiary deed recorded on _____ (date), in docket or book _____ at page _____, or instrument number _____, records of _____ county, Arizona.

Dated: _____

Signature
(acknowledgment).

M. For the purposes of this section:

1. "Beneficiary deed" means a deed authorized under this section.
2. "Owner" means any person who executes a beneficiary deed as provided in this section.

Arkansas

§ 18-12-608. Beneficiary deeds—terms—recording required.

(a)(1) (A) A beneficiary deed is a deed that conveys an interest in real property, including any debt secured by a lien on real property, to a grantee designated by the owner and that expressly states that the deed is not to take effect until the death of the owner.

(B)(i) A beneficiary deed transfers the interest to the designated grantee beneficiary effective upon the death of the owner, subject to:

(a) All conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, oil, gas, or mineral leases, and other encumbrances made by the owner or to which the real property was subject at the time of the owner's death, whether or not the conveyance or encumbrance was created before or after the execution of the beneficiary deed; and

(b) A claim for the amount of federal or state benefits that could have been recovered by the Department of Health and Human Services from the estate of the grantor under § 20-76-436 but for the transfer under the beneficiary deed.

(ii) No legal or equitable interest shall vest in the grantee until the death of the owner prior to revocation of the beneficiary deed.

(2) (A) The owner may designate multiple grantees under a beneficiary deed.

(B) Multiple grantees may be joint tenants with right of survivorship, tenants in common, holders of a tenancy by the entirety, or any other tenancy that is otherwise valid under the laws of this state.

(3) (A) The owner may designate a successor grantee beneficiary under a beneficiary deed.

(B) The condition upon which the interest of the successor grantee vests shall be included in the beneficiary deed.

(b)(1) If real property is owned as a tenancy by the entirety or as a joint tenancy with the right of survivorship, a beneficiary deed that conveys an interest in the real property to a grantee designated by all of the then surviving owners and that expressly states the beneficiary deed is not to take effect until the death of the last surviving owner transfers the interest to the designated grantee beneficiary effective upon the death of the last surviving owner.

(2) (A) If a beneficiary deed is executed by fewer than all of the owners of real property owned as a tenancy by the entirety or as joint tenants with right of survivorship, the beneficiary deed is valid if the last surviving owner is a person who executed the beneficiary deed.

(B) If the last surviving owner did not execute the beneficiary deed, the beneficiary deed is invalid.

(c)(1) A beneficiary deed is valid only if the beneficiary deed is executed before the death of the owner or the last surviving owner and is recorded before the death of the owner as provided by law in the office of the county recorder of the county in which the real property is located.

(2) A beneficiary deed may be used to transfer an interest in real property to a trust estate even if the trust is revocable.

(d)(1) A beneficiary deed may be revoked at any time by the owner or, if there is more than one (1) owner, by any of the owners who executed the beneficiary deed.

(2) To be effective, the revocation shall be:

(A) Executed before the death of the owner who executes the revocation; and

(B) Recorded in the office of the county recorder of the county in which the real property is located before the death of the owner as provided by law.

(3) If the revocation is not executed by all the owners, the revocation is not effective unless executed by the last surviving owner and recorded before the death of the last surviving owner.

(4) A beneficiary deed that complies with this section may not be revoked, altered, or amended by the provisions of the owner's will.

(e) If an owner executes more than one (1) beneficiary deed concerning the same real property, the recorded beneficiary deed that is last signed before the owner's death is the effective beneficiary deed.

(f) Any third party owing an obligation to the owner of an interest that is made subject to a beneficiary deed may require any person claiming to be entitled to any part of such interest as grantee to present reasonable evidence that the owner who executed the beneficiary deed is deceased and the owner did not execute and record a revocation of the beneficiary deed prior to the owner's death.

(g)(1) This section does not prohibit other methods of conveying property that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner.

(2) This section does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.

(3) In the event of a bankruptcy or divorce, a beneficiary deed shall be treated as a revocable trust.

(h) A beneficiary deed is sufficient if it complies with other applicable laws and if it is in substantially the following form:

“Beneficiary Deed

CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

I (we) hereby convey to _____ (grantee) effective on my (our) death the following described real property:

(Legal description)

(Signature of grantor(s))
(acknowledgment).”

(i) The instrument of revocation shall be sufficient if it complies with other applicable laws and is in substantially the following form:

“Revocation of Beneficiary Deed

CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

The undersigned hereby revokes the beneficiary deed recorded on _____ (date), in docket or book _____ at page _____, or instrument number _____, records of _____ County, Arkansas.

Dated: _____

Signature
(acknowledgment).”

California Recommended

§ 5600. Application of part

5600. (a) This part applies to a revocable transfer on death deed made by a transferor who dies on or after January 1, 2008, whether the deed was executed or recorded before, on, or after January 1, 2008.

(b) Nothing in this part invalidates an otherwise valid transfer under Section 5602.

Comment. Section 5600 implements the general rule that a new provision of the Probate Code applies retroactively. See Section 3. However, this part does not interfere with rights of a decedent's successors acquired by reason of the decedent's death before the operative date of this part. An instrument of a decedent who dies before the operative of this part, or an instrument of a decedent who dies after the operative date of this part that was not executed in compliance with this part, is governed by other law. See Sections 3(g) (application of old law), 5602 (effect on other forms of transfer).

Former Sections 5600-5604, relating to a nonprobate transfer to a former spouse, are continued without change, other than renumbering, in Chapter 3 (commencing with Section 5040) of Part 1. The sections are relocated to make room for new Part 4 (commencing with Section 5600), relating to the revocable TOD deed.

§ 5602. Effect on other forms of transfer

5602. (a) This part does not preclude use of any other method of conveying real property that is permitted by law and that has the effect of postponing enjoyment of the property until the death of the owner.

(b) This part does not invalidate a deed of real property, otherwise effective to convey title to the property, that is not recorded until after the death of the owner.

Comment. Subdivision (a) of Section 5602 recognizes the possibility of other devices that may achieve an effect similar to the revocable TOD deed, such as a revocable deed under *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914), or another instrument under Section 5000 (nonprobate transfer).

Although a revocable TOD deed is ineffective unless recorded before the owner's death (see Section 5626), subdivision (b) makes clear that the pre-death recordation requirement does not apply to other types of deed. As between a revocable TOD deed recorded before the transferor's death and another instrument recorded after the transferor's death, the revocable TOD deed prevails. See Section 5660 (conflicting dispositive instruments).

§ 5604. Effect of other law

5604. (a) Except as provided in subdivision (b), nothing in this part affects the application to a revocable transfer on death deed of any other statute governing a nonprobate transfer on death, including but not limited to any of the following provisions that by its terms or intent would apply to a nonprobate transfer on death:

- (1) Division 2 (commencing with Section 100).
- (2) Part 1 (commencing with Section 5000) of this division.
- (3) Division 10 (commencing with Section 20100).
- (4) Division 11 (commencing with Section 21101).

(b) Notwithstanding subdivision (a), a provision of another statute governing a nonprobate transfer on death does not apply to a revocable transfer on death deed to the extent this part provides a contrary rule.

Comment. Section 5604 makes clear that the revocable TOD deed law is supplemented by general statutory provisions governing a nonprobate transfer. The specific cross references in this section are illustrative and not exclusive. General provisions referenced in this section include effect of death on community property, establishing and reporting fact of death, simultaneous death, effect of homicide or abuse, disclaimer, provisions

relating to effect of death, nonprobate transfers of community property, nonprobate transfer to former spouse, proration of taxes, rules for interpretation of instruments, and limitations on transfers to drafters.

This part may in some instances limit the effect of a provision otherwise applicable to a nonprobate transfer on death. See, e.g., Section 5620 & Comment (capacity to make deed).

§ 5606. Application of definitions

5606. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this part.

Comment. Although Section 5606 limits the application of these definitions, a defined term may also be used in another statute in its defined sense. See, e.g., Section 5000(a) (nonprobate transfer includes revocable TOD deed).

The definitions in this article are supplemented by those in Part 2 (commencing with Section 20) of Division 1. See, e.g., Sections 24 (beneficiary), 28 (community property), 39 (fiduciary), 45 (instrument), 48 (interested person), 56 (person), 58 (personal representative), 62 (property), 68 (real property), 81 (transferor), 81.5 (transferee), 82 (trust), 84 (trustee), 88 (will).

§ 5608. Beneficiary

5608. “Beneficiary” means a person named in a revocable transfer on death deed as transferee of the property.

Comment. Section 5608 is a specific application of Section 24 (“beneficiary” defined). The beneficiary must be identified by name. Section 5622 (beneficiary).

§ 5610. Real property

5610. “Real property” means the fee or an interest in real property. The term includes but is not limited to any of the following interests in real property:

(a) A leasehold.

(b) An interest in a common interest development within the meaning of Section 1351 of the Civil Code.

(c) An easement, license, permit, or other right in property to the extent the right is both (1) a recordable interest in property and (2) transferable on death of the owner of the right.

Comment. Section 5610 supplements the definition of real property found in Section 68 (“real property” includes leasehold). Any interest in real property may be the subject of a revocable TOD deed.

Under subdivision (b), an interest in a CID includes a community apartment project, a condominium project, a planned development, and a stock cooperative. The provision makes clear that these forms of tenure are real property for the purpose of a revocable TOD deed, regardless of whether elements of the interest are contractual in nature.

Subdivision (c) would apply to such an interest as a use or occupancy permit or an extraction or removal right (e.g., oil and gas, minerals, timber, or grazing). A property interest under subdivision (c) may relate to private land as well as to public land (whether state or federal). If the interest is both recordable and transferable at death, by will or otherwise, the interest may be the subject of a revocable TOD deed.

§ 5612. Recorded

5612. “Recorded” has the meaning provided in Section 1170 of the Civil Code.

Comment. Section 5612 adopts the rule that an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder’s office, with the proper officer, for record. See Civ. Code § 1170 (recorded). This definition applies to variants of the term defined, including “of record,” “recordation,” and the like.

§ 5614. Revocable transfer on death deed

5614. (a) “Revocable transfer on death deed” means an instrument that makes a donative transfer of real property under this part.

(b) A revocable transfer on death deed may also be known as a “revocable TOD deed.”

Comment. Section 5614 adopts revocable TOD deed terminology, rather than “beneficiary deed” terminology used in some jurisdictions that have enacted comparable legislation.

A revocable TOD deed may be made for real property or any interest in real property. See Section 5610 (“real property” defined).

The beneficiary must be identified by name in a revocable TOD deed. See Section 5622 (beneficiary).

A revocable TOD deed creates no rights in the beneficiary until the death of the transferor, and is revocable until that time. See Sections 5630 (revocability) and 5650 (effect during transferor’s life).

For a revocable TOD deed statutory form see Section 5642. For construction of a revocable TOD deed see Part 1 (commencing with Section 21101) of Division 11 (rules for interpretation of instruments).

§ 5616. Transferor

5616. “Transferor” means an owner of real property who makes a revocable transfer on death deed of the property.

Comment. Section 5616 is a specific application of Section 81 (“transferor” defined).

§ 5620. Capacity to make deed

5620. An owner of real property who has testamentary capacity may make a revocable transfer on death deed of the property.

Comment. Under Section 5620 testamentary, rather than contractual, capacity is required for execution of a revocable transfer on death deed. The standard of testamentary capacity is prescribed in Section 6100.5.

This is an exception to the general rule of Section 812 (capacity to make a decision, other than health care or will). This section is consistent with case law that to make a gift deed, the transferor need only have testamentary capacity, not contractual capacity. *Goldman v. Goldman*, 116 Cal. App. 2d 227, 253 P. 2d 474 (1953).

§ 5622. Beneficiary

5622. (a) The transferor shall identify the beneficiary by name in a revocable transfer on death deed.

(b) The transferor may name an alternate beneficiary to take property if a named beneficiary fails to survive the transferor.

(c) The transferor may name more than one beneficiary or alternate beneficiary. Unless the instrument otherwise provides, beneficiaries take the property as tenants in common, in equal shares.⁴

(d) The transferor may name as beneficiary the trustee of a trust even if the trust is revocable.

Comment. Subdivision (a) of Section 5622 makes explicit the requirement that a beneficiary be identified by name in the instrument. A class gift is not permissible.

Subdivision (b) makes explicit the right of a transferor to name an alternate beneficiary. The transferor may name more than one alternate beneficiary.

Subdivision (c); see also Section 10 (singular includes plural). Subdivision (c) makes explicit the right of a transferor to name multiple beneficiaries. A beneficiary must survive the transferor in order to take an interest under this section. Section 21109. For the consequence of a named beneficiary’s failure to survive the decedent, see Section 21110 (antilapse).

⁴The words “in equal shares” were added by the Commission in 2007. CLRC Memorandum 2007-1, at 6.

Subdivision (d) makes clear that the beneficiary under a revocable TOD deed may be a trustee and need not be the trust beneficiary. If a trust named as beneficiary is revoked before the transferor's death, general rules of construction applicable to such a gift would govern. See Section 21111 (failure of transfer).

A transferor may condition the beneficiary's right to the property on an intervening life estate. See Section 5652 (effect at death).

§ 5624. Execution

5624. (a) Except as provided in subdivision (b), a revocable transfer on death deed is not effective unless the transferor signs and dates the deed and acknowledges the deed before a notary public.

(b) A revocable transfer on death deed may be signed and dated in the transferor's name by a person other than the transferor at the transferor's direction and in the transferor's presence, but shall be acknowledged by the transferor.

Comment. Section 5624 prescribes execution requirements. A revocable TOD deed is not invalid because it does not comply with the requirements for execution of a will. See Section 5000(a) (provision for nonprobate transfer on death in written instrument).

A properly executed revocable TOD deed is ineffective unless recorded before the transferor's death. See Section 5626 (recordation, delivery, and acceptance).

§ 5626. Recordation, delivery, and acceptance

5626. (a) A revocable transfer on death deed is not effective unless the deed is recorded before the transferor's death.

(b) The transferor is not required to deliver a revocable transfer on death deed to the beneficiary during the transferor's life.

(c) The beneficiary is not required to accept a revocable transfer on death deed from the transferor during the transferor's life.

Comment. Subdivision (a) of Section 5626 requires recordation of the revocable TOD deed before the transferor's death, but does not require recordation by the transferor — an agent or other person authorized by the transferor may record the instrument. The deed is considered recorded for purposes of this section when it is deposited for record with the county recorder. See Section 5612 ("record" defined).

Subdivision (b) makes clear that delivery of a revocable TOD deed is not necessary, notwithstanding a former Law Revision Commission Comment to Section 5000 to the effect that Section 5000 does not relieve against the delivery requirement of the law of deeds. The recordation requirement for a revocable TOD deed makes delivery unnecessary.

Consideration is not required for a revocable TOD deed. See Civ. Code § 1040.

Subdivision (c) states the rule that, unlike an inter vivos deed, a revocable TOD deed does not require acceptance. Acceptance of a donative transfer is presumed. Disclaimer procedures are available to a beneficiary. See Sections 267, 279 (disclaimer).

A revocable TOD deed has no effect, and confers no rights on the beneficiary, until the transferor's death. See Section 5650 (effect during transferor's life).

§ 5628. Multiple deeds

5628. (a) If a revocable transfer on death deed is recorded for the same property for which another revocable transfer on death deed is recorded, the later executed deed is the operative instrument and its recordation revokes the earlier executed deed.

(b) Revocation of a revocable transfer on death deed does not revive an instrument earlier revoked by recordation of that deed.

Comment. Subdivision (a) of Section 5628 gives effect to the last executed of revocable TOD deeds recorded before the transferor's death. A revocable TOD deed is executed by signing, dating, and acknowledging

before a notary public. See Section 5624 (execution). Execution is complete when the transferor acknowledges the deed before a notary public, not when the deed is signed and dated.

Under subdivision (b), recordation of a revocable TOD deed has the effect of revoking an earlier executed revocable TOD deed, regardless of the order of recordation of the deeds. Subsequent revocation of the later executed recorded deed does not revive an earlier executed deed. Instead, the property passes under failed transfer principles. See Section 21111 (failed transfer).

§ 5630. Revocability

5630. (a) A transferor who has testamentary capacity may revoke a revocable transfer on death deed at any time.

(b) Revocation of a revocable transfer on death deed is effective notwithstanding a provision in the deed that purports to make the deed irrevocable.

Comment. Section 5630 states the rule that a transfer on death deed is revocable. The transferor's right of revocation may be subject to a contractual or court ordered limitation.

A TOD deed may be revocable in some circumstances even though the transferor lacks testamentary capacity. The transferor's agent under a durable power of attorney may not revoke a TOD deed unless expressly authorized. See Section 4264 (power of attorney). If the transferor's conservator seeks to revoke a TOD deed, the transferor's estate plan must be taken into account under general principles of substituted judgment, and notice must be given to the beneficiary. See Sections 2580-2586 (guardianship and conservatorship).

§ 5632. Revocation of deed

5632. (a) An instrument revoking a revocable transfer on death deed shall be executed and recorded before the transferor's death in the same manner as execution and recordation of a revocable transfer on death deed.

(b) Joinder, consent, or agreement of, or notice to, the beneficiary is not required for revocation of a revocable transfer on death deed.

Comment. Under subdivision (a) of Section 5632 a revoking instrument must be signed, dated, acknowledged, and recorded by the transferor or a person acting at the transferor's direction. See Sections 5624 (execution), 5626 (recordation).

Subdivision (b) implements the principle that creation and recordation of a revocable TOD deed creates no rights in the beneficiary. See Section 5650 (effect during transferor's life).

§ 5640. Statutory forms permissive

5640. (a) A transferor may make or revoke a revocable transfer on death deed by an instrument in substantially the form provided in this article.

(b) Nothing in this chapter limits the right of a transferor to make or revoke a revocable transfer on death deed by an instrument not in substantially the form provided in this article.

Comment. Section 5640 makes clear that use of the statutory forms provided in this article are permissive and are not mandatory. The statutory forms are sufficient to create or revoke a revocable TOD deed.

§ 5642. Statutory form revocable TOD deed

5642. A transferor may make a revocable transfer on death deed by an instrument in substantially the following form:

Revocable Transfer on Death (TOD) Deed
[California Probate Code Section 5600]

Recording Requested By:

When Recorded Mail This Deed To
Name:
Address:
Assessor's Parcel Number: Space Above
For Recorder's Use

This deed is exempt from documentary transfer tax under Rev. & Tax. Code § 11930.

This deed is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3

Notice to Owner. This deed may have significant and unintended consequences for your estate plan; you should consult a professional before using it.

This deed **MUST** be recorded before you die in order to be effective.

You may revoke this deed by recording another instrument before you die.

The property conveyed by this deed may be liable for reimbursement of the state for Medi-Cal expenditures.

If you hold this property in joint tenancy or as community property with right of survivorship, this deed will pass your interest in the property to the beneficiary and not to a surviving coowner. You may choose to make the beneficiary's right subject to a life estate in your surviving spouse.

If you do not want these results, you should not use this form.

Notice to Beneficiary. This deed does not transfer ownership of the property to you until the owner dies, and you acquire no rights in the property until then. The owner may revoke this deed at any time.

When the owner dies you should record evidence of death under Probate Code Section 210 and you must file the change in ownership notice required by Revenue and Taxation Code Section 480 and (2) notify the Department of Health Services if required by Probate Code Section 215.

You should file a claim for reassessment exclusion under Revenue and Taxation Code Section 63.1, if applicable.

If you do not wish to receive the property, you may disclaim it under Probate Code Section 275.

IDENTIFYING INFORMATION

Owner(s) of Property Who Join in this Deed:

Address or Other Description of Property:

Name(s) of Beneficiary(ies):

TRANSFER ON DEATH

I transfer all my interest in the described property to the named beneficiary on my death. If I name more than one beneficiary, the beneficiaries shall take equal shares as tenants in common. If a named beneficiary dies before me, the share that would otherwise go to that beneficiary shall pass in accordance with applicable provisions of the California Probate Code.

If I sign here, I choose to make the beneficiary’s right to the described property subject to a life estate in my surviving spouse. Signature(s) of owner(s) who make this choice:

This revocable TOD deed revokes any previous revocable TOD deed I have made for the described property. This deed is revocable at any time before my death.

SIGNATURE AND DATE

Signature(s) of Owner(s) Who Join in this Deed:

Date: _____

ACKNOWLEDGMENT

State of California)
County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that by his/her/their signature(s) on the instrument the person(s) executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

Comment. Section 5642 prescribes a form for creation of a revocable TOD deed. Use of the form is not mandatory. See Section 5640 (statutory forms permissive).

The form provided in this section enables the transferor to condition passage of the property to the beneficiary on a life estate in the transferor’s surviving spouse. Comparable principles apply to a surviving registered domestic partner under Family Code Section 297.5. The option provided in this form should not be read to preclude a transferor from making a revocable TOD deed subject to a life estate in a person other than the surviving spouse, or from imposing conditions on the life estate. See Sections 5640 (statutory forms permissive), 5652 (effect at death),

§ 5644. Statutory form revocation of revocable TOD deed

5644. A transferor may revoke a revocable transfer on death deed by an instrument in substantially the following form:

**Revocation of
Revocable Transfer on Death (TOD) Deed
[California Probate Code Section 5600]**

Recording Requested By:

When Recorded Mail This Deed To
Name:
Address:

Assessor's Parcel Number: Space Above
For Recorder's Use

This deed revocation is exempt from documentary transfer tax under Rev. & Tax. Code § 11930.

This deed revocation is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3

Notice to Owner. This revocation MUST be recorded before you die in order to be effective. This revocation is effective only as to the interests of owners who join in this revocation.

IDENTIFYING INFORMATION

Owner(s) of Property Who Join in this Revocation:

Address or Other Description of Property:

Recording Information for Revocable TOD Deed:

County: _____
Date of Recordation: _____
Book and Page or Series Number: _____

REVOCAION

I revoke the described revocable TOD deed.

SIGNATURE AND DATE

Signature(s) of Owner(s) Who Join in this Revocation:

Date: _____

ACKNOWLEDGMENT

State of California)

County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that by his/her/their signature(s) on the instrument the person(s) executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

Comment. Section 5644 prescribes a form for revocation of a revocable TOD deed. Use of the form is not mandatory, since other recorded instruments may revoke a TOD deed. See Sections 5628 (multiple deeds), 5640 (statutory forms permissive), 5660 (conflicting dispositive instruments).

§ 5650. Effect during transferor’s life

5650. During the transferor’s life, execution and recordation of a revocable transfer on death deed:

(a) Does not affect the ownership rights of the transferor, and the transferor or the transferor’s agent or other fiduciary may convey, assign, contract, encumber, or otherwise deal with the property, and the property is subject to process of the transferor’s creditors, as if no revocable transfer on death deed were executed or recorded.

(b) Does not create any legal or equitable right in the beneficiary, and the property is not subject to process of the beneficiary’s creditors.

(c) Does not transfer or convey any right, title, or interest in the property.

Comment. Section 5650 makes clear that a revocable TOD deed is effective only on the transferor’s death and not before. A revocable TOD deed remains revocable until that time. See Section 5630 (revocability).

The transferor’s execution and recordation of a revocable TOD deed has no effect on the ability of the transferor’s creditors to subject the property to an involuntary lien or execution of a judgment.

The reference to the transferor’s agent or other fiduciary in subdivision (a) includes a conservator. The authority of the fiduciary is subject to the qualification that the specific transaction entered into on behalf of the transferor must be within the scope of the fiduciary’s authority. See, e.g., Section 4264 (power of attorney).

Subdivision (b) makes clear that the transferor’s execution and recordation of a revocable TOD deed does not enable the creditors of a beneficiary to subject the property to an involuntary lien or execution of a judgment. The beneficiary is not entitled to notice of a trustee’s sale, nor is the beneficiary’s consent required to enable the transferor to refinance.

The beneficiary’s joinder, consent, or agreement to any transaction by the transferor is unnecessary and irrelevant. If an obligation of the beneficiary incurred before the transferor’s death attaches to the property on the transferor’s death as a result of the doctrine of after-acquired title, that obligation is subordinate to any limitations on

the transferor's interest in the property. See Sections 5652 (effect at death), 5670 (priority of secured creditor of transferor).

Subdivision (c) reinforces the concept that a revocable TOD deed does not effectuate a transfer before the transferor's death. Creation of a revocable TOD deed should not have the effect of a default on a loan secured by the property, since it is not a disposition of the property.

§ 5652. Effect at death

5652. (a) A revocable transfer on death deed transfers all of the transferor's interest in the property to the beneficiary on the transferor's death. A revocable transfer on death deed that purports to transfer less than all of the transferor's interest in the property is void, and the instrument does not transfer the property on the transferor's death.

(b) A revocable transfer on death deed may condition the beneficiary's right to the property on an intervening life estate, but may not otherwise create a future interest in a beneficiary.

(c) Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor's interest that is of record at the transferor's death, including, but not limited to, a lien, encumbrance, easement, lease, or other instrument affecting the transferor's interest, whether recorded before or after recordation of the revocable transfer on death deed. The holder of rights under that instrument may enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed.

(d) Notwithstanding a contrary provision in the deed, a revocable transfer on death deed transfers the property without covenant or warranty of title.

Comment. Under subdivision (a) of Section 5652, whatever interest the transferor owned at death in the property passes to the beneficiary. It should be noted, however, that this provision is not limited to the fee interest. If the transferor's ownership interest is a less than fee interest, the transferor's entire less than fee ownership interest passes to the beneficiary on the transferor's death.

Under subdivision (c), a beneficiary takes only what the transferor has at death. This is a specific application of the general rule that recordation of a revocable TOD deed does not affect the transferor's ownership rights or ability to deal with the property until death. See Section 5650 (effect during transferor's life). Likewise, if an obligation of the beneficiary attaches to the property as a result of the doctrine of after-acquired title, that obligation is subordinate to any limitations on the transferor's interest in the property, and a transfer by the beneficiary financed by a purchase money mortgage is subject to the priority of a recorded encumbrance on the transferor's interest notwithstanding Civil Code Section 2898 (priority of purchase money encumbrance).

Subdivision (d) emphasizes the point that a revocable TOD deed is basically a quitclaim, passing whatever interest the transferor had at death to the beneficiary. A covenant or warranty of title included by the transferor in the deed has no effect.

§ 5654. Medi-Cal eligibility and reimbursement

5654. (a) For the purpose of determination of eligibility for health care under Chapter 7 (commencing with Section 14000) or Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code, execution and recordation of a revocable transfer on death deed is not a lifetime transfer of the property.

(b) For the purpose of a claim of the Department of Health Care Services under Section 14009.5 of the Welfare and Institutions Code, property transferred by a revocable transfer on death deed is a part of the estate of the decedent, and the beneficiary is a recipient of the property by distribution or survival.

Comment. Subdivision (a) of Section 5654 is a specific application of the general rule that execution and recordation of a revocable TOD deed divests the transferor of no interest in the property, and invests the beneficiary with no rights in the property, during the transferor's life. Section 5650 (effect during transferor's life).

Subdivision (b) is consistent with case law interpretation of the meaning and purpose of Welfare and Institutions Code Section 14009.5, providing for reimbursement to the state for Medi-Cal payments made during the decedent's life. See *Bonta v. Burke*, 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

§ 5656. Property taxation

5656. For the purpose of application of the property taxation and documentary transfer tax provisions of the Revenue and Taxation Code:

(a) Execution and recordation of, or revocation of, a revocable transfer on death deed of real property is not a change in ownership of the property and does not require declaration or payment of a documentary transfer tax or filing of a preliminary change of ownership report.

(b) Transfer of real property on the death of the transferor by a revocable transfer on death deed is a change in ownership of the property.

Comment. Section 5656 prescribes the effect of a revocable TOD deed or its revocation for purposes of property tax reassessment and documentary transfer taxation.

Under subdivision (a), mere recordation or revocation of a revocable TOD deed is not a transfer or change in ownership for taxation purposes. This is an application of existing law. See, e.g., Rev. & Tax Code §§ 480.3 (application of preliminary change of ownership requirement), 11930 (exemption from documentary transfer tax).

Under subdivision (b), a change in ownership pursuant to a revocable TOD deed does not occur until the transferor's death. The TOD beneficiary is responsible for filing the change in ownership statement required by Revenue and Taxation Code Section 480. See Section 5680 (beneficiary rights and duties). Although a transfer of property by a revocable TOD deed is a change in ownership for reassessment purposes, the transfer may qualify for exclusion under the Revenue and Taxation Code, depending on the nature of the parties to the transfer. See, e.g., Rev. & Tax. Code §§ 62-63.1.

§ 5660. Conflicting dispositive instruments

5660. If a revocable transfer on death deed recorded before the transferor's death and another instrument both purport to dispose of the same property:

(a) If the other instrument is not recorded before the transferor's death, the revocable transfer on death deed is the operative instrument.

(b) If the other instrument is recorded before the transferor's death and makes a revocable disposition of the property, the later executed of the revocable transfer on death deed or the other instrument is the operative instrument.

(c) If the other instrument is recorded before the transferor's death and makes an irrevocable disposition of the property, the other instrument and not the revocable transfer on death deed is the operative instrument.

Comment. Section 5660 establishes the general rules governing a conflicting disposition of property that is subject to a recorded revocable TOD deed. A revocable TOD deed has no effect unless recorded. Section 5626 (recordation, delivery, and acceptance). A conflicting instrument may not affect a revocable TOD deed under this section unless recorded before the transferor's death.

Under this section the transferor's will does not override a revocable TOD deed, notwithstanding a devise of the property in the will and regardless of the date of execution of the will. This section does not apply if the transferor revokes a recorded revocable TOD deed before death. See Section 5630 (revocability).

Absent a total disposition of the property before death, the revocable TOD deed passes property subject to conflicting interests of record. See Section 5652 (effect at death).

§ 5662. Joint deed

5662. Except as otherwise provided in this part, if coowners of property join in a revocable transfer on death deed of the property:

(a) The property interest of a coowner passes to the beneficiary on the death of that coowner.

(b) A coowner may revoke the transfer on death deed as to the interest of that coowner. The revocation does not affect the transfer on death deed as to the interest of another coowner.

Comment. Section 5662 provides rules governing a revocable TOD deed joined in by coowners of the property. A coowner of property may condition passage of the coowner's interest to the beneficiary on a life estate in the surviving coowner. Cf. Section 5652 (effect at death).

The revocation right under subdivision (b) applies before or after the death of another coowner.

For rules applicable to property held in joint tenancy, see Section 5664. For rules applicable to community property, see Section 5666. For rules applicable to community property with right of survivorship, see Section 5668.

§ 5664. Joint tenancy

5664. Unless the deed otherwise provides, if an owner of property held in joint tenancy makes a revocable transfer on death deed of the property:

(a) The death of the transferor severs the joint tenancy as to the interest of the transferor.

(b) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the joint tenancy.

Comment. Section 5664 addresses the conflict between a revocable TOD deed and an earlier joint tenancy in the property. In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660 (conflicting dispositive instruments).

Because a revocable TOD deed is revocable until the transferor's death, execution and recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when the transferor dies with the revocable TOD deed still in effect. If another joint tenant who has not made a revocable TOD deed predeceases the transferor, the transferor takes the other joint tenant's interest by right of survivorship, and the combined interest passes pursuant to the transferor's revocable TOD deed. See Section 5652(a) (transferor's entire interest in property passes at death).

In the case of simultaneous death, Section 223 (joint tenants) controls. The proportionate interest of each joint tenant passes under the revocable TOD deed or other dispositive instrument of that joint tenant.

Section 5665 provides a default rule; joint tenants may provide a different result in the deed. For example, the deed may provide that on the death of a joint tenant, the property passes to the surviving joint tenant and, on the death of the surviving joint tenant, to the TOD beneficiary. In that circumstance, the TOD deed would remain revocable by the surviving joint tenant. See Sections 5630 (revocability), 5632 (revocation of deed).

§ 5666. Community property

5666. (a) Chapter 2 (commencing with Section 5010) of Part 1 applies to a revocable transfer on death deed of community property.

(b) For the purpose of application of Chapter 2 (commencing with Section 5010) of Part 1 to a revocable transfer on death deed of community property, written consent to the deed, revocation of written consent to the deed, or modification of the deed, is ineffective unless recorded within the time required by that chapter for execution or service of the written consent, revocation, or modification.

Comment. Subdivision (a) of Section 5666 incorporates the general statutes governing the rights of spouses in a nonprobate transfer of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer apply to a revocable TOD deed. Section 5604(a)(2) (effect of other law).

Under the rules governing a nonprobate transfer of community property, a person has the power of disposition at death of the person's interest in community property without the joinder of the person's spouse. A

revocable transfer on death deed of community property joined in by both spouses is effective as to the interests of both spouses. The revocable TOD deed may be subject to subsequent modification or revocation as to the interest of each spouse. Comparable principles apply to the property of registered domestic partners under Family Code Section 297.5.

Subdivision (b) makes clear that the general statute governing the rights of spouses in a nonprobate transfer of community property is qualified by the recording requirement in the case of a revocable TOD deed of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer are subject to a contrary rule in the revocable TOD deed law. See Section 5604(b); see also Section 5011(b) (rights of parties subject to a contrary state statute specifically applicable to the instrument under which the nonprobate transfer is made).

It should be noted that a third party that acts in reliance on apparent spousal rights under a revocable TOD deed is protected in that reliance. Section 5682 (BFP protection).

§ 5668. Community property with right of survivorship

5668. (a) A revocable transfer on death deed of community property with right of survivorship is subject to Section 5666, relating to a revocable transfer on death deed of community property.

(b) Unless the deed otherwise provides, if an owner of community property with right of survivorship makes a revocable transfer on death deed of the property:

(1) The death of the transferor terminates the right of survivorship in the same manner as severance of a joint tenancy under Section 5664.

(2) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the community property with right of survivorship.

Comment. Section 5668 addresses the effect of a revocable TOD deed on community property with right of survivorship. See Civ. Code § 682.1 (CPWROS).

A revocable TOD deed of the property is subject to the rules governing a nonprobate transfer of community property. Subdivision (a).

Subdivision (b) is consistent with Civil Code Section 682.1(a) (termination of survivorship right pursuant to same procedures by which joint tenancy may be terminated). In the case of simultaneous death, Section 223 (joint tenants) controls; the one-half interest of each spouse passes under the revocable TOD deed or other dispositive instrument of that spouse.

Subdivision (b) provides a default rule; the spouses may provide a different result in the deed. For example, the deed may provide that on the death of the spouse, the property passes to the surviving spouse and, on the death of the surviving spouse, to the TOD beneficiary. In that circumstance, the TOD deed would remain revocable by the surviving spouse. See Sections 5630 (revocability), 5632 (revocation of deed).

Comparable principles apply to the property of registered domestic partners under Family Code Section 297.5.

§ 5670. Priority of secured creditor of transferor

5670. Notwithstanding any other statute governing priorities among creditors, a creditor of the transferor whose right is evidenced at the time of the transferor's death by an encumbrance or lien of record on property transferred by a revocable transfer on death deed has priority against the property over a creditor of the beneficiary, regardless of whether the beneficiary's obligation was created before or after the transferor's death and regardless of whether the obligation is secured or unsecured, voluntary or involuntary, recorded or unrecorded.

Comment. Section 5670 makes clear that a creditor of the transferor has priority over a creditor of the beneficiary, at least to the extent the transferor's creditor has a lien or encumbrance of record at the time of the transferor's death. Thus the doctrine of after-acquired title (Civ. Code §§ 1106, 2930) does not create a priority in the beneficiary's creditors, even if the right of the transferor's creditor was created after the interest of the

beneficiary's creditor. Likewise, the priority given by statute to a purchase money encumbrance by the beneficiary's transferee does not override the general priority of an encumbrance of record by a creditor of the transferor. See Civ. Code § 2898 (priority of purchase money encumbrance).

§ 5672. Liability for unsecured debts

5672. Each beneficiary is personally liable to the extent provided in Section 5674 for the unsecured debts of the transferor. Any such debt may be enforced against the beneficiary in the same manner as it could have been enforced against the transferor if the transferor had not died. In any action based on the debt, the beneficiary may assert any defense, cross-complaint, or setoff that would have been available to the transferor if the transferor had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

Comment. Section 5672 is drawn from Section 13204, relating to the liability of a decedent's successor who takes real property of small value under the affidavit procedure. A beneficiary who wishes to avoid the liability imposed by this section may commence a probate proceeding and return the property to the estate under Section 5676. See Section 5674 (limitation on liability). See also Section 275 (disclaimer).

§ 5674. Limitation on liability

5674. (a) A beneficiary is not liable under Section 5672 if proceedings for the administration of the transferor's estate are commenced and the beneficiary satisfies the requirements of Section 5676.

(b) The aggregate of the personal liability of a beneficiary under Section 5672 shall not exceed the sum of the following:

(1) The fair market value at the time of the transferor's death of the property received by the beneficiary pursuant to the revocable transfer on death deed, less the amount of any liens and encumbrances on the property at that time.

(2) The net income the beneficiary received from the property.

(3) If the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this paragraph, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 5676.

Comment. Section 5674 is drawn from Section 13207, relating to limitation of liability of a decedent's successor who takes real property of small value under the affidavit procedure.

§ 5676. Return of property to estate for benefit of creditors

5676. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the transferor's estate are commenced, each beneficiary is liable for:

(1) The restitution to the transferor's estate of the property the beneficiary received pursuant to the revocable transfer on death deed if the beneficiary still has the property, together with (A) the net income the beneficiary received from the property and (B) if the beneficiary encumbered the property after the transferor's death, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the transferor's estate of the fair market value of the property if the beneficiary no longer has the property, together with (A) the net income the beneficiary received from the property prior to disposing of it and (B) interest from the date of disposition at the rate

payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the “fair market value of the property” is the fair market value, determined as of the time of the disposition of the property, of the property the beneficiary received pursuant to the revocable transfer on death deed, less the amount of any liens and encumbrances on the property at the time of the transferor’s death.

(b) Subject to subdivision (c), if proceedings for the administration of the transferor’s estate are commenced and a beneficiary made a significant improvement to the property received by the beneficiary pursuant to the revocable transfer on death deed, the beneficiary is liable for whichever of the following the transferor’s estate elects:

(1) The restitution of the property, as improved, to the estate of the transferor upon the condition that the estate reimburse the beneficiary for (A) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (B) the amount paid by the beneficiary for principal and interest on any liens or encumbrances that were on the property at the time of the transferor’s death.

(2) The restoration to the transferor’s estate of the fair market value of the property, determined as of the time of the transferor’s death, less the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the time of the transferor’s death.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the beneficiary to satisfy a liability under Section 5672.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the transferor. Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of creditors of the transferor.

(e) An action to enforce the liability under this section is forever barred three years after the transferor’s death. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 5676 is drawn from Section 13206, relating to restoration of property to the estate by a decedent’s successor who takes real property of small value under the affidavit procedure. The beneficiary of revocable TOD-deeded property that is restored to the transferor’s estate under this section is the beneficiary of a specific gift for purposes of abatement under Section 21402.

Subdivision (d) makes clear that liability for restitution of property to the estate under this section is limited to satisfaction of creditor claims, regardless of whether restitution under this section is made voluntarily or pursuant to a court proceeding. Any surplus belongs to the beneficiary.

§ 5680. Beneficiary rights and duties

5680. (a) The beneficiary may establish the fact of the transferor’s death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2. For the purpose of this subdivision, the beneficiary is a person empowered by statute to act on behalf of the transferor or the transferor’s estate within the meaning of Section 103526 of the Health and Safety Code.

(b) For the purpose of filing the change in ownership statement required by Section 480 of the Revenue and Taxation Code, the beneficiary is a transferee of real property by reason of death.

(c) For the purpose of giving the notice to the Director of Health Services provided for in Section 215, the beneficiary is a beneficiary of the transferor.

(d) The beneficiary is liable to the transferor's estate for prorated estate and generation skipping transfer taxes to the extent provided in Division 10 (commencing with Section 20100).

Comment. Subdivision (a) of Section 5680 establishes that a beneficiary may record an affidavit of death of the transferor to effectuate the transfer. See Section 212 (recordation is prima facie evidence of death to the extent it identifies real property located in the county, title to which is affected by the death). Subdivision (a) authorizes the named beneficiary to obtain a certified copy of the transferor's death certificate under Health and Safety Code Section 103525 for the purpose of effectuating the transfer by revocable TOD deed.

Subdivision (b) cross-references the duty imposed on the beneficiary to file a change of ownership statement with the county recorder or assessor within 150 days after the transferor's death. See Rev. & Tax. Code § 480.

Subdivision (c) cross-references the duty imposed on the beneficiary to give the Director of Health Services notice of the death of a transferor who has received Medi-Cal benefits. See Section 215.

Subdivision (d) is a specific application of Division 10 (commencing with Section 20100), relating to proration of taxes. The beneficiary of a nonprobate transfer, such as a revocable TOD deed, is liable for a pro rata share of estate and generation skipping transfer taxes paid by the transferor's estate. See Sections 20100 et seq. (proration of estate tax), 20200 et seq. (proration of tax on generation-skipping transfer).

A beneficiary may disclaim the property under Section 275 (disclaimer).

§ 5682. BFP protection

5682. A person acting in good faith and for a valuable consideration with the beneficiary of a revocable transfer on death deed of real property for which an affidavit of death is recorded under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2 has the same rights and protections as the person would have if the beneficiary had been named as a distributee of the property in an order for distribution of the transferor's estate that had become final.

Comment. Section 5682 is drawn from Section 13203(a) (affidavit procedure for real property of small value).

§ 5690. Contest of transfer

5690. (a) The transferor's personal representative or an interested person may, under Part 19 (commencing with Section 850) of Division 2, contest the validity of a transfer of property by a revocable transfer on death deed.

(b) The proper county for a contest proceeding is the proper county for proceedings concerning administration of the transferor's estate, whether or not proceedings concerning administration of the transferor's estate have been commenced at the time of the contest.

(c) On commencement of a contest proceeding, the contestant may record a lis pendens in the county in which the revocable transfer on death deed is recorded.

Comment. Section 5690 incorporates the procedure of Sections 850-859, relating to a conveyance or transfer of property claimed to belong to a decedent or other person. A person adversely affected by a revocable TOD deed has standing to contest the transfer. Cf. Section 48 ("interested person" defined).

Grounds for contest may include but are not limited to lack of capacity of the transferor (Section 5620), improper execution or recordation (Sections 5622-5624), invalidating cause for consent to a transfer of community property (Section 5015), and transfer to a disqualified person (Section 21350). See also Section 5696 (fraud, undue influence, duress, mistake, or other invalidating cause).

The proper county for proceedings for administration of a decedent's estate is the county of the decedent's domicile or, in the case of a nondomiciliary, the county of the decedent's death or, if the decedent died outside the state, where property of the decedent is located. Prob. Code §§ 7051, 7052.

Recordation of a lis pendens within 90 days after the transferor's death preserves remedies for the contestant. See Section 5694 (remedies).

§ 5692. Time for contest

5692. (a) A contest proceeding may not be commenced before the transferor's death.

(b) A contest proceeding shall be commenced within the earlier of the following times:

(1) Three years after the transferor's death.

(2) One year after the beneficiary establishes the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.

Comment. Section 5692 limits the contest of a revocable TOD deed to a post death challenge. A challenge before the transferor's death would be premature since a revocable TOD deed may be revoked at any time before the transfer occurs by reason of the transferor's death. However, the transferor's conservator may seek to revoke a revocable TOD deed pursuant to substituted judgment principles. See Section 5630 (revocability) & Comment; see also Sections 2580-2586 (substituted judgment).

§ 5694. Remedies

5694. If the court in a contest proceeding determines that a transfer of property by a revocable transfer on death deed is invalid, the court shall order the following relief:

(a) If the proceeding was commenced and a lis pendens was recorded within 90 days after the transferor's death, the court shall void the deed and order transfer of the property to the person entitled to it.

(b) If the proceeding was not commenced and a lis pendens was not recorded within 90 days after the transferor's death, the court shall grant appropriate relief but the court order shall not affect the rights in the property of a purchaser or encumbrancer for value and in good faith acquired before commencement of the proceeding and recordation of a lis pendens.

Comment. The 90 day period under Section 5694 represents a balance between the 40 day period applicable to disposition of an estate without administration under Sections 13100 (affidavit procedure for collection or transfer of personal property) and 13151 (court order determining succession to property), and the six month period applicable to the affidavit procedure for real property of small value under Section 13200.

§ 5696. Fraud, undue influence, duress, mistake, or other invalidating cause

5696. Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a transfer of property by a revocable transfer on death deed.

Comment. Section 5696 is drawn from Section 5015 (nonprobate transfer of community property).

Colorado

§ 15-15-401. Definitions.

As used in this part 4, unless the context otherwise requires:

- (1) “Beneficiary deed” means a deed, subject to revocation by the owner, which conveys an interest in real property and which contains language that the conveyance is to be effective upon the death of the owner and which may be in substantially the form described in section 15-15-404.
- (2) “Deed” means any instrument of conveyance of real property.
- (3) “Grantee-beneficiary” means one or more persons or entities capable of holding title to real property designated in a beneficiary deed to receive an interest in real property upon the death of the owner. “Grantee-beneficiary” includes, but is not limited to, a successor grantee-beneficiary.
- (4) “Owner” means the grantor of a beneficiary deed.
- (5) “Successor grantee-beneficiary” means the person or entity designated in a beneficiary deed to receive an interest in the property if the primary grantee-beneficiary does not survive the owner.
- (6)(a) “Transfer”, when used as a verb, means to convey.
- (b) “Transfer”, when used as a noun, means a conveyance.

§ 15-15-402. Real property–beneficiary deed.

- (1) In addition to any method allowed by law to effect a transfer at death, title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner’s death, a beneficiary deed signed by the owner of such interest, as grantor, designating a grantee-beneficiary of the interest. The transfer by a beneficiary deed shall be effective only upon the death of the owner. A beneficiary deed need not be supported by consideration.
- (2) The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required. Subject to the right of the grantee-beneficiary to disclaim or refuse to accept the property, the conveyance shall be effective upon the death of the owner.
- (3) During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property without the joinder, signature, consent, or agreement of, or notice to, the grantee-beneficiary for any purpose.

§ 15-15-403. Medicaid eligibility exclusion.

No person who is an applicant for or recipient of medical assistance for which it would be permissible for the department of health care policy and financing to assert a claim pursuant to section 25.5-4-301 or 25.5-4-302, C.R.S., shall be entitled to such medical assistance if the person has in effect a beneficiary deed. Notwithstanding the provisions of section 15-15-402(1), the execution of a beneficiary deed by an applicant for or recipient of medical assistance as described in this section shall cause the property to be considered a countable resource in accordance with section 25.5-4-302(6), C.R.S., and applicable rules.

§ 15-15-404. Form of beneficiary deed–recording.

(1) An owner may transfer an interest in real property effective on the death of the owner by executing a beneficiary deed that contains the words “conveys on death” or “transfers on death” or otherwise indicates the transfer is to be effective on the death of the owner and recording the beneficiary deed prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. A beneficiary deed may be in substantially the following form:

BENEFICIARY DEED

(§§ 15-15-401, ET SEQ., Colorado Revised Statutes)

CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

_____, as grantor,

(Name of grantor)

designates _____ as

(Name of grantee-beneficiary)

grantee-beneficiary whose address is _____ (Note to Assessor and Treasurer: This address is for identification purposes only, all notices and tax statements should continue to be sent to grantor.)

(Optional)[or if grantee-beneficiary fails to survive grantor, grantor designates _____, as

(Name of successor grantee-beneficiary)

successor grantee-beneficiary whose address is _____]and grantor transfers, sells, and conveys on grantor’s death to the grantee-beneficiary, the following described real property located in the County of _____, State of Colorado:

(insert legal description here)

Known and numbered as _____

THIS BENEFICIARY DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE GRANTOR. IT REVOKES ALL PRIOR BENEFICIARY DEEDS BY THIS GRANTOR FOR THIS REAL PROPERTY EVEN IF THIS BENEFICIARY DEED FAILS TO CONVEY ALL OF THE GRANTOR’S INTEREST IN THIS REAL PROPERTY.

WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY DISQUALIFY THE GRANTOR FROM BEING DETERMINED ELIGIBLE FOR, OR FROM RECEIVING MEDICAID UNDER TITLE 26, COLORADO REVISED STATUTES.

WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY NOT AVOID PROBATE.

Executed this _____.

(Date)

(Grantor)

(2) Unless the owner designates otherwise in a beneficiary deed, a beneficiary deed shall not be deemed to contain any warranties of title and shall have the same force and effect as a conveyance made using a bargain and sale deed.

§ 15-15-405. Revocation—change—revocation by will prohibited.

(1) An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. The joinder, signature, consent, agreement of, or notice to, the grantee-beneficiary is not required for the revocation to be effective. A revocation may be in substantially the following form:

REVOCATION OF BENEFICIARY DEED

(§§ 15-15-401, et seq., Colorado Revised Statutes)

CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

_____, as grantor, hereby

(Name of grantor)

REVOKES all beneficiary deeds concerning the following described real property located in the County of _____, State of Colorado:

(insert legal description here)

Known and numbered as _____

Executed this _____.

(Date)

(Grantor)

(2) A subsequent beneficiary deed revokes all prior grantee-beneficiary designations by the owner for the described real property in their entirety even if the subsequent beneficiary deed fails to convey all of the owner’s interest in the described real property. The joinder, signature, consent, or agreement of, or notice to, either the original or new grantee-beneficiary is not required for the change to be effective.

(3) The most recently executed beneficiary deed or revocation of all beneficiary deeds or revocations that have been recorded prior to the owner’s death shall control regardless of the order of recording.

(4) A beneficiary deed that complies with the requirements of this part 4 may not be revoked, altered, or amended by the provisions of the will of the owner.

§ 15-15-406. Acknowledgment.

A beneficiary deed or revocation of a beneficiary deed shall be subject to the requirements of section 38-35-109(2), C.R.S., and may be acknowledged in accordance with section 38-35-101, C.R.S.

§ 15-15-407. Vesting of ownership in grantee-beneficiary.

(1) Title to the interest in real property transferred by a beneficiary deed shall vest in the designated grantee-beneficiary only on the death of the owner.

(2) A grantee-beneficiary of a beneficiary deed takes title to the owner’s interest in the real property conveyed by the beneficiary deed at the death of the owner subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests, affecting title to the property, whether created before or after the recording of the beneficiary deed, or to which the owner was subject during the owner’s lifetime including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust, or other lien. The grantee-beneficiary also takes title subject to any interest in the property of which the

grantee-beneficiary has either actual or constructive notice.

(3)(a) A person having an interest described in subsection (2) of this section whose interest is not recorded in the records of the office of the clerk and recorder of the county in which the property is located at the time of the death of the owner, shall record evidence or a notice of the interest in the property not later than four months after the death of the owner. The notice shall name the person asserting the interest, describe the real property, and describe the nature of the interest asserted.

(b) Failure to record evidence or notice of interest in the property described in subsection (2) of this section within four months after the death of the owner shall forever bar the person from asserting an interest in the property as against all persons who do not have notice of the interest. A person who, without notice, obtains an interest in the property acquired by the grantee-beneficiary shall take the interest free from all persons who have not recorded their notice of interest in the property or evidence of their interest prior to the expiration of the four-month period.

(4) The interest of the grantee-beneficiary shall be subject to any claim of the department of health care policy and financing for recovery of medical assistance payments pursuant to section 25.5-4-301 or 25.5-4-302, C.R.S., which shall be enforced in accordance with section 15-15-409.

(5) The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries.

§ 15-15-408. Joint tenancy.

(1) A joint tenant of an interest in real property may use the procedures described in this part 4 to transfer his or her interest effective upon the death of such joint tenant. However, title to the interest shall vest in the designated grantee-beneficiary only if the joint tenant-grantor is the last to die of all of the joint tenants of such interest. If a joint tenant-grantor is not the last joint tenant to die, the beneficiary deed shall not be effective, and the beneficiary deed shall not make the grantee-beneficiary an owner in joint tenancy with the surviving joint tenant or tenants. A beneficiary deed shall not sever a joint tenancy.

(2) As used in this section, "joint tenant" means a person who owns an interest in real property as a joint tenant with right of survivorship.

§ 15-15-409. Rights of creditors and others.

Repealed.

§ 15-15-410. Purchaser from grantee-beneficiary protected.

(1) Subject to the rights of claimants under section 15-15-407(2), if the property acquired by a grantee-beneficiary or a security interest therein is acquired for value and without notice by a purchaser from, or lender to, a grantee-beneficiary, the purchaser or lender shall take title free of rights of an interested person in the deceased owner's estate and shall not incur personal liability to the estate or to any interested person.

(2) For purposes of this section, any recorded instrument evidencing a transfer to a purchaser from, or lender to, a grantee-beneficiary on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that the transfer was made for value. Any such sale or loan by the grantee-beneficiary shall not relieve the grantee-beneficiary of the

obligation to the personal representative of the deceased owner's estate under section 15-15-409.

§ 15-15-411. Limitations on actions and proceedings against grantee-beneficiaries.

(1) Unless previously adjudicated or otherwise barred, the claim of a claimant to recover from a grantee-beneficiary who is liable to pay the claim, and the right of an heir or devisee or of a personal representative acting on behalf of an heir or devisee, to recover property from a grantee-beneficiary or the value thereof from a grantee-beneficiary is forever barred as follows:

(a) A claim by a creditor of the owner is forever barred at one year after the owner's death.

(b) Any other claimant or an heir or devisee is forever barred at the earlier of the following:

(I) Three years after the owner's death; or

(II) One year after the time of recording the proof of death of the owner in the office of the clerk and recorder in the county in which the legal property is located.

(2) Nothing in this section shall be construed to bar an action to recover property or value received as the result of fraud.

§ 15-15-412. Nontestamentary disposition.

A beneficiary deed shall not be construed to be a testamentary disposition and shall not be invalidated due to nonconformity with the provisions of the "Colorado Probate Code" governing wills.

§ 15-15-413. Proof of death.

Proof of the death of the owner or a grantee-beneficiary shall be established in the same manner as for proving the death of a joint tenant.

§ 15-15-414. Disclaimer.

A grantee-beneficiary may refuse to accept all or any part of the real property interest described in a beneficiary deed. A grantee-beneficiary may disclaim all or any part of the real property interest described in a beneficiary deed by any method provided by law. If a grantee-beneficiary refuses to accept or disclaims any real property interest, the grantee-beneficiary shall have no liability by reason of being designated as a grantee-beneficiary under this part 4.

§ 15-15-415. Applicability.

The provisions of this part 4 shall apply to beneficiary deeds executed by owners who die on or after the effective date of House Bill 04-1048, as enacted at the second regular session of the sixty-fourth general assembly.

Kansas

§ 59-3501. Real estate; transfer-on-death.

(a) An interest in real estate may be titled in transfer-on-death, TOD, form by recording a deed signed by the record owner of such interest, designating a grantee beneficiary or beneficiaries of the interest. Such deed shall transfer ownership of such interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration.

(b) The signature, consent, or agreement of or notice to a grantee beneficiary of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.

§ 59-3502. Same; filing of form with register of deeds.

An interest in real estate is titled in transfer-on-death form by executing, acknowledging and recording in the office of the register of deeds in the county where the real estate is located, prior to the death of the owner, a deed in substantially the following form:

(Name of owner) as owner transfers on death to (name of beneficiary)

_____ as grantee beneficiary, the following described interest in real estate: (here insert description of the interest in real estate). THIS TRANSFER ON DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY THIS OWNER FOR THIS INTEREST IN REAL ESTATE.

Instead of the words “transfer-on-death” the abbreviation “TOD” may be used.

§ 59-3503. Same; beneficiary; revocation; change; revocation by will, prohibited.

(a) A designation of the grantee beneficiary may be revoked at any time prior to the death of the record owner, by executing, acknowledging and recording in the office of the register of deeds in the county where the real estate is located an instrument describing the interest revoking the designation. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required.

(b) A designation of the grantee beneficiary may be changed at any time prior to the death of the record owner, by executing, acknowledging and recording a subsequent transfer-on-death deed in accordance with K.S.A. 2004 Supp. 59-3502. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required. A subsequent transfer-on-death beneficiary designation revokes all prior designations of grantee beneficiary or beneficiaries by such record owner for such interest in real estate.

(c) A transfer-on-death deed executed, acknowledged and recorded in accordance with this act may not be revoked by the provisions of a will.

§ 59-3504. Same; vesting of ownership in beneficiary; grantee beneficiary.

(a) Title to the interest in real estate recorded in transfer-on-death form shall vest in the designated grantee beneficiary or beneficiaries on the death of the record owner.

(b) Grantee beneficiaries of a transfer-on-death deed take the record owner’s interest in the real estate at death subject to all conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the record owner’s lifetime including, but not limited to, any executory contract of sale, option to purchase,

lease, license, easement, mortgage, deed of trust or lien, claims of the state of Kansas for medical assistance, as defined in K.S.A. 39-702, and amendments thereto, pursuant to subsection (g)(2) of K.S.A. 39-709, and amendments thereto, and to any interest conveyed by the record owner that is less than all of the record owner's interest in the property.

(c) If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.

§ 59-3505. Same; joint owner.

(a) A record joint owner of an interest in real estate may use the procedures in this act to transfer such interest in transfer-on-death form. However, title to such interest shall vest in the designated grantee beneficiary or beneficiaries only if such record joint owner is the last to die of all of the record joint owners of such interest. A deed in transfer-on-death form shall not sever a joint tenancy.

(b) As used in this section, "joint owner" means a person who owns an interest in real estate as a joint tenant with right of survivorship.

§ 59-3506. Same; application of 58-2414 to grantor.

The provisions of K.S.A. 58-2414, and amendments thereto, apply to the grantor of a transfer-on-death deed.

§ 59-3507. Same; nontestamentary disposition.

A deed in transfer-on-death form shall not be considered a testamentary disposition and shall not be invalidated due to nonconformity with the provisions of chapter 59 of the Kansas Statutes Annotated.

Missouri

§ 461.001. Nontestamentary provisions.

Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, stock certificate, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust agreement, declaration of trust, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust or to evidence ownership of property is deemed to be nontestamentary, and exempt from the requirements of section 473.087, RSMo, and section 474.320, RSMo:

- (1) That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after the decedent's death to a person or persons designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;
- (2) That any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand;
- (3) That any property which is the subject of the instrument shall pass on decedent's death to a person or persons designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;
- (4) Except to the extent specifically excluded thereunder, sections 461.003 to 461.081 apply to transfers under this section.

§ 461.003. Law, how cited.

Sections 461.003 to 461.081 may be cited as the "Nonprobate Transfers Law of Missouri".

§ 461.005. Definitions.

In sections 461.003 to 461.081, unless the context otherwise requires, the following terms mean:

- (1) "Beneficiary", a person or persons designated or entitled to receive property pursuant to a nonprobate transfer on surviving one or more persons;
- (2) "Beneficiary designation", a provision in writing that is not a will that designates the beneficiary of a nonprobate transfer, including the transferee in an instrument that makes the transfer effective on death of the owner, and that complies with the conditions of any governing instrument, the rules of any transferring entity and applicable law;
- (3) "Death of the owner", in the case of joint owners, means death of the last surviving owner;

- (4) “In proper form”, a phrase which applies to a beneficiary designation or a revocation or change thereof, or a request to make, revoke or change a beneficiary designation, which complies with the terms of the governing instrument, the rules of the transferring entity and applicable law, including any requirements with respect to supplemental documents;
- (5) “Joint owners”, persons who hold property as joint tenants with right of survivorship and a husband and wife who hold property as tenants by the entirety;
- (6) “LDPS”, an abbreviation of lineal descendants per stirpes which may be used in a beneficiary designation to designate a substitute beneficiary as provided in section 461.045;
- (7) “Nonprobate transfer”, a transfer of property taking effect upon the death of the owner, pursuant to a beneficiary designation. A nonprobate transfer under sections 461.003 to 461.081 does not include survivorship rights in property held as joint tenants or tenants by the entirety, a transfer to a remainderman on termination of a life tenancy, a transfer under a trust established by an individual, either inter vivos or testamentary, a transfer pursuant to the exercise or nonexercise of a power of appointment, or a transfer made on death of a person who did not have the right to designate his or her estate as the beneficiary of the transfer;
- (8) “Owner”, a person or persons having a right, exercisable alone or with others, regardless of the terminology used to refer to the owner in any written beneficiary designation, to designate the beneficiary of a nonprobate transfer, and includes joint owners. The provisions of this subdivision shall apply to all beneficiary deeds executed and filed at any time, including, but not limited to, those executed and filed on or before August 28, 2005;
- (9) “Ownership in beneficiary form”, holding property pursuant to a registration in beneficiary form or other writing that names the owner of the property followed by a transfer on death direction and the designation of a beneficiary;
- (10) “Person”, living individuals, entities capable of owning property and fiduciaries;
- (11) “Proof of death”, includes a death certificate or record or report that is prima facie proof or evidence of death under section 472.290, RSMo;
- (12) “Property”, any present or future interest in property, real or personal, tangible or intangible, legal or equitable. Property includes a right to direct or receive payment of a debt, money or other benefits due under a contract, account agreement, deposit agreement, employment contract, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust or law, a right to receive performance remaining due under a contract, a right to receive payment under a promissory note or a debt maintained in a written account record, rights under a certificated or uncertificated security, rights under an instrument evidencing ownership of property issued by a governmental agency and rights under a document of title within the meaning of section 400.1-201, RSMo;

(13) “Registration in beneficiary form”, titling of an account record, certificate, or other written instrument evidencing ownership of property in the name of the owner followed by a transfer on death direction and the designation of a beneficiary;

(14) “Security”, a certificated or uncertificated security as defined in section 400.8-102, RSMo, including securities as defined in section 409.401, RSMo;

(15) “Transfer on death direction”, the phrase “transfer on death to” or the phrase “pay on death to” or the abbreviation “TOD” or “POD” after the name of the owners and before the designation of the beneficiary; and

(16) “Transferring entity”, a person who owes a debt or is obligated to pay money or benefits, render contract performance, deliver or convey property, or change the record of ownership of property on the books, records and accounts of an enterprise or on a certificate or document of title that evidences property rights, and includes any governmental agency, business entity or transfer agent that issues certificates of ownership or title to property and a person acting as a custodial agent for an owner’s property.

§ 461.009. Nonprobate transfers not subject to requirements of a will.

Nonprobate transfers are effective with or without consideration, and are not to be considered testamentary or subject to section 473.087, RSMo, (dealing with the requirement to probate a will), and section 474.320, RSMo, (dealing with will form, execution and attestation).

§ 461.011. Death of owner, authority of agent.

For the purpose of discharging its duties under the nonprobate transfers law, the authority of a transferring entity acting as agent for an owner of property subject to a nonprobate transfer shall not cease at death of the owner. The transferring entity shall transfer the property to the designated beneficiary in accordance with the governing instrument, the rules of the transferring entity and sections 461.003 to 461.081.

§ 461.012. Nonprobate transfers subject to agreement of transferor.

1. When any of the following is required, provision for a nonprobate transfer is a matter of agreement between the owner and the transferring entity, under such rules, terms and conditions as the owner and transferring entity may agree:

(1) Submission to the transferring entity of a beneficiary designation under a governing instrument;

(2) Registration by a transferring entity of a transfer on death direction on any certificate or record evidencing ownership of property;

(3) The consent of a contract obligor for a transfer of performance due under the contract;

(4) The consent of a financial institution for a transfer of an obligation of the financial institution; or

(5) The consent of a transferring entity for a transfer of an interest in the transferring entity.

2. Whenever subsection 1 of this section is applicable, sections 461.003 to 461.081 do not impose an obligation on a transferring entity to accept an owner's request to make provision for a nonprobate transfer of property.

3. When a beneficiary designation, revocation or change is subject to acceptance by a transferring entity, the transferring entity's acceptance of the beneficiary designation, revocation or change relates back to and is effective as of the time when the request was received by the transferring entity.

§ 461.014. Transfer obligation resulting from acceptance and registration.

When a transferring entity accepts a beneficiary designation or beneficiary assignment, or registers property in beneficiary form, the acceptance or registration constitutes the agreement of the owner and transferring entity that, unless the beneficiary designation is revoked or changed prior to the owner's death, on proof of death of the owner and compliance with the transferring entity's requirements for showing proof of entitlement, the property will be transferred to and placed in the name and control of the beneficiary in accordance with the beneficiary designation or transfer on death direction, the agreement of the parties and sections 461.003 to 461.081.

§ 461.021. Beneficiary designation under written instrument or law, effect.

A beneficiary designation, under a written instrument or law, that authorizes a transfer of property pursuant to a written designation of beneficiary, transfers the right to receive the property to the designated beneficiary who survives, effective on death of the owner, if the beneficiary designation is executed and delivered in proper form to the transferring entity prior to the death of the owner.

§ 461.023. Assignments effective on death of owner—delivery, effect.

1. A written assignment of a contract right that assigns the right to receive any performance remaining due under the contract to an assignee designated by the owner, that expressly states that the assignment is not to take effect until the death of the owner, transfers the right to receive performance due under the contract to the designated assignee beneficiary, effective on death of the owner, if the assignment is executed and delivered in proper form to the contract obligor prior to the death of the owner or is executed in proper form and acknowledged before a notary public or other person authorized to administer oaths. A beneficiary assignment need not be supported by consideration or be delivered to the assignee beneficiary.

2. This section does not preclude other methods of assignment that are permitted by law and that have the effect of postponing enjoyment of a contract right until the death of the owner.

§ 461.025. Deeds effective on death of owner—recording, effect.

1. A deed that conveys an interest in real property to a grantee designated by the owner, that expressly states that the deed is not to take effect until the death of the owner, transfers the interest provided to the designated grantee beneficiary, effective on death of the owner, if the deed is executed and filed of record with the recorder of deeds in the city or county or counties in which the real property is situated prior to the death of the owner. A beneficiary deed need not be supported by consideration or be delivered to the grantee beneficiary. A beneficiary deed may be used to transfer an interest in real property to a trust estate, regardless of such trust's revocability.

2. This section does not preclude other methods of conveyancing that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner. This section does not invalidate any deed, otherwise effective by law to convey title to the interest and estates therein provided, that is not recorded until after the death of the owner.

§ 461.026. Writing intended to transfer tangible personal property upon death.

1. A deed of gift, bill of sale or other writing intended to transfer an interest in tangible personal property, that expressly states that the transfer is not to take effect until the death of the owner, transfers ownership to the designated transferee beneficiary, effective on death of the owner, if the instrument is in other respects sufficient to transfer the type of property involved and is executed by the owner and acknowledged before a notary public or other person authorized to administer oaths. A beneficiary transfer instrument need not be supported by consideration or be delivered to any transferee beneficiary.

2. This section does not preclude other methods of transferring ownership of tangible personal property that are permitted by law and that have the effect of postponing enjoyment of property until the death of the owner.

§ 461.027. Transfer of property to beneficiary form.

1. A transferor of property, with or without consideration, may directly transfer the property to a transferee to hold as owner in beneficiary form.

2. A transferee under an instrument described in subsection 1 of this section shall be the owner of the property for all purposes and shall have all the rights to the property otherwise provided by law to owners, including the right to revoke or change the beneficiary designation.

3. A direct transfer of property to a transferee to hold as owner in beneficiary form is effective when the writing perfecting the transfer becomes effective to make the transferee the owner.

§ 461.028. Registration of property, including accounts and securities in beneficiary form, effect.

1. Property may be held or registered in beneficiary form by including in the name in which the property is held or registered a direction to transfer the property on death of the owner to a beneficiary designated by the owner.
2. Property is registered in beneficiary form by showing on the account record, security certificate or instrument evidencing ownership of the property the name of the owner, and the estate by which two or more joint owners hold the property, followed in substance by the words “transfer on death to (name of beneficiary)”. In lieu of the words “transfer on death to” the words “pay on death to” or the abbreviation “TOD” or “POD” may be used.
3. A transfer on death direction may only be placed on an account record, security certificate or instrument evidencing ownership of property by the transferring entity or a person authorized by the transferring entity.
4. A transfer on death direction transfers the owner’s interest in the property to the designated beneficiary, effective on the owner’s death, if the property is registered in beneficiary form prior to the death of the owner, or if the request to make the transfer on death direction is delivered in proper form to the transferring entity prior to the owner’s death.
5. An account record, security certificate or instrument evidencing ownership of property that contains a transfer on death direction written as part of the name in which the property is held or registered, is conclusive evidence in the absence of fraud, duress, undue influence or evidence of clerical mistake by the transferring entity that the direction was regularly made by the owner and accepted by the transferring entity, and was not revoked or changed prior to the death giving rise to the transfer; and the transferring entity shall have no obligation to retain the original writing, if any, by which the owner caused the property to be registered in beneficiary form, more than six months after the transferring entity has mailed or delivered to the owner, at the address shown on the registration, an account statement, certificate or instrument that shows the manner in which the property is held or registered in beneficiary form.

§ 461.031. Ownership of property in beneficiary form during lifetime and at death.

1. Prior to the death of the owner, a beneficiary shall have no rights in the property by reason of the beneficiary designation and the signature or agreement of the beneficiary shall not be required for any transaction respecting the property.
2. On death of one of two or more joint owners, property with respect to which a beneficiary designation has been made belongs to the surviving joint owner or owners, and the right of survivorship continues as between two or more surviving joint owners.
3. On death of the owner, property passes by operation of law to the beneficiary.

4. If two or more beneficiaries survive, there is no right of survivorship among the beneficiaries in the event of death of a beneficiary thereafter unless the beneficiary designation expressly provides for survivorship among them, and, unless so expressly provided, surviving beneficiaries hold their separate interests in the property as tenants in common. The share of any subsequently deceased beneficiary belongs to that beneficiary's estate.

5. If no beneficiary survives the owner, the property belongs to the estate of the owner.

§ 461.033. Revocation or change of beneficiary designation.

1. A beneficiary designation may be revoked or changed in whole or in part during the lifetime of the owner. A revocation or change of a beneficiary designation involving property of joint owners may only be made with the agreement of all owners then living.

2. A subsequent beneficiary designation revokes a prior beneficiary designation unless the subsequent beneficiary designation expressly provides otherwise.

3. A revocation or change in a beneficiary designation shall comply with the terms of the governing instrument, the rules of the transferring entity and the applicable law.

4. A beneficiary designation may not be revoked or changed by the provisions of a will unless the beneficiary designation expressly grants the owner the right to revoke or change a beneficiary designation by will.

5. A transfer during the owner's lifetime of the owner's interest in property, with or without consideration, terminates the beneficiary designation with respect to the property transferred.

6. The effective date of a revocation or change in a beneficiary designation shall be determined in the same manner as the effective date of a beneficiary designation.

§ 461.035. Revocation or change in beneficiary designation by agent.

1. An attorney in fact, custodian, conservator or other agent may not make, revoke or change a beneficiary designation unless the document establishing the agent's right to act, or a court order, expressly authorizes such action and such action complies with the terms of the governing instrument, the rules of the transferring entity and applicable law.

2. This section shall not prohibit the authorized withdrawal, sale, pledge or other present transfer of the property by an attorney in fact, custodian, conservator or other agent notwithstanding the fact that the effect of the transaction may be to extinguish a beneficiary's right to receive a transfer of the property at the death of the owner.

§ 461.037. Loss, destruction, damage or involuntary conversion—property subject to beneficiary designation.

In the event property subject to a beneficiary designation is lost, destroyed, damaged or involuntarily converted during the owner's lifetime, the beneficiary succeeds to any right with respect to the loss, destruction, damage or involuntary conversion which the owner would have had if the owner had survived, but has no interest in any payment or substitute property received by the owner during the owner's lifetime.

§ 461.039. Effect of collateral conveyance, contract or pledge of property subject to nonprobate transfer—requests for payment.

1. A beneficiary of a nonprobate transfer takes the owner's interest in the property at death subject to all conveyances, assignments, contracts, setoffs, licenses, easements, liens and security interests made by the owner or to which the owner was subject during the owner's lifetime.

2. A beneficiary of a nonprobate transfer of an account with a bank, savings and loan association, credit union, broker or mutual fund takes the owner's interest in the property at death subject to all requests for payment of money issued by the owner prior to death, whether paid by the transferring entity before or after death, or unpaid. The beneficiary is liable to the payee of an unsatisfied request for payment, to the extent that it represents an obligation that was enforceable against the owner during the owner's lifetime. To the extent that a claim properly paid by the personal representative of the owner's estate includes the amount of an unsatisfied request for payment to the claimant, the personal representative shall be subrogated to the rights of the claimant as payee. Each beneficiary's liability with respect to an unsatisfied request for payment is limited to the same proportionate share of the request for payment as the beneficiary's proportionate share of the account under the beneficiary designation. Beneficiaries shall have the right of contribution among themselves with respect to requests for payment which are satisfied after the owner's death, to the extent the requests for payment would have been enforceable by the payees. In no event shall a beneficiary's liability to payees, the owner's estate and other beneficiaries under this section and section 461.300 with respect to all requests for payment exceed the value of the account received by the beneficiary. If a request for payment which would not have been enforceable under this section is satisfied from a beneficiary's share of the account, the beneficiary shall not be liable to any other payee or the owner's estate under this section or section 461.300 for the amount so paid, but the beneficiary shall have no right of contribution against other beneficiaries with respect to that amount.

§ 461.042. Survival required.

1. An individual who is a beneficiary of a nonprobate transfer shall not be entitled to a transfer unless the individual survives the owner by one hundred twenty hours.

2. If an owner provides and the transferring entity accepts, or if a governing instrument or applicable law provides, a period of survival different than one hundred twenty hours, the period

designated shall determine the survival requirement of beneficiaries under this section. An owner and transferring entity may agree that certain circumstances raise a different presumption of survival or nonsurvival.

3. This section does not apply to survivorship rights of joint owners.

§ 461.043. Validity of beneficiary designation—amendment or revocation of trust.

1. A beneficiary designation designating a trustee under a trust established or to be established by the owner or some other person, including a funded or unfunded trust, shall not be invalid because the trust is amendable or revocable or both or because the trust was amended after the designation.

2. Unless a beneficiary designation provides otherwise, a trust that was revoked or terminated before the death of the owner shall be deemed not to have survived the owner.

3. Unless a beneficiary designation provides otherwise, a legal entity or trust that does not exist or come into existence at the time of the owner's death shall be deemed not to have survived the owner.

§ 461.045. Lineal descendant substitutes.

1. Whenever a person designated as beneficiary of a nonprobate transfer is a lineal descendant of the owner, and the beneficiary is deceased at the time the beneficiary designation is made or does not survive the owner, or is treated as not surviving the owner, the nonsurviving beneficiary's share shall belong to that beneficiary's lineal descendants per stirpes who survive the owner, to take in place of and in substitution for the nonsurviving beneficiary, the same as the beneficiary would have taken if the beneficiary had survived. This subsection shall not apply to a beneficiary designation with the notation "no LDPS" after a beneficiary's name or other words negating an intention to direct the transfer to the lineal descendant substitutes of a nonsurviving beneficiary.

2. A beneficiary designation may provide that the share of any beneficiary not related to the owner as provided in subsection 1 of this section, and who does not survive the owner, shall belong to that beneficiary's lineal descendants per stirpes who survive the owner, by including after the name of the beneficiary the words "and lineal descendants per stirpes" or the abbreviation "LDPS".

3. Lineal descendants, taking as substitutes for a beneficiary of a nonprobate transfer, if they are of the same degree of kinship to the nonsurviving beneficiary, share equally, but if they are of unequal degree, then those of more remote degree take the share of their parent by representation.

4. Whenever a nonprobate transfer is to be made to a beneficiary's lineal descendants per stirpes, the property shall belong to such lineal descendants of the beneficiary who survive the owner,

and in such proportions, as would result if the survivors were inheriting personal property of the beneficiary under the laws of Missouri and the beneficiary had died at the time of the owner's death, intestate, unmarried, domiciled in Missouri and possessed of such property.

5. Whenever a beneficiary of a nonprobate transfer does not survive the owner and the beneficiary is a person for whom the beneficiary's surviving lineal descendants take as substitutes under subsection 1 or 2 of this section, if there are no lineal descendants of the beneficiary who survive the owner, the beneficiary's share shall belong to the surviving beneficiaries, or to the owner's estate, as would be the case if transfer to the beneficiary's lineal descendants were not required to be considered.

§ 461.048. Disclaimer.

If a beneficiary of a nonprobate transfer disclaims in whole or in part the nonprobate transfer in the manner provided by law, then with respect to the disclaimed transfer, the disclaimant is treated as having predeceased the owner unless the beneficiary designation provides otherwise; but the possibility that a beneficiary or descendant may disclaim a transfer shall not require any transferring entity to withhold making the transfer in the normal course of business.

§ 461.051. Marriage dissolution or annulment—revocation of transfer to former spouse, exception—transferred then to whom—revival upon marriage to former spouse.

1. If, after an owner makes a beneficiary designation, the owner's marriage is dissolved or annulled, any provision of the beneficiary designation in favor of the owner's former spouse or a relative of the owner's former spouse is revoked on the date the marriage is dissolved or annulled, whether or not the beneficiary designation refers to marital status. The beneficiary designation shall be given effect as if the former spouse or relative of the former spouse had disclaimed the revoked provision.

2. Subsection 1 of this section does not apply to a provision of a beneficiary designation that has been made irrevocable, or revocable only with the spouse's consent, or that is made after the marriage was dissolved, or that expressly states that marriage dissolution shall not affect the designation of a spouse or relative of a spouse as beneficiary.

3. Any provision of a beneficiary designation revoked solely by this section is revived by the owner's remarriage to the former spouse or by a nullification of the marriage dissolution or annulment.

4. In this section, "a relative of the owner's former spouse" means an individual who is related to the owner's former spouse by blood, adoption or affinity and who, after the divorce or annulment, is not related to the owner by blood, adoption or affinity.

§ 461.054. Disqualification for fraud, duress and undue influence and causing owner's death—proceeding to determine disqualification.

1. A beneficiary designation or a revocation of a beneficiary designation that is procured by fraud, duress or undue influence is void.
2. A beneficiary who willfully and unlawfully causes or participates with another in causing the death of the owner, or the insured individual under a life insurance policy or certificate, is disqualified from receiving any benefit of a nonprobate transfer from the owner or any proceeds payable as a result of the death of an individual insured under a life insurance policy or certificate. The beneficiary designation shall be given effect as if the disqualified beneficiary had disclaimed it. The fact that a beneficiary willfully and unlawfully caused or participated with another in causing the death of the owner may be established by a criminal conviction or guilty plea, after the right of direct appeal has been exhausted, or determined in a proceeding pursuant to subsection 3 of this section using a preponderance of the evidence standard.
3. On petition of any interested person or the transferring entity, the trier of fact shall determine whether a beneficiary designation or a revocation of a beneficiary designation is void by reason of subsection 1 of this section or whether subsection 2 of this section applies to prevent any person from receiving any benefit of the nonprobate transfer. The trier of fact may mitigate the effect of subsection 1 or 2 on any person as the trier of fact determines justice requires. Any party may demand a jury trial.

§ 461.059. Omitted spouse or child, after-born and after-adopted child—not applicable to multiple party accounts or TOD nonprobate transfers.

1. No law intended to protect a spouse or child from unintentional disinheritance by the will of a testator shall apply to a nonprobate transfer.
2. A beneficiary designation designating the children of the owner or any other person as a class and not by name shall include all children of the person, whether born or adopted before or after the beneficiary designation is made.
3. If a beneficiary designation names an individual who is a child of the owner, and if the owner has a child born or adopted after the owner makes the beneficiary designation, the after-born or after-adopted child shall be entitled to receive a fractional share of any property otherwise transferable to any child of the owner who is named in the beneficiary designation, computed as follows: the numerator of the fraction shall be one, and the denominator shall be the total number of the owner's children, whether born or adopted before or after the beneficiary designation was made and whether named or not in the beneficiary designation. The property otherwise transferable to the owner's children named in the beneficiary designation shall be reduced in the proportion that their shares bear to each other. If there is no share designated for any child of the owner an after-born or after-adopted child shall receive no share of the property subject to the nonprobate transfer.

4. A beneficiary designation, a governing instrument or the rules of any transferring entity may provide that the after-born child rule does not apply, in which case after-born and after-adopted children of the owner shall receive no share of property designated for named children of the owner.

5. A transferring entity shall have no obligation to apply subsection 3 of this section in making distribution with respect to property registered in beneficiary form. This exception for the transferring entity shall not affect the ownership interest of the after-born or after-adopted child.

§ 461.062. Nonprobate transfer rules.

1. The rights and obligations of the owner, beneficiary and transferring entity shall be governed by the nonprobate transfers law of Missouri.

2. When provision for a nonprobate transfer is a matter of agreement between the owner and the transferring entity pursuant to section 461.012, a transferring entity may adopt rules for the making, revocation, acceptance and execution of beneficiary designations and a transferring entity may adopt the rules in subdivisions (1) to (15) of subsection 3 of this section in whole or in part by incorporation by reference.

3. The following rules in subdivisions (1) to (15) of this subsection shall apply to all beneficiary designations except as otherwise provided by any governing instrument, the rules of any transferring entity, applicable law or the beneficiary designation:

(1) A beneficiary designation or a request for registration of property in beneficiary form shall be made in writing, signed by the owner and dated, except as provided in subdivision (2) of this subsection;

(2) A security that is not presently registered in the name of the owner may be registered in beneficiary form on instructions given by a broker or a person delivering the security;

(3) A beneficiary designation may designate one or more primary beneficiaries and one or more contingent beneficiaries;

(4) On property registered in beneficiary form, primary beneficiaries are the persons shown immediately following the transfer on death direction. Words indicating that the persons shown are primary beneficiaries are not required. If contingent beneficiaries are designated, their names in the registration shall be preceded by the words “contingent beneficiaries”, or an abbreviation thereof, or words of similar meaning;

(5) Unless a different percentage or fractional share is stated for each beneficiary, surviving multiple primary beneficiaries or multiple contingent beneficiaries share equally. When a percentage or fractional share is designated for multiple beneficiaries, either primary or contingent, surviving beneficiaries share in the proportion that their designated shares bear to each other;

(6) Provision for a transfer of unequal shares to multiple beneficiaries for property registered in beneficiary form may be expressed in the registration by a number preceding the name of each beneficiary that represents a percentage share of the property to be transferred to that beneficiary. The number representing a percentage share need not be followed by the word “percent” or a percent sign;

(7) A nonprobate transfer of property also transfers any interest, rent, royalties, earnings, dividends or credits earned or declared on the property, but not paid or credited before the owner’s death;

(8) If a distribution by a transferring entity pursuant to a nonprobate transfer results in fractional shares in a security or other property that is not divisible, the transferring entity may distribute the fractional shares in the name of all beneficiaries as tenants in common or as the beneficiaries may direct, or the transferring entity may sell the property, that is not divisible and distribute the proceeds to the beneficiaries in the proportions to which they are entitled;

(9) On death of the owner, the property, less a setoff for all amounts and charges owing by the owner to the transferring entity, shall belong to the surviving beneficiaries, and their lineal descendants when required as substitutes, as follows:

(a) If a multiple primary beneficiary does not survive and has no surviving lineal descendant substitutes, the nonsurviving primary beneficiary’s share shall belong to the surviving primary beneficiaries in the proportion that their shares bear to each other;

(b) If no primary beneficiary or lineal descendant substitute survives, the property shall belong to the surviving contingent beneficiaries in equal shares or in the percentage or fractional share stated;

(c) If a multiple contingent beneficiary does not survive and has no lineal descendant substitutes, the nonsurviving contingent beneficiary’s share shall belong to the surviving contingent beneficiaries in the proportion that their shares bear to each other;

(d) If no beneficiary survives the owner, the property shall belong to the owner’s estate;

(10) If a trustee designated as a beneficiary does not survive the owner, resigns or is unable or unwilling to execute the trust as trustee, and, if within one year of the owner’s death no successor trustee has been appointed or has undertaken to act, or if a trustee is designated as beneficiary and no trust instrument or probated will creating an express trust has been presented to the transferring entity, the transferring entity may in its discretion make the distribution as it would be made if the trust did not survive the owner;

(11) If, within six months of the owner’s death, the transferring entity has not been presented evidence that a nonsurviving beneficiary for whom LDPS distribution applies had lineal descendants who survived the owner, the transferring entity may in its discretion make the transfer as if the beneficiary’s descendants, if any, did not survive the owner;

(12) If a beneficiary cannot be located at the time the transfer is made to located beneficiaries, the transferring entity shall hold the missing beneficiary's share. If the missing beneficiary's share is not claimed by the beneficiary or the beneficiary's personal representative or successors within one year of the owner's death, the transferring entity shall transfer the share as if the beneficiary did not survive the owner. The transferring entity shall have no obligation to attempt to locate a missing beneficiary, to pay interest on the share held for a missing beneficiary or to invest the missing beneficiary's share in any different property. Cash, interest, rent, royalties, earnings or dividends payable to the missing beneficiary may be held by the transferring entity at interest or reinvested by the transferring entity in the account or in a dividend reinvestment account associated with a security held for the missing beneficiary;

(13) If a transferring entity is required to make a nonprobate transfer to a minor or a disabled adult the transfer may be made pursuant to the Missouri transfers to minors law, chapter 404, RSMo, the Missouri personal custodian law, chapter 404, RSMo, or a similar law of another state;

(14) A written request for execution of a nonprobate transfer may be made by any beneficiary, a beneficiary's legal representative or attorney in fact, or the owner's personal representative. The request shall be under oath or affirmation, subscribed before a notary public or other person authorized to administer oaths, and shall include the following:

(a) The full name, address and tax identification number of each beneficiary;

(b) The percentage or fractional share to be distributed to each beneficiary;

(c) The manner in which percentage or fractional shares in nondivisible property or the proceeds therefrom are to be distributed;

(d) A statement that there are no known disputes as to the persons entitled to a distribution under the nonprobate transfer or the amounts to be distributed to each person, and no known claims that would affect the distribution requested;

(e) Such other information as the transferring entity may require;

(15) A written request pursuant to subdivision (14) of this subsection shall be accompanied by the following:

(a) Any certificate or instrument evidencing ownership of the contract, account, security or property;

(b) Proof of death of the owner and any nonsurviving beneficiary;

(c) An inheritance tax waiver from states that require it;

(d) Where the request is made by a legal representative, a certified copy of the court order appointing the legal representative; and

(e) Such other proof of entitlement as the transferring entity may require.

§ 461.065. Transferor protection.

1. The owner in making provision for a nonprobate transfer under sections 461.003 to 461.081 gives to the transferring entity the protections provided in this section for executing the owner's beneficiary designation.

2. The transferring entity may execute a nonprobate transfer with or without a written request.

3. The transferring entity may rely and act on:

(1) A certified or authenticated copy of a death certificate issued by an official or agency of the place where the death occurred as showing the fact, place, date, time of death and the identity of the decedent; or

(2) A certified or authenticated copy of any report or record of a governmental agency, domestic or foreign, that a person is missing, detained, dead or alive and the dates, circumstances and places disclosed by the record or report.

4. The transferring entity may rely and act on, and shall have no duty to verify, information in a written request made by a person specified in subdivision (14) of subsection 3 of section 461.062, under oath or affirmation, subscribed before a notary public or other person authorized to administer oaths, for execution of the beneficiary designation.

5. The transferring entity shall have no duty:

(1) To give notice to any person of the date, manner and persons to whom transfer will be made under the beneficiary designation, except as provided in subsection 6 of this section;

(2) To attempt to locate any beneficiary or lineal descendant substitute, or determine whether a nonsurviving beneficiary or descendant had lineal descendants who survived the owner;

(3) To locate a trustee or custodian, obtain appointment of a successor trustee or custodian, or discover the existence of a trust instrument or will that creates an express trust; or

(4) To determine any fact or law that would cause the beneficiary designation to be revoked in whole or in part as to any person because of change in marital status or other reason, or that would qualify or disqualify any person to receive a share under the nonprobate transfer, or that would vary the distribution provided in the beneficiary designation.

6. (1) The transferring entity shall have no duty to withhold making a transfer based on knowledge of any fact or claim adverse to the transfer to be made unless, prior to the transfer, the transferring entity has received written notice at a place and time and in a manner which affords a reasonable opportunity to act on it before the transfer is made, that:

- (a) Asserts a claim of beneficial interest in the transfer adverse to the transfer to be made;
- (b) Gives the name of the claimant and an address for communications directed to the claimant;
- (c) Identifies the deceased owner and the property to which the claim applies; and
- (d) States the amount and nature of the claim as it affects the transfer.

(2) If a notice as provided in subdivision (1) of this subsection is received by the transferring entity, the transferring entity may discharge any duty to the claimant by delivering a notice or sending a notice by certified mail to the claimant at the address given in the notice of claim advising that a transfer adverse to the claimant's asserted claim may be made in thirty days from the date of delivery or mailing unless the transfer is restrained by a court order. If the transferring entity so delivers or mails such a notice it shall withhold making the transfer for thirty days after the date of delivery or mailing and may then make the transfer unless restrained by a court order.

(3) No other notice or other information shown to have been available to the transferring entity, its transfer agent and their employees, shall affect the right to the protections provided in sections 461.003 to 461.081.

7. The transferring entity shall have no responsibility for the application or use of property transferred to a fiduciary which the fiduciary as such is entitled to receive.

8. Notwithstanding the protections provided the transferring entity in sections 461.003 to 461.081, in the event the transferring entity is uncertain as to the beneficiary entitled to receive a transfer or the beneficiary's proper share, or in the event of a dispute as to the proper transfer, the transferring entity may require the parties to adjudicate their respective rights or to furnish an indemnity bond protecting the transferring entity.

9. A transfer by the transferring entity in accordance with sections 461.003 to 461.081 and pursuant to the beneficiary designation in good faith and in reliance on information the transferring entity reasonably believes to be accurate, discharges the transferring entity from all claims for the amounts paid and the property transferred.

10. The protections provided a transferring entity in sections 461.003 to 461.081 are in addition to protections provided by chapters 400, 403, 404 and 456, RSMo.

§ 461.067. Rights of beneficiaries or others—improper distribution, liability of distributee—purchasers for value.

1. Any protection provided to a transferring entity or to a purchaser or lender for value under sections 461.003 to 461.081 shall have no bearing on the rights of beneficiaries or others in disputes among themselves concerning the ownership of the property.
2. Unless the payment or transfer can no longer be questioned because of adjudication, estoppel or limitations, a transferee of money or property pursuant to a nonprobate transfer that was improperly distributed or paid, is liable to return to the transferring entity or deliver to the rightful transferees the money or property improperly received and the income earned thereon by the transferee. If the transferee does not have the property, then the transferee is liable to return the value of the property as of the date of disposition, and the income and gain received by the transferee from the property and its proceeds. If the transferee has encumbered the property, the transferee shall satisfy any debt incurred that imposes an encumbrance on the property, sufficient to release any security interest, lien or other encumbrance on the property.
3. A purchaser for value of property or a lender who acquires a security interest in the property from a beneficiary of a nonprobate transfer after the death of the owner, in good faith, takes the property free of any claims of or liability to the owner's estate, creditors of the owner's estate, persons claiming rights as beneficiaries under the nonprobate transfer or heirs of the owner's estate, in absence of actual knowledge that the transfer was improper or that the information in an affidavit, if any, provided pursuant to subdivision (14) of subsection 3 of section 461.062 is not true; and, a purchaser or lender for value shall have no duty to verify sworn information relating to the nonprobate transfer. The protection provided by this subsection applies to information that relates to the ownership interest of the beneficiary in the property and the beneficiary's right to sell, encumber and transfer good title to a purchaser or lender and does not relieve a purchaser or lender from the notice imparted by instruments of record respecting the property.
4. A nonprobate transfer that is improper because of the application of sections 461.045 to 461.059 shall impose no liability on the transferring entity if made honestly in good faith, regardless of any negligence in determining the proper transferees. The remedy of the rightful transferees shall be limited to an action against the improper transferees.

§ 461.071. Rights of creditors.

A deceased owner's creditors, surviving spouse and unmarried minor children shall have the rights set forth in section 461.300 with respect to the value of property passing by nonprobate transfer.

§ 461.073. Scope and application of law.

1. Subject to the provisions of section 461.079, sections 461.003 to 461.081 apply to a nonprobate transfer on death if at the time the owner designated the beneficiary:

- (1) The owner was a resident of this state;
 - (2) The obligation to pay or deliver arose in this state or the property was situated in this state; or
 - (3) The transferring entity was a resident of this state or had a place of business in this state or the obligation to make the transfer was accepted in this state.
2. The direction for a nonprobate transfer on death of the owner and the obligation to execute the nonprobate transfer remain subject to the provisions of sections 461.003 to 461.081 despite a subsequent change in the beneficiary, in the rules of the transferring entity under which the transfer is to be executed, in the residence of the owner, in the residence or place of business of the transferring entity or in the location of the property.
3. Sections 461.003 to 461.045 and 461.059 to 461.065 do not apply to accounts or deposits in financial institutions unless the provisions of sections 461.003 to 461.081 are incorporated into the certificate, account or deposit agreement in whole or in part by express reference.
4. Sections 461.003 to 461.081 apply to transfer on death directions given to a personal custodian under the Missouri personal custodian law to the extent that they do not conflict with section 404.560, RSMo.
5. Sections 461.003 to 461.045 and 461.059 to 461.065 do not apply to certificates of ownership or title issued by the director of revenue.
6. Sections 461.003 to 461.045, 461.051 and 461.059 to 461.081 do not apply to property, money or benefits paid or transferred at death pursuant to a life or accidental death insurance policy, annuity, contract, plan or other product sold or issued by a life insurance company unless the provisions of sections 461.003 to 461.081 are incorporated into the policy or beneficiary designation in whole or in part by express reference.
7. Sections 461.003 to 461.045 and 461.059 to 461.065 do not apply to any nonprobate transfer where the governing instrument or law expressly provides that the nonprobate transfers law of Missouri shall not apply.
8. Section 461.051 shall not apply to any employee benefit plan governed by 29 U.S.C. Section 1001 et seq.

§ 461.076. Jurisdiction of probate division of circuit court.

The probate division of the circuit court may hear and determine questions and issue appropriate orders concerning the determination of the beneficiary who is entitled to receive a nonprobate transfer, the proper share of each beneficiary and any action to obtain the return of any money or property, or its value and earnings, improperly distributed to any person.

§ 461.079. Beneficiary designation and nonprobate transfer—law governing.

1. A beneficiary designation that purports to have been made and which is valid under the Uniform Probate Code, Uniform TOD Security Registration Law or similar law of another state is governed by the law of that state and the nonprobate transfer may be executed and enforced in this state.
2. The meaning and legal effect of a nonprobate transfer shall be determined by the local law of the particular state selected in a governing instrument or beneficiary designation.
3. The provisions of this chapter shall be applied and construed to effectuate their general purpose to make uniform the law with respect to the subject of this chapter among states enacting a similar law.

§ 461.081. Nonprobate transfer laws to be effective when—prior transfers to be valid.

1. Sections 461.003 to 461.081 shall apply to beneficiary designations for nonprobate transfers made on and after August 28, 1989. Sections 461.003 to 461.081 shall apply to all nonprobate transfers occurring on and after January 1, 1990.
2. Any provision for a nonprobate transfer of money, benefits or property at death as now permitted in sections 461.003 to 461.081, purported to have been made before August 28, 1989, is validated notwithstanding that there was no specific statutory authority for making the nonprobate transfer in that manner at the time provision for the nonprobate transfer was made.

§ 461.300. Nonprobate transfer—liability for pro rata share.

1. Each recipient of a recoverable transfer of a decedent's property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge the statutory allowances to the decedent's surviving spouse and dependent children, and claims remaining unpaid after application of the decedent's estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or inheritance or other transfer taxes imposed by reason of the decedent's death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. No proceeding may be brought under this section when the deficiency described in this subsection is solely attributable to costs and expenses of administration.
2. The obligation of a recipient of a recoverable transfer may be enforced by an action for accounting commenced within eighteen months following the decedent's death by the decedent's personal representative or a qualified claimant, but no action for accounting under this section shall be commenced by any qualified claimant unless the personal representative has received a written demand therefor by a qualified claimant, within sixteen months following the decedent's death. If the personal representative fails to commence an action within thirty days of the receipt of a written demand to do so, any qualified claimant may commence such action. If the personal representative fails to commence the action, the personal representative shall disclose to the

qualified claimant or qualified claimants who made such written demand all material knowledge within the possession of the personal representative reasonably relating to the identity of any recipient of a recoverable transfer made by the decedent. In the event the personal representative fails to provide such information with respect to any recoverable transfer of the decedent's property to the personal representative, the eighteen-month limitation is tolled for such recoverable transfer until such time as the personal representative provides such information. In the event the personal representative is alleged in a verified pleading to be a recipient of a recoverable transfer from the decedent, the court may appoint an administrator ad litem to represent the estate in any proceeding brought pursuant to this section. Sums recovered in an action for accounting under this section shall be administered by the personal representative as part of the decedent's estate.

3. The judgment in a proceeding authorized by this section shall take into account the expenses of administration of the estate including the cost of administering the additional assets obtained in the proceeding, and the costs of the proceeding to the extent authorized by this subsection. The court may order the costs of the proceeding, including attorney fees, to be treated as expenses of administration of the estate.

4. If an action for accounting has been commenced under this section within eighteen months following the decedent's death, then any party to the proceeding may join and bring into the action for accounting any other recipient of a recoverable transfer of the decedent's property even if the other recipient is not joined until more than eighteen months following the decedent's death. If an action for accounting has been commenced under this section more than eighteen months following the decedent's death pursuant to the tolling provisions of subsection 2 of this section, then the personal representative, or former personal representative, who received a recoverable transfer of the decedent's property shall be liable to account under the provisions of subsection 1 of this section for the value of all such property received by such personal representative, or former personal representative, and no other recipient of a recoverable transfer of the decedent's property may be joined or brought into the action, and in such case, full recovery, rather than pro rata recovery, may be had from the recoverable property received by such personal representative or former personal representative.

5. This section shall not affect the right of any transferring entity, as defined in section 461.005, to execute a direction of the decedent to make a payment or to make a recoverable transfer on death of the decedent, or make the transferring entity liable to the decedent's estate, unless before the payment or transfer is made the transferring entity has been served with process in a proceeding brought under this section and the transferring entity has had a reasonable time to act on it.

6. This section does not create a lien on any property that is the subject of a recoverable transfer, except as a lien may be perfected by the way of attachment, garnishment, or judgment in an accounting proceeding authorized by this section.

7. An action for accounting under the provisions of this section may be filed in the probate division of the circuit court, and the probate division of the circuit court may hear and determine

questions and issue appropriate orders in an action for accounting under this section. Any proceeding under this section and any statements by a personal representative in connection with any recoverable transfer shall be deemed to be proceedings or statements under the probate code that are subject to section 472.013, RSMo.

8. The recipient of any property held in trust that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, and the recipient of any property held in joint tenancy with right of survivorship that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, are subject to this section, but only to the extent of the decedent's contribution to the value of the property.

9. The provisions of this section shall apply to all actions commenced after August 28, 1995, except that with respect to decedents dying prior to August 28, 1995, an action for accounting under this section may be commenced within two years following the decedent's death.

10. As used in this section, the following terms mean:

(1) "Creditor", any person to whom the decedent is liable, which liability survives whether arising in contract, tort, or otherwise, and any person to whom the decedent's estate is liable for funeral expenses and the reasonable cost of a tombstone;

(2) "Dependent child", the decedent's minor children whom the decedent was obligated to support and the children who were in fact being supported by the decedent;

(3) "Qualified claimant", a creditor, surviving spouse, dependent child, or a person acting for a dependent child of the decedent;

(4) "Recoverable transfer", a nonprobate transfer of a decedent's property under sections 461.003 to 461.081 and any other transfer of a decedent's property other than from the administration of the decedent's probate estate that was subject to satisfaction of the decedent's debts immediately prior to the decedent's death, but only to the extent of the decedent's contribution to the value of such property.

Nevada

§ 111.109. Conveyance by deed which becomes effective upon death of grantor.

1. The owner of an interest in real property may create a deed that conveys his interest in real property to a grantee which becomes effective upon the death of the owner. Such a conveyance is subject to liens on the property in existence on the date of the death of the owner.
2. The owner of an interest in real property who creates a deed pursuant to subsection 1 may designate in the deed:
 - (a) Multiple grantees who will take title to the property upon his death as joint tenants with right of survivorship, tenants in common, husband and wife as community property, community property with right of survivorship or any other tenancy that is recognized in this State.
 - (b) A grantee or multiple grantees who will take title to the property upon his death as the sole and separate property of the grantee or grantees without the necessity of the filing of a quitclaim deed or disclaimer by the spouse of any grantee.
3. If the owner of the real property which is the subject of a deed created pursuant to subsection 1 holds the interest in the property as a joint tenant with right of survivorship or as community property with the right of survivorship and:
 - (a) The deed includes a conveyance of the interest from each of the other owners, the deed becomes effective on the date of the death of the last surviving owner; or
 - (b) The deed does not include a conveyance of the interest from each of the other owners, the deed becomes effective on the date of the death of the owner who created the deed only if the owner who conveyed his interest in real property to the grantee is the last surviving owner.
4. If an owner of an interest in real property who creates a deed pursuant to subsection 1 transfers his interest in the real property to another person during his lifetime, the deed created pursuant to subsection 1 is void.
5. If an owner of an interest in real property who creates a deed pursuant to subsection 1 executes and records more than one deed concerning the same real property, the deed that is last recorded before the death of the owner is the effective deed.
6. A deed created pursuant to subsection 1 is valid only if executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner or the death of the last surviving owner. The deed must be in substantially the following form:

DEED
I (We) _____ (owner) hereby convey to _____ (grantee), effective on my (our) death, the following described real property: (Legal Description)
THIS DEED IS REVOCABLE. THIS DEED DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE GRANTOR. THIS DEED REVOKES ALL PRIOR DEEDS BY THE GRANTOR WHICH CONVEY THE SAME REAL PROPERTY PURSUANT TO SUBSECTION 1 OF NRS 111.109 REGARDLESS OF WHETHER THE PRIOR DEEDS

FAILED TO CONVEY THE GRANTOR'S ENTIRE INTEREST IN THE SAME REAL PROPERTY.

(Signature of Grantor)

7. A deed created pursuant to subsection 1 may be revoked at any time by the owner or, if there is more than one owner, by any of the owners who created the deed. The revocation is valid only if executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner who executes the revocation. If the property is held as joint tenants with right of survivorship or as community property with the right of survivorship and the revocation is not executed by all of the owners, the revocation does not become effective unless the revocation is executed and recorded by the last surviving owner. The revocation of deed must be in substantially the following form:

REVOCATION OF DEED

The undersigned hereby revokes the deed recorded on _____ (date), in docket or book _____, at page _____, or instrument number _____, records of _____ County, Nevada.

(Date)

(Signature)

8. Upon the death of the last grantor of a deed created pursuant to subsection 1, a declaration of value of real property pursuant to NRS 375.060 and a copy of the death certificate of each grantor must be attached to a Death of Grantor Affidavit and recorded in the office of the county recorder where the deed was recorded. The Death of Grantor Affidavit must be in substantially the following form:

DEATH OF GRANTOR AFFIDAVIT

_____ (affiant name), being duly sworn, deposes and says that _____ (name of deceased), the decedent mentioned in the attached certified copy of the Certificate of Death, is the same person as _____ (name of grantor), named as the grantor or as one of the grantors in the deed recorded on _____ (date), in docket or book _____, at page _____, or instrument number _____, records of _____ County, Nevada, covering the following described property: (Legal Description)

_____ (affiant name) is the grantee or at least one of the grantees to whom the real property is conveyed upon the death of the grantor _____ (name of deceased) or is the authorized representative of the grantee or at least one of the grantees.

(Date)

(Signature)

9. The provisions of this section must not be construed to limit the recovery of benefits paid for Medicaid.

New Mexico

§ 45-6-401. Real property; transfer on death deed.

A. An interest in real property may be titled in transfer on death form by recording a deed signed and acknowledged by the record owner of the interest and designating a grantee beneficiary or beneficiaries of the interest. The deed transfers ownership of that interest upon the death of the owner. A transfer on death deed need not be supported by consideration.

B. The signature, consent or agreement of or notice to a grantee beneficiary of a transfer on death deed is not required for any purpose during the lifetime of the record owner.

C. An interest in real property is titled in transfer on death form by executing, acknowledging and recording in the office of the county clerk in the county where the real property is located, prior to the death of the owner, a deed in substantially the following form:

TRANSFER ON DEATH DEED

.....(Name of owner)... as owner transfers on death to ...(name of beneficiary)..., as grantee beneficiary, the following described interest in real property. THIS TRANSFER ON DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY THIS OWNER FOR THIS INTEREST IN REAL PROPERTY.

(description)

Witness.....hand.....and seal.....this.....day of 20...

.....(Seal)

(Here add acknowledgment(s)).

D. A designation of the grantee beneficiary may be revoked by the record owner at any time prior to the death of the record owner, by the record owner executing, acknowledging and recording in the office of the county clerk in the county where the real property is located an instrument describing the interest and revoking the designation. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required.

E. A designation of the grantee beneficiary may be changed by the record owner at any time prior to the death of the record owner, by the record owner executing, acknowledging and recording a subsequent transfer on death deed. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required. A subsequent transfer on death beneficiary designation revokes a prior designation to the extent there is a conflict between the two designations.

F. A transfer on death deed executed, acknowledged and recorded in accordance with this section is not revoked by the provisions of a will.

G. A joint tenancy in real property is not effected by a transfer on death deed, and the rights of a surviving joint tenant shall prevail over a grantee beneficiary named in a transfer on death deed.

If a joint tenant has executed a transfer on death deed, and if that joint tenant is the last surviving joint tenant, then the transfer on death deed is effective on that joint tenant's death.

H. Title to the interest in real estate recorded in transfer on death form shall vest in the designated grantee beneficiary or beneficiaries on the death of the record owner.

I. Grantee beneficiaries of a transfer on death deed take the record owner's interest in the real estate at death subject to all conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the record owner's lifetime and to any interest conveyed by the record owner that is less than all of the record owner's interest in the property.

J. If the assets of the estate are insufficient, a transfer resulting from a transfer on death deed is not effective against the estate of a deceased party to the extent needed to pay any claims against the estate and the statutory allowances to the surviving spouse and children.

K. If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.

Ohio

§ 5302.22 Transfer on death deed.

(A) A deed conveying any interest in real property, and in substance following the form set forth in this division, when duly executed in accordance with Chapter 5301. of the Revised Code and recorded in the office of the county recorder, creates a present interest as sole owner or as a tenant in common in the grantee and creates a transfer on death interest in the beneficiary or beneficiaries. Upon the death of the grantee, the deed vests the interest of the decedent in the beneficiary or beneficiaries. The deed described in this division shall in substance conform to the following form:

“Transfer on Death Deed

_____ (marital status), of _____ County, _____ (for valuable consideration paid, if any), grant(s) (with covenants, if any), to _____ whose tax mailing address is _____, transfer on death to _____, beneficiary(s), the following real property: (Description of land or interest in land and encumbrances, reservations, and exceptions, if any.)
Prior Instrument Reference: _____
_____, wife (husband) of the grantor, releases all rights of dower therein.
Executed this _____ day of _____.

(Signature of Grantor)
(Execution in accordance with Chapter 5301. of the Revised Code)”

(B) Any person who, under the Revised Code or the common law of this state, owns real property or any interest in real property as a sole owner or as a tenant in common may create an interest in the real property transferable on death by executing and recording a deed as provided in this section conveying the person’s entire, separate interest in the real property to one or more individuals, including the grantor, and designating one or more other persons, identified in the deed by name, as transfer on death beneficiaries.

A deed conveying an interest in real property that includes a transfer on death beneficiary designation need not be supported by consideration and need not be delivered to the transfer on death beneficiary to be effective.

(C) Upon the death of any individual who owns real property or an interest in real property that is subject to a transfer on death beneficiary designation made under a transfer on death deed as provided in this section, the deceased owner’s interest shall be transferred only to the transfer on death beneficiaries who are identified in the deed by name and who survive the deceased owner or that are in existence on the date of death of the deceased owner. The transfer of the deceased owner’s interest shall be recorded by presenting to the county auditor and filing with the county recorder an affidavit, accompanied by a certified copy of a death certificate for the deceased owner. The affidavit shall recite the name and address of each designated transfer on death beneficiary who survived the deceased owner or that is in existence on the date of the deceased owner’s death, the date of the deceased owner’s death, a description of the subject real property or interest in real property, and the names of each designated transfer on death beneficiary who

has not survived the deceased owner or that is not in existence on the date of the deceased owner's death. The affidavit shall be accompanied by a certified copy of a death certificate for each designated transfer on death beneficiary who has not survived the deceased owner. The county recorder shall make an index reference to any affidavit so filed in the record of deeds. Upon the death of any individual holding real property or an interest in real property that is subject to a transfer on death beneficiary designation made under a transfer on death deed as provided in this section, if the title to the real property is registered pursuant to Chapter 5309. of the Revised Code, the procedure for the transfer of the interest of the deceased owner shall be pursuant to section 5309.081 of the Revised Code.

§ 5302.23 Characteristics and ramifications of real property subject to transfer on death beneficiary designation.

(A) Any deed containing language that shows a clear intent to designate a transfer on death beneficiary shall be liberally construed to do so.

(B) Real property or an interest in real property that is subject to a transfer on death beneficiary designation as provided in section 5302.22 of the Revised Code or as described in division (A) of this section has all of the following characteristics and ramifications:

(1) An interest of a deceased owner shall be transferred to the transfer on death beneficiaries who are identified in the deed by name and who survive the deceased owner or that are in existence on the date of the deceased owner's death. If there is a designation of more than one transfer on death beneficiary, the beneficiaries shall take title in the interest in equal shares as tenants in common. If a transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of the deceased owner's death, and the deceased owner has designated one or more persons as contingent transfer on death beneficiaries as provided in division (B)(2) of this section, the designated contingent transfer on death beneficiaries shall take the same interest that would have passed to the transfer on death beneficiary had that transfer on death beneficiary survived the deceased owner or been in existence on the date of the deceased owner's death. If none of the designated transfer on death beneficiaries survives the deceased owner or is in existence on the date of the deceased owner's death and no contingent transfer on death beneficiaries have been designated or have survived the deceased owner, the interest of the deceased owner shall be distributed as part of the probate estate of the deceased owner of the interest.

(2) A transfer on death deed may contain a designation of one or more persons as contingent transfer on death beneficiaries, who shall take the interest of the deceased owner that would otherwise have passed to the designated transfer on death beneficiary if that named designated transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of death of the deceased owner. Persons designated as contingent transfer on death beneficiaries shall be identified in the deed by name.

(3) The designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a person designated as a transfer on death beneficiary has no interest in the

real property until the death of the owner of the interest.

(4) The designation in a deed of any transfer on death beneficiary may be revoked or changed at any time, without the consent of that designated transfer on death beneficiary, by the owner of the interest by executing in accordance with Chapter 5301. of the Revised Code and recording a deed conveying the grantor's entire, separate interest in the real property to one or more persons, including the grantor, with or without the designation of another transfer on death beneficiary.

(5) A fee simple title or any fractional interest in a fee simple title may be subjected to a transfer on death beneficiary designation.

(6) A designated transfer on death beneficiary takes only the interest that the deceased owner or owners held on the date of death, subject to all encumbrances, reservations, and exceptions.

(7) No rights of any lienholder, including, but not limited to, any mortgagee, judgment creditor, or mechanic's lien holder, shall be affected by the designation of a transfer on death beneficiary pursuant to this section and section 5302.22 of the Revised Code. If any lienholder takes action to enforce the lien, by foreclosure or otherwise through a court proceeding, it is not necessary to join the transfer on death beneficiary as a party defendant in the action unless the transfer on death beneficiary has another interest in the real property that is currently vested.

(8) Any transfer on death of real property or of an interest in real property that results from a deed designating a transfer on death beneficiary is not testamentary.

Wisconsin

§ 705.15. Nonprobate transfer of real property on death

(1) An interest in real property that is solely owned, owned by spouses as survivorship marital property, or owned by 2 or more persons as joint tenants may be transferred without probate to a designated TOD beneficiary as provided in this section on the death of the sole owner or the last to die of the multiple owners.

(2) A TOD beneficiary may be designated on a deed that evidences ownership of the property interest in the owner or owners by including the words “transfer on death” or “pay on death,” or the abbreviation “TOD” or “POD,” after the name of the owner or owners of the property and before the name of the beneficiary or beneficiaries. The designation may be included on the original deed that passes the property interest to the owner or owners or may be made at a later time by the sole owner or all then surviving owners by executing and recording another deed that designates a TOD beneficiary. A TOD beneficiary designation is not effective unless the deed on which the designation is made is recorded.

(3) The designation of a TOD beneficiary on a deed does not affect ownership of the property until the owner’s death. The designation may be canceled or changed at any time by the sole owner or all then surviving owners, without the consent of the beneficiary, by executing and recording another deed that designates a different beneficiary or no beneficiary. The recording of a deed that designates a TOD beneficiary or no beneficiary revokes any designation made in a previously recorded deed relating to the same property interest.

(4) On the death of the sole owner or the last to die of multiple owners, ownership of the interest in the real property passes, subject to any lien or other encumbrance, to the designated TOD beneficiary or beneficiaries who survive all owners and to any predeceased beneficiary’s issue who would take under s. 854.06(3). If no beneficiary or predeceased beneficiary’s issue who would take under s. 854.06(3) survives the death of all owners, the interest in the real property passes to the estate of the deceased sole owner or the estate of the last to die of the multiple owners.

(5) A TOD beneficiary’s interest in the property on the death of the sole owner or the last to die of multiple owners may be confirmed as provided in s. 863.27, 865.201, or 867.046.

(6) Chapter 854 [on “Transfers at Death – General Rules”] applies to transfers on death under this section.

§ 854.01. Definitions.

In this chapter:

- (1) “Extrinsic evidence” means evidence that would be inadmissible under the common law parole evidence rule or a similar doctrine because the evidence is not contained in the governing instrument to which it relates.
- (2) “Governing instrument” means a will; a deed; a trust instrument; an insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an instrument that creates or exercises a power of appointment; or any other dispositive, appointive, or nominative instrument that transfers property at death.
- (3) “Revocable,” with respect to a disposition, provision, or nomination, means one under which the decedent, at the time referred to, was alone empowered, by law or under the governing instrument, to change or revoke, regardless of whether the decedent was then empowered to designate himself or herself in place of a former designee, and regardless of whether the decedent then had the capacity to exercise the power.

§ 854.02. Scope.

This chapter applies to all statutes and governing instruments that transfer property at death.

§ 854.03. Requirement of survival by 120 hours.

- (1) Except as provided in sub. (5), if property is transferred to an individual under a statute or under a provision in a governing instrument that requires the individual to survive an event and it is not established that the individual survived the event by at least 120 hours, the individual is considered to have predeceased the event.
- (2) (a) In this subsection, “co-owners with right of survivorship” includes joint tenants, owners of survivorship marital property and other co-owners of property or accounts that are held under circumstances that entitle one or more persons to all of the property or account upon the death of one or more of the others.
(b) Except as provided in sub. (5), if property is transferred under a governing instrument that establishes 2 or more co-owners with right of survivorship, and if at least one of the co-owners did not survive the others by at least 120 hours, the property is transferred to the co-owners in proportion to their ownership interests.
- (3) Except as provided in subs. (4) and (5), if a husband and wife die leaving marital property and it is not established that one survived the other by at least 120 hours, 50% of the marital property shall be distributed as if it were the husband’s individual property and the husband had survived, and 50% of the marital property shall be distributed as if it were the wife’s individual property and the wife had survived.

(4) Except as provided in sub. (5), if the insured and the beneficiary under a policy of life or accident insurance have both died and it is not established that one survived the other by at least 120 hours, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. If the policy is the marital property of the insured and of the insured's spouse and there is no alternative beneficiary except the estate or the personal representative of the estate, the proceeds shall be distributed as marital property in the manner provided in sub. (3).

(5) (am) This section does not apply if any of the following conditions applies:

1. The statute or governing instrument requires the individual to survive an event by a specified period.

2. The statute or governing instrument indicates that the individual is not required to survive an event by any specified period.

3. The statute or governing instrument deals with simultaneous deaths or deaths in a common disaster and the provision is relevant to the facts.

4. The imposition of a 120-hour survival requirement would cause a nonvested property interest or a power of appointment to fail to be valid, or to be invalidated, under s. 700.16 or under the rule against perpetuities of the applicable jurisdiction.

5. The application of this section to more than one statute or governing instrument would result in an unintended failure or unintended duplication of a transfer.

6. The application of this section would result in the escheat of an intestate estate under s. 852.01 (3)

7. The statute or governing instrument specifies that this statute, or one similar to it, does not apply.

8. The imposition of a 120-hour survival requirement would be administratively cumbersome and would not change the identity of the ultimate beneficiaries of the property or the property that each beneficiary would receive.

(bm) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

(6) Unless the statute or governing instrument provides otherwise, proof that an individual survived the period required under subs. (1) to (4) must be by clear and convincing evidence.

§ 854.04. Representation; per stirpes; modified per stirpes; per capita at each generation; per capita.

(1) (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "by representation," "by right of representation," or "per stirpes," the property is divided into equal shares for the designated person's surviving children and for the designated person's deceased children who left surviving issue. Each surviving child and each deceased child who left surviving issue are allocated one share.

(b) The share of each deceased child allocated a share under par. (a) is divided among that person's issue in the same manner as under par. (a), repeating until the property is fully allocated among surviving issue.

(2) (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person by “modified per stirpes”, the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor and each deceased person in that same generation who left surviving issue are allocated one share.

(b) The share of each deceased person allocated a share in par. (a) is divided among that person’s issue in the same manner as under par. (a), repeating until the property is fully allocated.

(3) (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person “per capita at each generation,” the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor in that generation and each deceased person in that generation who left surviving issue are allocated one share. The shares of the deceased persons in that same generation who left surviving issue are combined for allocation under par. (b).

(b) The combined share created under par. (a) is divided among the surviving issue of the persons whose shares were combined in the same manner as under par. (a), as though all of those issue were the issue of one person. The process is repeated until the property is fully allocated.

(4) Except as provided in sub. (6), if a statute or governing instrument calls for property to be distributed to a group or class “per capita”, the property is divided into as many shares as there are surviving members of the group or class, and each member is allocated one share.

(5) For the purposes of subs. (1) to (3), all of the following apply:

(a) An individual who is deceased and who left no surviving issue is disregarded.

(b) An individual who has a surviving ancestor who is an issue of the designated person is not allocated a share.

(6) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

§ 854.05. No exoneration of encumbered property.

(1) In this section:

(a) “Debt” includes accrued interest on the debt.

(b) “Encumbrance” includes mortgages, liens, pledges and other security agreements that are encumbrances on property.

(2) (a) Except as provided in sub. (5), all property that is specifically transferred by a governing instrument shall be assigned to the transferee without exoneration of a debt that is secured by an encumbrance on the property.

(b) If the debt that is secured by the encumbrance on the property is paid in whole or in part out of other assets, the specifically transferred property shall be assigned to the transferee only if any of the following applies:

1. The transferee contributes to the person or entity that held the assets that were used to pay the debt an amount equal to the amount that was paid.

2. The person or entity secures the amount described in subd. 1. through a new encumbrance on the property.

(3) Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on property in which the decedent at the time of death had an interest as a joint tenant or as a holder of survivorship marital property is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the property.

(4) Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on the proceeds payable under a life insurance policy in which the decedent was the named insured is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the proceeds.

(5) (a) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

(b) A general directive to pay debts does not give rise to a presumption of exoneration.

§ 854.06. Predeceased transferee.

(1) In this section:

(a) “Provision in a governing instrument” includes all of the following:

1. A gift to an individual whether or not the individual is alive at the time of the execution of the instrument.

2. A share in a class gift only if a member of the class dies after the execution of the instrument.

3. An appointment by the decedent under any power of appointment, unless the issue who would take under this section could not have been appointees under the terms of the power.

(c) “Stepchild” means a child of the decedent’s surviving, deceased or former spouse, and not of the decedent.

(2) This section applies to revocable provisions in a governing instrument executed by the decedent that provide for an outright transfer upon the death of the decedent to any of the following persons:

(a) A grandparent of the decedent, or issue of a grandparent, subject to s. 854.21.

(b) A stepchild of the decedent, subject to s. 854.15.

(3) Subject to sub. (4), if a transferee under a provision described in sub. (2) does not survive the decedent but has issue who do survive, the issue of the transferee take the transfer per stirpes, as provided in s. 854.04 (1).

(4) (a) Subsection (3) does not apply if any of the following applies:

1. The governing instrument provides that a transfer to a predeceased beneficiary lapses.

2. The governing instrument designates one or more persons, classes, or groups of people as contingent transferees, in which case those transferees take in preference to those under sub.

(3) But if none of the contingent transferees survives, sub. (3) applies to the first group in the sequence of contingent transferees that has one or more transferees specified in sub. (2) who left surviving issue.

(bm) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

§ 854.07. Failed transfer and residue.

(1) Except as provided in sub. (4) and s. 854.06, if an attempted transfer under a governing instrument fails, the attempted transfer becomes part of the residue of the governing instrument. This subsection does not apply if the attempted transfer is itself a residuary transfer.

(2) Except as provided in sub. (4) and s. 854.06, if the residue of a governing instrument is to be transferred to 2 or more persons, the share of a residuary transferee that fails passes to the other residuary transferees in proportion to the interest of each in the remaining part of the residue.

(3) If a governing instrument other than a will does not effectively dispose of an asset that is governed by the instrument, that asset shall be paid or distributed to the transferor's probate estate.

(4) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

§ 854.08. Nonademption of specific gifts in certain cases.

(1) The common law doctrine of ademption by extinction, as it might otherwise apply to the situations governed by this section, is abolished.

(2)(a) Subject to sub. (6), if property that is the subject of a specific gift is sold by the person who executed the governing instrument within 2 years of the person's death, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any balance of the purchase price unpaid at the time of death, including any security interest in the property and interest accruing before death, together with the incidents of the specific gift.

2. A general pecuniary transfer equivalent to the amount of the purchase price paid to, or for the benefit of, the person within one year of the seller's death.

(b) Acceptance of a promissory note of the purchaser or a 3rd party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the person who executed the governing instrument or by a trustee under a revocable living trust created by the person is a sale by the person for purposes of this section.

(3) Subject to sub. (6), if insured property that is the subject of a specific gift is destroyed, damaged, lost, stolen or otherwise subject to any casualty compensable by insurance, the specific beneficiary has the right to the following amounts, if available under the governing instrument, reduced by any amount expended or incurred to restore or repair the property:

(a) Any insurance proceeds paid with respect to the property after the decedent's death, together with the incidents of the specific gift.

(b) A general pecuniary transfer equivalent to any insurance proceeds paid to, or for the benefit of, the decedent within one year of the decedent's death.

(4) (a) Subject to sub. (6), if property that is the subject of a specific gift is taken by condemnation prior to the death of the person who executed the governing instrument, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any amount of the condemnation award unpaid at the time of death.

2. A general pecuniary transfer equivalent to the amount of an award paid to, or for the benefit of, the person who executed the governing instrument within one year of that person's death.

(b) In the event of an appeal in a condemnation proceeding, the award is, for purposes of this section, limited to the amount established on the appeal. Acceptance of an agreed price or a jurisdictional offer is a sale under sub. (2).

(5) (a) In this subsection, "agent" means an agent under a durable power of attorney, as defined in s. 243.07 (1) (a).

(b) Subject to pars. (c) and (d) and sub. (6), if property that is the subject of a specific gift is sold or mortgaged by a guardian, conservator, or agent of the person who executed the governing instrument, or if a condemnation award or insurance proceeds are paid to a guardian, conservator, or agent, the specific beneficiary has the right to a general pecuniary transfer equivalent to the proceeds of the sale, mortgage, condemnation award, or insurance proceeds, reduced by any amount expended or incurred to restore or repair the property or to reduce the indebtedness on the mortgage, if the funds are available under the governing instrument.

(c) Paragraph (b) does not apply with respect to a guardian or conservator if, subsequent to the sale, mortgage, award, or receipt of insurance proceeds, the person who executed the governing instrument is adjudicated competent and survives such adjudication for a period of one year; but in such event the rights of the specific beneficiary shall be determined as though the proceeds were paid to the owner under sub. (2), (3), or (4).

(d) Paragraph (b) does not apply with respect to an agent if the person who executed the governing instrument is competent at the time of the sale, mortgage, award, or receipt of

insurance proceeds but in such event the rights of the specific beneficiary shall be determined as though the proceeds were paid to the owner under sub. (2), (3), or (4).

(6) (ag) This section is inapplicable if the person who executed the governing instrument gives property during the person's lifetime to the specific beneficiary with the intent of satisfying the specific gift and the requirement under s. 854.09 (1) is satisfied.

(ar) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

(b) If part of the property that is the subject of the specific gift is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property is not affected by this section; but this section applies to the part affected by the destruction, damage, sale or condemnation.

(c) The amount that the specific beneficiary receives under subs. (2) to (5) is reduced by any expenses of the sale, by the expenses of collection of the proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or the decedent's estate is increased because of items covered by this section. Expenses include legal fees paid or incurred.

§ 854.09. Advancement; satisfaction.

(1) A gift that the decedent made during his or her lifetime, including an incomplete gift that became complete on the decedent's death, is treated as a full or partial satisfaction of a transfer at death to an heir under s. 852.01 (1) or a transferee under a governing instrument executed by the decedent only if at least one of the following applies:

(a) The governing instrument, if any, either expressly or as construed from extrinsic evidence, provides that the gift be taken into account.

(b) The decedent declared in a document, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death, whether or not the document was contemporaneous with the gift.

(c) The transferee acknowledged in writing before or after the decedent's death, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death.

(2) For partial satisfaction, property given during life is valued as of the time that the transferee came into possession or enjoyment of the property or at the death of the person who executed the governing instrument, whichever occurs first.

(3) If the transferee fails to survive the person who executed the governing instrument and his or her issue take a substitute transfer under intestacy or under a governing instrument, the issue receive the same transfer that the named transferee would have received had the transferee survived, unless the transferor declared otherwise in a document, either expressly or as construed from extrinsic evidence.

§ 854.10. Choice of law.

The meaning and legal effect of a governing instrument are determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to s. 861.02 or 861.31 or any other public policy of this state otherwise applicable to the disposition.

§ 854.11. Gift of securities.

(1) In this section, “securities” includes all of the following:

(a) Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, collateral trust certificate, transferable share or voting trust certificate.

(b) Any certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease.

(c) Any interest or instrument commonly known as a security.

(d) Any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the instruments or interests specified in pars. (a) to (c).

(2) Except as provided in sub. (4), if a person executes a governing instrument that transfers securities and at the time of the execution or immediately after execution the described securities are in fact governed by the instrument, the transfer includes additional securities that are governed by the instrument at the person’s death if all of the following apply:

(a) The additional securities were acquired after the governing instrument was executed.

(b) The additional securities were acquired as a result of ownership of the described securities.

(c) The additional securities are any of the following types:

1. Securities of the same organization acquired as a result of a plan of reinvestment.

2. Securities of the same organization acquired by action initiated by the organization or any successor, related or acquiring organization, excluding any acquired by exercise of purchase options.

3. Securities of another organization acquired as a result of a merger, consolidation, reorganization or other distribution by the organization or any successor, related or acquiring organization.

(3) Except as provided in sub. (4), a transfer of a stated number of shares or amount of securities is construed to be a specific gift if the same or a greater number of shares or amount of the securities was governed by the instrument at the time of, or immediately after, execution of the instrument, even if the instrument does not describe the securities more specifically or qualify the description by a possessive pronoun such as “my”.

(4) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

§ 854.12. Debt to transferor.

(1) (a) If an heir owes a debt to the decedent, the amount of the indebtedness shall be offset against the intestate share of the debtor heir.

(b) In contesting an offset under par. (a), the debtor heir shall have the benefit of any defense that would be available to the debtor heir in a direct proceeding by the personal representative for the recovery of the debt, except that the debtor heir may not defend on the basis that the debt was discharged in bankruptcy or on the basis that the relevant statute of limitations has expired. If the debtor fails to survive the decedent, the court may not include the debt in computing any intestate shares of the debtor's issue.

(2) (a) Subject to par. (c), if a transferee under a revocable governing instrument survives the transferor and is indebted to the transferor, the amount of the indebtedness shall be treated as an offset against the property to which the debtor transferee is entitled. If multiple revocable governing instruments transfer property to the debtor, the debt shall be equitably allocated against the various instruments.

(b) Subject to par. (c), in contesting an offset under par. (a), the debtor shall have the benefit of any defense that would be available to the transferee in a direct proceeding for the recovery of the debt, except that the transferee may not defend on the basis that the debt was discharged in bankruptcy, unless that discharge occurred before the execution of the governing instrument, or on the basis that the relevant statute of limitations has expired. If the transferee fails to survive the decedent, the debt may not be included in computing the entitlement of alternate beneficiaries.

(c) If the person who executed the governing instrument had an intent contrary to any provision in this subsection, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

(3) The property not distributed to the debtor becomes part of the residue of the entity that holds the debt. If the debt is not held by an entity, then the property not distributed to the debtor becomes part of the residue of the decedent's probate estate.

§ 854.13. Disclaimer of transfers at death.

(1) In this section:

(a) "Beneficiary under a governing instrument" includes any person who receives or might receive property under the terms or legal effect of a governing instrument.

(c) "Power" has the meaning given in s. 702.01 (4).

(2) (a)

1. In this paragraph, "person" includes a person who is unborn or whose identity is unascertained.

2. A person who is an heir, recipient of property or beneficiary under a governing instrument, donee of a power created by a governing instrument, appointee under a power exercised by a governing instrument, taker in default under a power created by a governing instrument or person succeeding to disclaimed property may disclaim any property, including

contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(b) Upon the death of a joint tenant, a surviving joint tenant may disclaim any property that would otherwise accrue to him or her by right of survivorship and that is the subject of the joint tenancy by delivering a written instrument of disclaimer under this section.

(c) Upon the death of a spouse, the surviving spouse may disclaim the decedent spouse's interest in survivorship marital property.

(d) Property may be disclaimed in whole or in part, except that a partial disclaimer of property passing by a governing instrument or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by the governing instrument or by the instrument exercising the power.

(e) The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(f) A guardian of the estate or a conservator appointed under ch. 54 or ch. 880, 2003 stats., may disclaim on behalf of his or her ward, with court approval, if the ward is entitled to disclaim under this section.

(g) An agent under a power of attorney may disclaim on behalf of the person who granted the power of attorney if all of the following apply:

1. The person who granted the power of attorney is entitled to disclaim under this section.
2. The power of attorney specifically grants the power to disclaim.

(gm) The trustee of a trust named as a recipient of property under a governing instrument may disclaim that property on behalf of the trust if the trust authorizes disclaimer by the trustee. If the trust does not authorize disclaimer by the trustee, the trustee's power to disclaim is subject to the approval of the court.

(h) A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action that would bar the right to disclaim under sub. (11g).

(i) A person who is a recipient of property under an inter vivos governing instrument, as defined in s. 700.27 (1) (c), may disclaim the property as provided in s. 700.27.

(3) The instrument of disclaimer shall do all of the following:

- (a) Describe the property disclaimed.
- (b) Declare the disclaimer and the extent of the disclaimer.
- (c) Be signed by the disclaimant.
- (d) Be delivered within the time and in the manner provided under subs. (4) and (5).

(4) (a) An instrument disclaiming a present interest shall be executed and delivered not later than 9 months after the effective date of the transfer under the governing instrument. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(b) An instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property is finally ascertained and his or her interest indefeasibly fixed. For cause shown, the period may be extended by a court of

competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(c) Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive discretionary or mandatory distributions of income or principal from any source may be executed and delivered at any time.

(d) Notwithstanding pars. (a) and (b), a person under 21 years of age may disclaim at any time not later than 9 months after the date on which the person attains 21 years of age.

(e) Notwithstanding pars. (a) and (b), a person whose interest in property arises by disclaimer or by default of exercise of a power created by a governing instrument may disclaim at any time not later than 9 months after the day on which the prior instrument of disclaimer is delivered, or the date of death of the donee of the power.

(5) (a) In addition to any requirements imposed by the governing instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by any of the following:

1. The transferor of the property disclaimed, if living.
2. The personal representative or special administrator of the deceased transferor of the property.
3. The holder of legal title to the property.

(b) If the trustee of any trust to which the interest or power relates does not receive the instrument of disclaimer under par. (a), a copy shall also be delivered to the trustee.

(c) When delivery is made to the personal representative or special administrator of a deceased transferor, a copy of the instrument of disclaimer shall be filed in the probate court having jurisdiction.

(d) Failure to deliver a copy of the instrument of disclaimer to the trustee under par. (b) or to file a copy in the probate court under par. (c), within the time specified under sub. (4), does not affect the validity of any disclaimer.

(e) If real property or an interest in real property is disclaimed, a copy of the instrument of disclaimer may be recorded in the office of the register of deeds of the county in which the real estate is situated.

(6) The property disclaimed under this section shall be considered not to have been vested in, created in or transferred to the disclaimant.

(7) (a) Subject to pars. (bm) and (c) and subs. (8), (9), and (10), unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the decedent. If the disclaimed interest is a remainder contingent on surviving to the time of distribution, the disclaimed interest passes as if the disclaimant had died immediately before the time for distribution. If the disclaimant is an appointee under a power exercised by a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by a governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power.

(bm) Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, if, by law or under the governing instrument, the issue of the

disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time the disclaimed interest would have taken effect in possession or enjoyment, the disclaimed interest passes only to the issue of the disclaimant who survive when the disclaimed interest takes effect in possession or enjoyment.

(c)

1. In this paragraph, “devisable future interest” is a future interest that can be passed under the will of the person who holds the future interest.

2. If the disclaimed interest is a devisable future interest under the law governing the transfer, then the disclaimed interest devolves as if it were a nondevisable future interest.

(8) Unless the decedent provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, a disclaimed interest in a joint tenancy passes to the decedent’s probate estate.

(9) Unless the decedent provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, a disclaimed interest in survivorship marital property passes to the decedent’s probate estate.

(10) (a) Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest not held by the disclaimant and limited to take effect in possession or enjoyment after the termination of the interest that is disclaimed accelerates to take effect as if the disclaimant had died immediately before the time when the disclaimed interest would have taken effect in possession or enjoyment or, if the disclaimant is an appointee under a power exercised by a power of appointment, as if the disclaimant had died before the effective date of the exercise of the power.

(b) Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest held by the disclaimant does not accelerate.

(11g) Bars to a person’s right to disclaim property include, but are not limited to, any of the following:

(a) The person’s assignment, conveyance, encumbrance, pledge, or transfer of the property or a contract for the assignment, conveyance, encumbrance, pledge, or transfer of the property.

(b) The person’s written waiver of the right to disclaim.

(c) The person’s acceptance of the property or benefit of the property.

(11p) The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under him or her.

(12) (a) This section does not affect the right of a person to waive, release, disclaim or renounce property under any other statute, the common law, or as provided in the creating instrument.

(b) Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law relating to disclaimers, constitutes an effective disclaimer under this section or s. 700.27.

(13) In this section, the effective date of a transfer under a revocable governing instrument is the date on which the person with the power to revoke the transfer no longer has that power or the power to transfer the legal or equitable ownership of the property that is the subject of the transfer.

§ 854.14. Beneficiary who kills decedent.

(2) Except as provided in sub. (6), the unlawful and intentional killing of the decedent does all of the following:

(a) Revokes a provision in a governing instrument that, by reason of the decedent's death, does any of the following:

1. Transfers or appoints property to the killer.
2. Confers a power of appointment on the killer.
3. Nominates or appoints the killer to serve in any fiduciary or representative capacity, including personal representative, trustee, or agent.

(b) Severs the interests of the decedent and killer in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and the killer into tenancies in common or marital property, whichever is appropriate.

(c) Revokes every statutory right or benefit to which the killer may have been entitled by reason of the decedent's death.

(3) Except as provided in sub. (6), provisions of a governing instrument that are revoked by this section are given effect as if the killer disclaimed all revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent. Except as provided in sub. (6), the killer's share of the decedent's intestate estate, if any, passes as if the killer had disclaimed his or her intestate share under s. 854.13.

(3m) (a) In this subsection:

1. "Owner" means a person appearing on the records of the policy issuer as the person having the ownership interest, or means the insured if no person other than the insured appears on those records as a person having that interest. In the case of group insurance, the "owner" means the holder of each individual certificate of coverage under the group plan and does not include the person who contracted with the policy issuer on behalf of the group, regardless of whether that person is listed as the owner on the contract.

2. "Ownership interest" means the rights of an owner under a policy.

3. "Policy" means an insurance policy insuring the life of a spouse and providing for payment of death benefits at the spouse's death.

4. "Proceeds" means the death benefit from a policy and all other economic benefits from it, whether they accrue or become payable as a result of the death of an insured person or upon the occurrence or nonoccurrence of another event.

(b)

1. Except as provided in sub. (6), if a noninsured spouse unlawfully and intentionally kills an insured spouse, the surviving spouse's ownership interest in a policy that designates the decedent spouse as the owner and insured, or in the proceeds of such a policy, is limited to a

dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of death of the decedent spouse. All other rights of the surviving spouse in the ownership interest or proceeds of the policy, other than the marital property interest described in this subsection, terminate at the decedent spouse's death.

2. Notwithstanding s. 766.61 (7) and except as provided in sub. (6), if an insured spouse unlawfully and intentionally kills a noninsured spouse, the ownership interest at death of the decedent spouse in any policy with a marital property component that designates the surviving spouse as the owner and insured is a fractional interest equal to one-half of the portion of the policy that was marital property immediately before the death of the decedent spouse.

(c) Notwithstanding s. 766.62 (5) and except as provided in sub. (6), if the employee spouse unlawfully and intentionally kills the nonemployee spouse, the ownership interest at death of the decedent spouse in any deferred employment benefit, or in assets in an individual retirement account that are traceable to the rollover of a deferred employment benefit plan, that has a marital property component and that is attributable to the employment of the surviving spouse is equal to one-half of the portion of the benefit or assets that was marital property immediately before the death of the decedent spouse.

(d) Except as provided in sub. (6), if the surviving spouse unlawfully and intentionally kills the decedent spouse, the estate of the decedent shall have the right to elect no more than 50 percent of the augmented deferred marital property estate, as determined under s. 861.02 (2), as though the decedent spouse were the survivor and the surviving spouse were the decedent. The court shall construe the provisions of ss. 861.03 to 861.11 as necessary to achieve the intent of this paragraph.

(4) Except as provided in sub. (6), a wrongful acquisition of property by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrongdoing.

(5) (a) A final judgment establishing criminal accountability for the unlawful and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section.

(b) A final adjudication of delinquency on the basis of an unlawful and intentional killing of the decedent conclusively establishes the adjudicated individual as the decedent's killer for purposes of this section.

(c) In the absence of a judgment establishing criminal accountability under par. (a) or an adjudication of delinquency under par. (b), the court, upon the petition of an interested person, shall determine whether, based on the preponderance of the evidence, the killing of the decedent was unlawful and intentional for purposes of this section.

(6) This section does not apply if any of the following applies:

(a) The court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the property.

(b) The decedent provided in his or her will, by specific reference to this section, that this section does not apply.

§ 854.15. Revocation of provisions in favor of former spouse.

(1) In this section:

(a) “Disposition of property” means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument.

(b) “Divorce, annulment or similar event” means any divorce, any annulment or any other event or proceeding that would exclude a spouse as a surviving spouse under s. 851.30.

(c) “Former spouse” means a person whose marriage to the decedent has been the subject of a divorce, annulment or similar event.

(d) “Relative of the former spouse” means an individual who is related to the former spouse by blood, adoption or marriage and who, after the divorce, annulment or similar event, is not related to the decedent by blood, adoption or marriage.

(2) This section applies only to governing instruments that were executed by the decedent before the occurrence of a divorce, annulment or similar event with respect to his or her marriage to the former spouse.

(3) Except as provided in subs. (5) and (6), a divorce, annulment or similar event does all of the following:

(a) Revokes any revocable disposition of property made by the decedent to the former spouse or a relative of the former spouse in a governing instrument.

(b) Revokes any disposition created by law to the former spouse or a relative of the former spouse.

(c) Revokes any revocable provision made by the decedent in a governing instrument conferring a power of appointment on the former spouse or a relative of the former spouse.

(d) Revokes the decedent’s revocable nomination of the former spouse or a relative of the former spouse to serve in any fiduciary or representative capacity.

(e) Severs the interests of the decedent and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and former spouse into tenancies in common.

(4) Except as provided in subs. (5) and (6), provisions of a governing instrument that are revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce, annulment or similar event.

(5) (am) This section does not apply if any of the following applies:

1. The express terms of a governing instrument provide otherwise.
2. The express terms of a court order provide otherwise.
3. The express terms of a contract relating to the division of the decedent’s and former spouse’s property made between the decedent and the former spouse before or after the marriage or the divorce, annulment or similar event provide otherwise.
4. The divorce, annulment or similar event is nullified.
5. The decedent and the former spouse have remarried.

(bm) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

(6) The effect of a judgment of annulment, divorce or legal separation on marital property agreements under s. 766.58 is governed by s. 767.375 (1).

§ 854.17. Marital property classification; ownership and division of marital property at death.

Classification of the property of a decedent spouse and surviving spouse, and ownership and division of that property at the death of a spouse, are determined under ch. 766 and s. 861.01.

§ 854.18. Order in which assets apportioned; abatement.

(1) (a) Except as provided in sub. (3) or in connection with the deferred marital property elective share amount of a surviving spouse who elects under s. 861.02, the share of a surviving spouse who takes under s. 853.12, or the share of a surviving child who takes under s. 853.25, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

1. If the governing instrument is a will, property subject to intestacy.
2. Residuary transfers or devises under the governing instrument.
3. General transfers or devises under the governing instrument.
4. Specific transfers or devises under the governing instrument.

(b) For purposes of abatement, a general transfer or devise charged on any specific property or fund is a specific transfer to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, it is a general transfer to the extent of the failure or insufficiency.

(2) (a) Abatement within each classification is in proportion to the amount of property that each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the governing instrument.

(b) If the subject of a preferred transfer is sold or used incident to administration of an estate, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

(3) If the governing instrument expresses an order of abatement, or if the transferor's estate plan or the purpose of the transfer, as expressed, implied, or construed through extrinsic evidence, would be defeated by the order of abatement under sub. (1), the shares of the distributees abate as necessary to give effect to the intention of the transferor.

§ 854.19. Penalty clause for contest.

A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing

instrument may not be enforced if the court determines that the interested person had probable cause for instituting the proceedings.

§ 854.20. Status of adopted persons.

(1) (a) Subject to par. (b) and sub. (5), a legally adopted person is treated as a birth child of the person's adoptive parents and the adoptive parents are treated as the birth parents of the adopted person for purposes of transfers at death to, through, and from the adopted person and for purposes of any statute or other rule conferring rights upon children, issue, or relatives in connection with the law of intestate succession or governing instruments.

(b) Subject to sub. (5), par. (a) applies only if at least one of the following applies:

1. The decedent or transferor is the adoptive parent or adopted child.
2. The adopted person was a minor at the time of adoption.
3. The adoptive parent raised the adopted person in a parent-like relationship beginning on or before the child's 15th birthday and lasting for a substantial period or until adulthood.

(2) (am) Subject to sub. (5), a legally adopted person ceases to be treated as a child of the person's birth parents and the birth parents cease to be treated as the parents of the child for the purposes specified in sub. (1) (a), except:

1. If the parent-child relationship between the child and one birth parent is replaced by adoption, but the relationship to the other birth parent is not replaced, then for all purposes the child continues to be treated as the child of the birth parent whose relationship was not replaced.

2.

a. Subject to subd. 2. b. and c., if a birth parent of a child born to married parents dies and the other birth parent subsequently remarries and the child is adopted by the stepparent, the child continues to be treated as the child of the deceased birth parent for purposes of transfers at death through that parent and for purposes of any statute or other rule conferring rights upon children, issue or relatives of that parent under the law of intestate succession or governing instruments.

b. Subd. 2. a. applies only if the adopted person was a minor at the time of adoption or if the adoptive parent raised the adopted person in a parent-like relationship beginning on or before the child's 15th birthday and lasting for a substantial period or until adulthood.

c. Subd. 2. a. does not apply if the parental rights of the deceased birth parent had been terminated.

(bm) Subject to sub. (5), if an adopted child is subsequently adopted by another person, the former adoptive parent is considered to be a birth parent for purposes of this subsection.

(5) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

§ 854.21. Persons included in family groups or classes.

(1) (a) Except as provided in sub. (7), a gift of property by a governing instrument to a class of persons described as “issue,” “lawful issue,” “children,” “grandchildren,” “descendants,” “heirs,” “heirs of the body,” “next of kin,” “distributees,” or the like includes a person adopted by a person whose birth child would be a member of the class, and issue of the adopted person, if the conditions for membership in the class are otherwise satisfied and at least one of the criteria under s. 854.20 (1) (b) 1., 2., and 3. is satisfied.

(b) Except as provided in sub. (7), a gift of property by a governing instrument to a class of persons described as “issue,” “lawful issue,” “children,” “grandchildren,” “descendants,” “heirs,” “heirs of the body,” “next of kin,” “distributees,” or the like excludes a birth child and his or her issue otherwise within the class if the birth child has been adopted and would cease to be treated as a child of the birth parent under s. 854.20 (2).

(2) (a) Subject to par. (b) and sub. (7), individuals born to unmarried parents are included in class gifts and other terms of relationship in accordance with s. 852.05.

(b) In addition to the requirements of par. (a) and subject to the provisions of sub. (7), in construing a disposition by a transferor who is not the birth parent, an individual born to unmarried parents is not considered to be the child of a birth parent unless that individual lived while a minor as a regular member of the household of that birth parent or of that birth parent’s parent, brother, sister, spouse or surviving spouse.

(3) Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by blood and relationships by marriage are construed to exclude relatives by marriage.

(4) Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by the half-blood and relationships by the full-blood are construed to include both types of relationships.

(5) Subject to sub. (7), if a statute or governing instrument transfers an interest to a group of persons described as a class, such as “issue”, “children”, “nephews and nieces” or any other class, a person conceived at the time the membership in the class is determined and subsequently born alive is entitled to take as a member of the class if that person otherwise satisfies the conditions for class membership and survives at least 120 hours past birth.

(6) Subject to sub. (7), a person who is eligible to be a transferee under a statute or governing instrument through 2 lines of relationship is limited to one share, based on the relationship that entitles the person to the larger share.

(7) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

§ 854.22. Form of distribution for transfers to family groups or classes.

(1) Subject to sub. (4), if a statute or governing instrument specifies that a present or future interest is to be created in a designated individual's "heirs", "heirs at law", "next of kin", "relatives", "family" or a term that has a similar meaning, the property passes to the persons, including the state, to whom it would pass and in the shares in which it would pass under the laws of intestacy of the designated individual's domicile, as if the designated individual had died immediately before the transfer was to take effect in possession or enjoyment. If the designated individual's surviving spouse is living and remarried when the transfer is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

(2) Subject to sub. (4), if a statute or governing instrument creates a class gift in favor of a designated individual's "descendants", "issue" or "heirs of the body" the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment in the shares that they would receive under the laws of intestacy of the designated individual's domicile, as if the designated individual had then died owning the subject matter of the class gift.

(3) The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs at law", "next of kin", "distributees", "relatives" or "family", or a term that has a similar meaning, does not create or presumptively create a reversionary interest in the transferor.

(4) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

§ 854.23. Protection of payers and other 3rd parties.

(1) In this section, "governing instrument" includes an instrument described in s. 854.01, a filed verified statement under s. 865.201, a certificate under s. 867.046 (1m), a confirmation under s. 867.046 (2), or a recorded application under s. 867.046 (5).

(2) (a) A payer or other 3rd party is not liable for having transferred property to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter. However, a payer or other 3rd party is liable for a payment made or other action taken after the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter.

(b) Severance of a joint interest under the provisions of this chapter does not affect any 3rd-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship, unless a document declaring the severance has been noted, registered, filed or

recorded in records appropriate to the kind and location of the property that are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(3) A claimant shall mail written notice of a claimed lack of entitlement under sub. (2) to the 3rd party's main office or home by registered or certified mail, return receipt requested, or serve the claim upon the 3rd party in the same manner as a summons in a civil action.

(4) (a) Upon receipt of written notice of a claimed lack of entitlement under this chapter, a 3rd party may transfer property held by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate. If no proceedings have been commenced, the transfer may be made to the court having jurisdiction of probate proceedings relating to decedents estates located in the county of the decedent's residence. The court shall hold the property and, upon its determination of the owner, shall order disbursement in accordance with the determination.

(b) Property transferred to the court discharges the 3rd party from all claims for the property.

(5) (a) In this subsection:

1. "Account" has the meaning given in s. 705.01 (1) or 710.05 (1) (a).
2. "Financial institution" has the meaning given in s. 705.01 (3).

(b) Notwithstanding sub. (2), in addition to the protections afforded a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 a financial institution is not liable for having transferred an account to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the account, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of a governing instrument, regardless of whether the financial institution received written notice of a claimed lack of entitlement under this chapter.

(c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).
2. Refuse to transfer the account to any person.

(d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

§ 854.24. Protection of buyers.

A person who purchases property for value or who receives property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this chapter to return the property nor liable under this chapter for the value of the property, unless the person has notice as described in s. 854.23 (3).

§ 854.25. Personal liability of recipients not for value.

(1) A person who, not for value, receives property to which the person is not entitled under this chapter shall return the property. If the property is not returned, the recipient shall be personally liable for the value of the property to the person who is entitled to it under this chapter,

regardless of whether the recipient has the property, its proceeds or property acquired with the property or its proceeds.

(2) (a) If a recipient described in sub. (1) gives all or part of the property described in sub. (1) to a subsequent recipient, not for value, the subsequent recipient shall return the property. If the property is not returned, the subsequent recipient shall be personally liable to the person who is entitled to it under this chapter for the value received, if the subsequent recipient has the property, its proceeds or property acquired with the property or its proceeds.

(b) If the subsequent recipient described in par. (a) does not have the transfer described, its proceeds or the property acquired with the property or its proceeds, but knew or should have known of his or her liability under this section, the subsequent recipient remains personally liable to the person who is entitled to it under this chapter for the value received.

(3) On petition of the person entitled to the property under this chapter showing that the mode of satisfaction chosen by the recipient in sub. (1) or (2) will create a hardship for the entitled person, the court may order that a different mode of satisfaction be used.

§ 854.26. Effect of federal preemption.

If any provision in this chapter is preempted by federal law with respect to property covered by this chapter, a person who receives property, other than for full consideration, which the person is not entitled to receive under this chapter is subject to s. 854.25.

UNIFORM PROBATE CODE EXCERPTS

§1-201. Definitions.

...

(4) “Beneficiary designation” refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

...

(18) “Governing instrument” means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

Part 7
Rules of Construction Applicable to Wills and Other Governing Instruments

§2-701. Scope.

In the absence of a finding of a contrary intention, the rules of construction in this Part control the construction of a governing instrument. The rules of construction in this Part apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

§2-702. Requirement of Survival by 120 Hours.

(a) [Requirement of Survival by 120 Hours Under Probate Code.] For the purposes of this Code, except as provided in subsection (d), an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is deemed to have predeceased the event.

(b) [Requirement of Survival by 120 Hours under Governing Instrument.] Except as provided in subsection (d), for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event.

(c) [Co-owners With Right of Survivorship; Requirement of Survival by 120 Hours.] Except as provided in subsection (d), if (i) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours and (ii) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by 120 hours, the property passes in the proportion that one bears to the whole number of co-owners. For the purposes of this subsection, “co-owners with right of survivorship” includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others.

(d) [Exceptions.] Survival by 120 hours is not required if:

- (1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;
- (2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;
- (3) the imposition of a 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under Section 2-901(a)(1), (b)(1), or (c)(1) or to become invalid under Section 2-901(a)(2), (b)(2), or (c)(2); but survival must be established by clear and convincing evidence; or

(4) the application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence.

(e) [Protection of Payors and Other Third Parties.]

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a claimed lack of entitlement under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this section.

(2) Written notice of a claimed lack of entitlement under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the Court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the Court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The Court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the Court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

(f) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

§2-703. Choice of Law as to Meaning and Effect of Governing Instrument.

The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in Part 2, the provisions relating to exempt property and allowances described in Part 4, or any other public policy of this State otherwise applicable to the disposition.

§2-704. Power of Appointment; Meaning of Specific Reference Requirement.

If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor’s intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.

§2-705. Class Gifts Construed to Accord With Intestate Succession.

[Note to drafting committee: This section is currently undergoing revision. –TPG]

(a) Adopted individuals and individuals born out of wedlock, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. Terms of relationship that do not differentiate relationships by blood from those by affinity, such as “uncles,” “aunts,” “nieces,” or “nephews”, are construed to exclude relatives by affinity. Terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as “brothers,” “sisters,” “nieces,” or “nephews”, are construed to include both types of relationships.

(b) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the household of that natural parent or of that parent’s parent, brother, sister, spouse, or surviving spouse.

(c) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.

§2-706. Life Insurance; Retirement Plan; Account With POD Designation; Transfer-on-Death Registration; Deceased Beneficiary.

(a) [Definitions.] In this section:

(1) “Alternative beneficiary designation” means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

(2) “Beneficiary” means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes (i) a class member if the beneficiary designation is in the form of a class gift and (ii) an individual or class

member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

(3) “Beneficiary designation” includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

(4) “Class member” includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had he [or she] survived the decedent.

(5) “Stepchild” means a child of the decedent’s surviving, deceased, or former spouse, and not of the decedent.

(6) “Surviving beneficiary” or “surviving descendant” means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under Section 2-702.

(b) [Substitute Gift.] If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:

(1) Except as provided in paragraph (4), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary’s surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(2) Except as provided in paragraph (4), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family,” or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled, had all of them survived the decedent, passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary’s surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph, “deceased beneficiary” means a class member who failed to survive the decedent and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship, such as in a beneficiary designation to an individual “if he survives me,” or in a beneficiary designation to “my surviving children,” are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative beneficiary designation only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one beneficiary

designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

(iii) "Younger-generation beneficiary designation" means a beneficiary designation that (A) is to a descendant of a beneficiary of the primary beneficiary designation, (B) is an alternative beneficiary designation with respect to the primary beneficiary designation, (C) is a beneficiary designation for which a substitute gift is created, and (D) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

(d) [Protection of Payors.]

(1) A payor is protected from liability in making payments under the terms of the beneficiary designation until the payor has received written notice of a claim to a substitute gift under this section. Payment made before the receipt of written notice of a claim to a substitute gift under this section discharges the payor, but not the recipient, from all claims for the amounts paid. A payor is liable for a payment made after the payor has received written notice of the claim. A recipient is liable for a payment received, whether or not written notice of the claim is given.

(2) The written notice of the claim must be mailed to the payor's main office or home by registered or certified mail, return receipt requested, or served upon the payor in the same manner as a summons in a civil action. Upon receipt of written notice of the claim, a payor may pay any amount owed by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds and, upon its determination under this section, shall order disbursement in accordance with the determination. Payment made to the court discharges the payor from all claims for the amounts paid.

(e) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a

payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

§2-707. Survivorship with Respect to Future Interests under Terms of Trust; Substitute Takers.

(a) **[Definitions.]** In this section:

(1) “Alternative future interest” means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

(2) “Beneficiary” means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(3) “Class member” includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had he [or she] survived the distribution date.

(4) “Distribution date,” with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

(5) “Future interest” includes an alternative future interest and a future interest in the form of a class gift.

(6) “Future interest under the terms of a trust” means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

(7) “Surviving beneficiary” or “surviving descendant” means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under Section 2-702.

(b) **[Survivorship Required; Substitute Gift.]** A future interest under the terms of a trust is contingent on the beneficiary’s surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(1) Except as provided in paragraph (4), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

(2) Except as provided in paragraph (4), if the future interest is in the form of a class gift, other than a future interest to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.

(4) If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i) "Primary future interest" means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary future interest.

(iii) "Younger-generation future interest" means a future interest that (A) is to a descendant of a beneficiary of the primary future interest, (B) is an alternative future interest with respect to the primary future interest, (C) is a future interest for which a substitute gift is created, and (D) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.

(d) [If No Other Takers, Property Passes Under Residuary Clause or to Transferor's Heirs.] Except as provided in subsection (e), if, after the application of subsections (b) and (c), there is no surviving taker, the property passes in the following order:

(1) if the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(2) if no taker is produced by the application of paragraph (1), the property passes to the transferor's heirs under Section 2-711.

(e) [If No Other Takers and If Future Interest Created by Exercise of Power of Appointment.] If, after the application of subsections (b) and (c), there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

(1) the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and

(2) if no taker is produced by the application of paragraph (1), the property passes as provided in subsection (d). For purposes of subsection (d), "transferor" means the donor if the power was a nongeneral power and means the donee if the power was a general power.

§2-708. Class Gifts to "Descendants," "Issue," or "Heirs of the Body"; Form of Distribution if None Specified.

If a class gift in favor of "descendants," "issue," or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift.

§2-709. Representation; Per Capita at Each Generation; Per Stirpes.

(a) [Definitions.] In this section:

(1) "Deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under Section 2-702.

(2) "Distribution date," with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur

at the beginning or end of a calendar day, but can occur at a time during the course of a day.

(3) “Surviving ancestor,” “surviving child,” or “surviving descendant” means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under Section 2-702.

(b) [Representation; Per Capita at Each Generation.] If an applicable statute or a governing instrument calls for property to be distributed “by representation” or “per capita at each generation,” the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants (ii) and deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

(c) [Per Stirpes.] If a governing instrument calls for property to be distributed “per stripes,” the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(d) [Deceased Descendant With No Surviving Descendant Disregarded.] For the purposes of subsections (b) and (c), an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

§2-710. Worthier-Title Doctrine Abolished.

The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor’s “heirs,” “heirs at law,” “next of kin,” “distributees,” “relatives,” or “family,” or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

§2-711. Interests in “Heirs” and Like.

If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual’s “heirs,” “heirs at law,” “next of kin,” “relatives,” or “family,” or language of similar import, the property passes to those persons, including the state, and in such shares as would succeed to the designated individual’s intestate estate under the intestate succession law of the designated individual’s domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual’s surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

Part 8
General Provisions Concerning Probate and Nonprobate Transfers

§2-801. [Reserved.]

§2-802. Effect of Divorce, Annulment, and Decree of Separation.

(a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he [or she] is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(b) For purposes of Parts 1, 2, 3, and 4 of this Article, and of Section 3-203, a surviving spouse does not include:

(1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless subsequently they participate in a marriage ceremony purporting to marry each to the other or live together as husband and wife;

(2) an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual; or

(3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

§2-803. Effect of Homicide on Intestate Succession, Wills, Trusts, Joint Assets, Life Insurance, and Beneficiary Designations.

(a) **[Definitions.]** In this section:

(1) “Disposition or appointment of property” includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) “Governing instrument” means a governing instrument executed by the decedent.

(3) “Revocable,” with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation, in favor of the killer, whether or not the decedent was then empowered to designate himself [or herself] in place of his [or her] killer and whether or not the decedent then had capacity to exercise the power.

(b) **[Forfeiture of Statutory Benefits.]** An individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent’s estate, including an intestate share, an elective share, an omitted spouse’s or child’s share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent’s intestate estate passes as if the killer disclaimed his [or her] intestate share.

(c) **[Revocation of Benefits Under Governing Instruments.]** The felonious and intentional killing of the decedent:

(1) revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument

conferring a general or nongeneral power of appointment on the killer, and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and

(2) severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship transforming the interests of the decedent and killer into equal tenancies in common.

(d) [Effect of Severance.] A severance under subsection (c)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(e) [Effect of Revocation.] Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

(f) [Wrongful Acquisition of Property.] A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his [or her] wrong.

(g) [Felonious and Intentional Killing; How Determined.] After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

(h) [Protection of Payors and Other Third Parties.]

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for having taken any other action in good faith reliance on the validity of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice of a claimed forfeiture or revocation under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of a claimed forfeiture or revocation under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed forfeiture or revocation under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if

no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(i) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

§2-804. Revocation of Probate and Nonprobate Transfers by Divorce; No Revocation by other Changes of Circumstances.

(a) [Definitions.] In this section:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.

(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.

(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or

annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his [or her] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a Court Order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship transforming the interests of the former spouses into equal tenancies in common.

(c) [Effect of Severance.] A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) [Effect of Revocation.] Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(e) [Revival if Divorce Nullified.] Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(f) [No Revocation for Other Change of Circumstances.] No change of circumstances other than as described in this section and in Section 2-803 effects a revocation.

(g) [Protection of Payors and Other Third Parties.]

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action

taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(2) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

(h) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

§2-1106. Disclaimer Of Interest In Property.

(a) In this section:

(1) “Future interest” means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation.

(2) “Time of distribution” means the time when a disclaimed interest would have taken effect in possession or enjoyment.

(b) Except for a disclaimer governed by Section 2-1107 or 2-1108, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate’s death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in paragraph (2), the following rules apply:

(A) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(B) If the disclaimant is an individual, except as otherwise provided in subparagraphs (C) and (D), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(C) If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(D) If the disclaimed interest would pass to the disclaimant’s estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor’s intestate estate under the intestate succession law of the transferor’s domicile had the transferor died at the time of distribution. However, if the transferor’s surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person than the disclaimant takes effect as if the had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

UNIFORM NONPROBATE TRANSFERS ON DEATH ACT

Prefatory Note

This Act is a free-standing version of Article VI of the Uniform Probate Code, as revised in 1989. The numbering and structure of the Act parallels that of Article VI.

Multiple-Person Accounts

Part 2 of this Act comprehensively covers the problems of financial institution accounts in which one or more persons have an interest.

Part 2 addresses the variety of state statutes that protect financial institutions in their dealings with joint and survivorship accounts, and resolves the doctrinal confusion in judicial decisions that uphold so-called Totten Trust accounts (which provide probate avoiding death benefits), yet invalidate functionally indistinguishable POD (payable on death) accounts. Part 2 speaks separately to (i) ownership of accounts as between multiple owners, and the existence, validity, and revocability of survivors' benefits; and (ii) financial institution protection.

Part 2 recognizes that a depositor may add another person to an account for various reasons. The depositor may intend to reflect lifetime ownership of the account by more than one person, or to pass sums on deposit at death to another person, or simply to enable account transactions by a third person as a convenience without creating any ownership or survivorship rights in the third person. The traditional "joint account" does not adequately allow the depositor to distinguish among the different functions of the multiple-person account, and the depositor's use of a joint account for one purpose may yield unwanted consequences for other purposes.

Part 2 clarifies the relationships among the various persons involved with an account. The account may be owned by a single party or by multiple parties. Either a single-party account or a multiple-party account may include a POD beneficiary designation or an agency (power of attorney) designation or both. Part 2 includes sample statutory forms that provide clear and simple instructions to both the financial institution and depositor in setting up multiple-person accounts.

Under Part 2, an account is owned by the parties during their lifetimes in accordance with each party's net contribution to the account. One party owns all if that party is the sole contributor to the account. Evidence of intention by a party to make a gift to another party might change the result, but no intention to make a present gift is imputed from opening an account in two names or from making an additional deposit to an account.

Rights at death, on the other hand, are governed by the principle that a depositor intends account balances to pass at death to the account survivors. Part 2 establishes a preference for survivorship between the parties whether or not specified in the account contract. But if the account contract expressly negates survivorship rights or if the account is designated as a tenancy in common, the surviving parties to the account do not take by right of survivorship.

Part 2 treats accounts in Totten Trust form as POD accounts. Survivorship benefits under multiple-party or POD accounts arise at death, and benefits are conferred by force of contract law and the statute. Survivorship rights cannot be changed except by notice to the financial

institution or a change in account form. Survivorship benefits, though revocable and effective on death for practical purposes, cannot be changed by will.

Part 2 also protects creditors of deceased parties. Under Part 2 a creditor may, through the personal representative of the depositor's estate, claim account balances needed to pay a debt or family allowance. The claim procedure may be initiated only on demand of the creditor and is subject to a relatively short limitation period.

Part 2 establishes that financial institutions may pay out on multiple-person accounts and be protected if the payment is made in accordance with contract terms. Part 2 covers banks, savings and loan associations, and credit unions; this feature is designed to correct existing state laws that provide variant account incidents and protections for the three types of financial institutions.

Financial institution protection is provided even though the person receiving a payment in accordance with the account contract is not the owner of the amounts received as against another party to the account or as against the estate of a deceased depositor. Ownership as between parties to accounts and financial institution protection are treated as separable and different matters.

The drafting committee believes that Part 2 is a substantial improvement of an already successful law. This part of the Uniform Probate Code is one of the most broadly accepted, having been adopted either as part of the code or independently by over half the states. Part 2 draws on improvements made by various states that have enacted the statute. Improvements over the previous version of the statute include provision for an agency designation, optional statutory account forms, treatment of community property and other types of marital property, payments to minors under the Uniform Transfers to Minors Act, and extensive terminological and drafting simplifications and standardizations. For additional detail, see the Prefatory Note to Article VI of the Uniform Probate Code, as revised in 1989.

TOD Security Registration

The purpose of Part 3 of this Act is to allow the owner of securities to register the title in transfer-on-death (TOD) form. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered. The legislation enables an issuer, transfer agent, broker, or other such intermediary to transfer the securities directly to the designated transferee on the owner's death. Thus, TOD registration achieves for securities a certain parity with existing TOD and pay-on-death (POD) facilities for bank deposits and other assets passing at death outside the probate process.

The TOD registration under Part 3 is designed to give the owner of securities who wishes to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only so long as the co-owners cooperate. Difficulties arise when co-owners fall into disagreement, or when one becomes afflicted or insolvent.

Use of the TOD registration form encouraged by this legislation has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the

registered asset is transferred, or whenever the owner otherwise complies with the issuer's conditions for changing the title form of the investment. Part 3 recognizes, in Section 302, that co-owners with right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as he or she sees fit after the other's death.

Implementation of Part 3 is wholly optional with issuers. The drafting committee received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that Part 3 takes full account of the practical requirements for efficient transfer within the securities industry.

Section 303 invites application of the legislation to locally owned securities though the statute may not have been locally enacted, so long as Part 3 is in force in a jurisdiction of the issuer or transfer agent. Thus, if the principal jurisdictions in which securities issuers and transfer agents are sited enact the measure, its benefits will become generally available to persons domiciled in states that do not at once enact the statute.

The legislation has been drafted as a separate part, hence not interpolated as an expansion of Part 2, treating bank accounts ("multiple-party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities. By virtue either of statute or of account terms (contract), multiple-party bank accounts allow any one cotenant to consume or transfer account balances. See R. Brown, *The Law of Personal Property* § 65, at 217 (2d ed. 1955); Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 *Harv. L. Rev.* 1108, 1112 (1984). The rule for securities, however, has been the rule that applies to real property: all cotenants must act together in transferring the securities. This difference in the legal regime reflects differences in function among the types of assets. Multiple-party bank accounts typically arise as convenience accounts, to facilitate frequent small transactions, often on an agency basis (as when spouses or relatives share an account). Securities resemble real estate in that the values are typically large and the transactions relatively infrequent, which is why the legal regime requires the concurrence of all concurrent owners for transfers affecting such assets.

Recently, of course, this distinction between bank accounts and securities has begun to crumble. Banks are offering certificates of deposit of large value under the same account forms that were devised for low-value convenience accounts. Meanwhile, brokerage houses with their so-called cash management accounts and mutual funds with their money market accounts have rendered securities subject to small recurrent transactions. In the latest developments, even the line between real estate and bank accounts is becoming indistinct, as the "home equity line of credit" creates a check-writing conduit to real estate values.

Nevertheless, even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules. True co-owners of securities, like owners of realty, should act together in transferring the asset.

The joint bank account and the Totten trust originated in ambiguous lifetime ownership forms, which required Section 214 or comparable state legislation to clarify that an inter vivos transfer was not intended. In the securities field, by contrast, we start with unambiguous lifetime

ownership rules. The sole purpose of the present statute is to facilitate a nonprobate TOD mechanism as an option for those owners.

For a comprehensive discussion of the issues entailed in this legislation, see Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789 (1987).

Part 1. Provisions Relating to Effect of Death

§101. Nonprobate Transfers on Death.

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

(1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(b) This section does not limit rights of creditors under other laws of this State.

Comment

This section is a revised version of former Section 6-201 of the original Uniform Probate Code, which authorized a variety of contractual arrangements that had sometimes been treated as testamentary in prior law. For example, most courts treated as testamentary a provision in a promissory note that if the payee died before making payment, the note should be paid to another named person; or a provision in a land contract that if the seller died before completing payment, the balance should be canceled and the property should belong to the vendee. These provisions often occurred in family arrangements. The result of holding such provisions testamentary was usually to invalidate them because not executed in accordance with the statute of wills. On the other hand, the same courts for years upheld beneficiary designations in life insurance contracts. The drafters of the original Uniform Probate Code declared in the Comment that they were unable to identify policy reasons for continuing to treat these varied arrangements as testamentary. The drafters said that the benign experience with such familiar will substitutes as the revocable inter vivos trust, the multiple-party bank account, and United States government bonds payable on death to named beneficiaries all demonstrated that the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize. The Comment also observed that because these provisions often are part of a business transaction and are evidenced by a writing, the danger of fraud is largely eliminated.

Because the modes of transfer authorized by an instrument under this section are declared to be nontestamentary, the instrument does not have to be executed in compliance with the formalities for wills; nor does the instrument have to be probated, nor does the personal representative have any power or duty with respect to the assets.

The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary. This section does not invalidate other arrangements by negative implication. Thus, this section does not speak to the phenomenon of the oral trust to hold property at death for named persons, an arrangement already generally enforceable under trust law.

The reference to a “marital property agreement” in the introductory portion of subsection (a) of Section 101 includes an agreement made during marriage as well as a premarital contract.

The term “or other written instrument of a similar nature” in the introductory portion of subsection (a) replaces the former language “or any other written instrument effective as a contract, gift, conveyance or trust” in the original Section 6-201. The Supreme Court of Washington read that language to relieve against the delivery requirement of the law of deeds, a result that was not intended. *Estate of O’Brien v. Woodhouse*, 109 Wash. 2d 913, 749 P.2d 154 (1988). The point was correctly decided in *First National Bank in Minot v. Bloom*, 264 N.W.2d 208, 212 (N.D. 1978), in which the Supreme Court of North Dakota held that “nothing in [former Section 6-201] of the Uniform Probate Code . . . eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another.”

§102. Liability of Nonprobate Transferees for Creditor Claims and Statutory Allowances.

(a) In this section, “nonprobate transfer” means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.

(b) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate that estate and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order of priority:

(1) a transferee designated in the decedent’s will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;

(3) other nonprobate transferees, in proportion to the values received.

(d) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devised under it.

(e) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

(f) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State, whether or not the transferee is located in this State.

(g) A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(h) A proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.

(i) Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:

(1) Payment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(2) A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary.

Comment

1. Added to the Code in 1998, this section extends protections for family exemption beneficiaries and creditors of decedents to new categories of non-probate transferees of decedents. However, unlike conventional and cumbersome probate protections, the remedy contemplated by this section is to enforce a duty placed on nonprobate transferees to contribute as necessary to satisfy family exemptions and duly allowed creditors' claims remaining unpaid because of inadequate probate estate values. The maximum liability for a single nonprobate transferee is the value of the transfer. Values are determined under (b) as of the time when the benefits are "received or controlled by the transferee." This would be the date of the decedent's death for nonprobate transfers via a revocable trust, and date of receipt for other nonprobate transfers. Two or more transferees are severally liable for proportions of the liability based on the value of transfers received by each.

Original UPC included section 6-107 and its 1989 sequel, 6-215. Both were designed to extend probate protections for exemption beneficiaries and unsecured creditors of insolvent estates to values in multiple-name accounts in financial institutions passing outside probate at death. Assets passing at death by revocable trust or TOD asset registration agreements were not covered. Original 6-201(b) and 6-101(b) as revised in 1989 mentioned creditors rights against nonprobate transfers at death, but provided only against invalidation of other possible remedies by implication from UPC's failure to deal with the problem.

If there are no probate assets, a creditor or other person seeking to use this section would need to secure appointment of a personal representative to invoke Code procedures for establishing a creditor's claim as "allowed." The use of regular probate proceedings as a prerequisite to gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI since original promulgation in 1969. It works well in practice inasmuch as Article III procedures for opening estates, satisfying probate exemptions, and presenting claims are extremely efficient.

2. New 6-102 replaces 6-215 with coverage designed to extend the principle of 6-215 to transfers at death by revocable trust, TOD security registration agreements and similar death benefits not insulated from decedents' creditors by other legislation. The initial clause of (b), "Unless otherwise provided by statute," is designed to prevent the section from colliding with existing legislation protecting death benefits in life insurance, retirement plans and IRAs from claims by creditors.

If applicable provisions in a state's insurance code do not exempt or protect a particular insurance death benefit, the insured's creditors would not be able to establish a "nonprobate transfer" under (a) except to the extent of any cash surrender value generated by premiums paid by the insured that the insured could have obtained immediately before death. Note, also, that (i)(1) would protect a life insurance company that paid a death benefit before receiving written notice from the decedent's personal representative even though some portion of the sum paid might involve a limited, contingent liability for the recipient.

3. The definition of "nonprobate transfer" in Section 1-102 reaches revocable transfers by a decedent; it does not apply to a transfer at death incident to a decedent's exercise or non-exercise of a presently exercisable general power of appointment created by another person. The drafters decided against creating a remedy for exemption beneficiaries and decedents' creditors based on the idea that a presently exercisable general power of appointment is the equivalent of ownership even though that concept is accepted in the Code's augmented estate provisions dealing with intentional disinheritance of a surviving spouse. Spousal protection against disinheritance by the other spouse supports the institution of marriage; creditors are better able to fend for themselves than financially disadvantaged mates of person inclined to disinherit their spouse. In addition, a presently exercisable general power of appointment created by another person is commonly viewed as a provision in the trust creator's instrument designed to provide flexibility in the estate plan rather than as a gift to the donee. Also, creditors of a deceased donee of such a power are likely to confront spendthrift trust provisions protecting trust benefits from creditors of beneficiaries, meaning that they may be without recourse whether or not a general power is viewed as ownership for purposes of creditors' rights.

4. The required ability to revoke or otherwise prevent a nonprobate transfer at death that is vital to application of (a)(1) is described as a "power," a word intended by the drafters to signify legal authority rather than capacity or practical ability. This corresponds to the definition in Code Section 2-201(6).

5. The exclusion of "a survivorship interest in a joint tenancy of real estate" from (a)'s definition of "nonprobate transfer" ignores that some states (e.g., South Dakota) presently enable an insolvent decedent's creditors to reach the share the decedent could have received prior to death by unilateral severance of the joint tenancy. The law in most other states is to the contrary, meaning that title examiners and others would be affected if the new section were enacted without the exclusion. Moreover, real estate joint tenancies have served for generations to keep the share of a couple's real estate owned by the first to die out of probate and away from estate creditors. This familiar arrangement needs not be disturbed incident to expanding protections of decedents' creditors against newly recognized nonprobate transfers at death.

No view is expressed as to whether a survivorship interest in personal or intangible property registered in two or more names as joint tenants with right of survivorship would come within 6-102(a). The outcome might depend on who originated the registration and whether severance by any co-owner acting alone was possible immediately preceding a co-owner's death.

6. A feature of replaced Section 6-215 that was clarified by 1991 technical amendment protects a survivor beneficiary of a joint account from liability to the probate estate of a deceased co-depositor for funds in the account owned by the survivor prior to decedent's death. The proposed replacement section continues this protection by language in (a)(1), i.e., "valid transfer effective at death ... by a transferor ... [who] had power, acting alone, to prevent the transfer by revocation or withdrawal and instead use the property for the benefit of the transferor ..." Section 6-211 and related sections of the Code make it clear

that parties to a joint and survivor account separately own values in the account in proportion to net contributions. Hence, a surviving joint account depositor who had contributed to the balance on deposit prior to the death of the other party is subject to the remedies described in this section only to the extent of new account values gained through survival of the decedent.

7. Transferees of nonprobate transfers subject to the possible liability described in (b) include trustees of revocable trusts to the extent of assets transferred to the trust before death that were subject to the decedent's sole power to revoke. Such assets would be valued as of the date of death when the trustee gains full control. The trustee of an irrevocable trust, or of a trust that may be revoked only by the settlor and another person or otherwise fails to meet the conditions prescribed by (a)(1), might receive a transfer at death by TOD registration. Such a transfer would involve a possibility of trust liability based on the value of the TOD transfer as of the time of receipt as provided in (b). Liability under this section incurred by a trustee is a trust liability for which the trustee incurs no personal liability other than as provided by UPC §3-808(b).

8. Trusts and non-trust recipients of nonprobate transfers incur liability in the order described in (c). Note that either a revocable or an irrevocable trust might be designated devisee of a pour-over provision that would make the trust the "principal non-probate instrument in the decedent's estate plan" and, so, liable under (c)(2) ahead of other nonprobate transferees to the extent of values acquired by a transfer at death as described in (a)(1); i.e., a TOD registration benefit payable to the trust in the case of an irrevocable trust. Note, too, that nothing would pass to the receptacle trust by the pour-over devise if all probate estate assets are used to discharge exemptions and claims. Still, the fact that the trust was designated to receive a pour-over devise signals that the trust probably includes the equivalent of a residuary clause measuring benefits by available assets and signaling probable intention of the settlor that residuary benefits should abate before other trust gifts if necessary because of settlor's debts.

9. The abatement order among classes of beneficiaries of trusts specified by (d) applies to all trusts subject to liability to the extent of nonprobate transfers received or administered whether or not the trust instrument is the principal nonprobate instrument in the decedent's estate plan. The drafters decided against use in (d) of a reference to UPC's abatement section, 3-902, in part because that section deals with intestate and partially intestate estates as well as estates governed by wills. Note, too, that trusts for successive beneficiaries also will be governed by income and principal accounting rules that will serve to resolve some abatement problems.

10. Subsection (e) recognizes that a number of separate instruments and transactions, executed at different times and with or without internal references linking them to other documents, may constitute the paperwork describing succession to a decedent's assets by probate and nonprobate methods. By authorizing control of abatement among gifts made by various transfers at death by the last executed instrument, the subsection permits a simple, last-minute override of earlier directions concerning a decedent's wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death. The expression "block buster will" was coined by estate planners in the mid-70's to refer to interest in legislation enabling a later will to override death benefits by any nonprobate transfer device. This subsection meets some of the goals of advocates of this legislation.

11. Subsection (f) builds on the principle employed in UPC's Augmented Estate Elective Share remedy (UPC §§2-201 — 2-214) in relation to nonprobate transfers made to persons in other states, possibly by transactions governed by laws of other states. The underlying principle is that the law of a decedent's last domicile should be controlling as to rules of public policy that override the decedent's power to devise the estate to anyone he or she chooses. The principle is implemented by subjecting donee recipients of the decedent's largesse to liability under the decedent's domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.

12. The first and third sentences of subsection (g) are identical to sentences now appearing in UPC 6-215. The second sentence is new. It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants. A creditor whose claim has been allowed but remains unsatisfied and whose demand for a proceeding has been turned down by the estate fiduciary may proceed at personal risk in efforts to enforce the estate claim against the nonprobate beneficiary. This is so because the last two sentences of (g) shift the risk of unrecoverable costs from the decedent's estate to the claimant who undertakes collection efforts on behalf of the decedent's estate. Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding. A p.r. tempted to decline a demand for a proceeding should note that the "good faith" standard of this section must be determined in light of the fiduciary responsibility imposed by UPC 3-703.

13. Subparagraph (h) meshes with time limits in UPC sections governing allowance and disallowance of claims. See sections 3-804 and 3-806.

14. Subsection (i)(1) is designed to protect issuers of TOD security registrations who make payments or delivery to designated death beneficiaries before receiving notice from the decedent's probate estate of a probable insolvency. These entities are not "transferees" subject to liability under (b), but they might be subjected to criticism or legal expense if invited to pass values along to beneficiaries in spite of warning notices from estate fiduciaries.

Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if no warning of probable estate insolvency has been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.

Part 2. Multiple-Person Accounts

Subpart 1. Definitions and General Provisions

§201. Definitions. In this part:

(1) "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share account.

(2) "Agent" means a person authorized to make account transactions for a party.

(3) "Beneficiary" means a person named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee.

(4) "Devisee" means any person designated in a will to receive a testamentary disposition of real or personal property.

(5) "Financial institution" means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union.

(6) "Heirs" means those persons, including surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(7) "Multiple-party account" means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned.

(8) "Party" means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent.

(9) “Payment” of sums on deposit includes withdrawal, payment to a party or third person pursuant to check or other request, and a pledge of sums on deposit by a party, or a set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

(10) “Person” means an individual, a corporation, an organization, or other legal entity.

(11) “Personal representative” includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(12) “POD designation” means the designation of (i) a beneficiary in an account payable on request to one party during the party’s lifetime and on the party’s death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or (ii) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.

(13) “Receive,” as it relates to notice to a financial institution, means receipt in the office or branch office of the financial institution in which the account is established, but if the terms of the account require notice at a particular place, in the place required.

(14) “Request” means a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but, for purposes of this part, if terms of the account condition payment on advance notice, a request for payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for payment.

(15) “State” includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(16) “Successors” means those persons, other than creditors, who are entitled to property of a decedent under the decedent’s will or otherwise.

(17) “Sums on deposit” means the balance payable on an account, including interest and dividends earned, whether or not included in the current balance, and any deposit life insurance proceeds added to the account by reason of death of a party.

(18) “Terms of the account” includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit.

Comment

This and the sections that follow are designed to reduce certain questions concerning many forms of multiple-person accounts (including the so-called Totten trust account). A “payable on death” designation and an “agency” designation are also authorized for both single-party and multiple-party accounts. The POD designation is a more direct means of achieving the same purpose as a Totten trust account; this part therefore discourages creation of a Totten trust account and treats existing Totten trust accounts as POD designations.

An agent (paragraph (2)) may not be a party. The agency designation must be signed by all parties, and the agent is the agent of all parties. See Section 205 (designation of agent).

A “beneficiary” of a party (paragraph (3)) may be either a POD beneficiary or the beneficiary of a Totten trust; the two types of designations in an account serve the same function and are treated the same under this part. See paragraph (12) (“POD designation” defined). The definition of “beneficiary” refers to a “person,” who may be an individual, corporation, organization, or other legal entity. Paragraph (10).

Thus a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

The term “multiple-party account” (paragraph (7)) is used in this part in a broad sense to include any account having more than one owner with a present interest in the account. Thus an account may be a “multiple-party account” within the meaning of this part regardless of whether the terms of the account refer to it as “joint tenancy” or as “tenancy in common,” regardless of whether the parties named are coupled by “or” or “and,” and regardless of whether any reference is made to survivorship rights, whether expressly or by abbreviation such as JTWROS or JT TEN. Survivorship rights in a multiple-party account are determined by the terms of the account and by statute, and survivorship is not a necessary incident of a multiple-party account. See Section 212 (rights at death).

Under paragraph (8), a “party” is a person with a present right to payment from an account. Therefore, present owners of a multiple-party account are parties, as is the present owner of an account with a POD designation. The beneficiary of an account with a POD designation is not a party, but is entitled to payment only on the death of all parties. The trustee of a Totten trust is a party but the beneficiary is not. An agent with the right of withdrawal on behalf of a party is not itself a party. A person claiming on behalf of a party such as a guardian or conservator, or claiming the interest of a party such as a creditor, is not itself a party, and the right of such a person to payment is governed by general law other than this part.

Various signature requirements may be involved in order to meet the payment requirements of the account. A “request” (paragraph (14)) involves compliance with these requirements. A party is one to whom an account is presently payable without regard to whose signature may be required for a “request.”

§202. Scope of Part.

(a) This part applies to accounts in this State.

(b) This part does not apply to (i) an account established for a partnership, joint venture, or other organization for a business purpose, (ii) an account controlled by one or more persons as an agent or trustee for a corporation, unincorporated association, or charitable or civic organization, or (iii) a fiduciary or trust account in which the relationship is established other than by the terms of the account.

Comment

Subsection (a) is drawn from Uniform Probate Code § 1-301(4).

The reference to a fiduciary or trust account in item (iii) of subsection (b) includes a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, and a fiduciary account arising from a fiduciary relation such as attorney-client.

§203. Types of Account; Existing Accounts.

(a) An account may be for a single party or multiple parties. A multiple-party account may be with or without a right of survivorship between the parties. Subject to Section 212(c), either a single-party account or a multiple-party account may have a POD designation, an agency designation, or both.

(b) An account established before, on, or after the effective date of this [Act], whether in the form prescribed in Section 204 or in any other form, is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation, within the meaning of this part, and is governed by this part.

Comment

In the case of an account established before (or after) the effective date of this Act that is not in substantially the form provided in Section 204, the account is governed by the provisions of this part applicable to the type of account that most nearly conforms to the depositor’s intent. See Section 204 (forms).

Thus, a tenancy in common account established before or after the effective date of this Act would be classified as a “multiple-party account” for purposes of this part. See Section 201(5) (“multiple-party account” defined). On death of a party there would not be a right of survivorship since the tenancy in common title would be treated as a multiple-party account without right of survivorship. See Section 212(c). It should be noted that a POD designation may not be made in a multiple-party account without right of survivorship. See Sections 201(8) (“POD designation” defined), 204 (forms), and 212 (rights at death).

Under this section, a Totten trust account established before, on, or after the effective date of this Act is governed by the provisions of this part applicable to an account with a POD designation. See Section 201(8) (“POD designation” defined) and the Comment to Section 201.

It should be noted that this section is subject to Section 405 (effective date and transitional provisions).

§204. Forms.

(a) A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of this part applicable to an account of that type:

UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM
PARTIES [Name One or More Parties]:

OWNERSHIP [Select One And Initial]:

- _____ SINGLE-PARTY ACCOUNT
- _____ MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

RIGHTS AT DEATH [Select One And Initial]:

- _____ SINGLE-PARTY ACCOUNT
- _____ SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

_____ At death of party, ownership passes to POD beneficiaries and is not part of party’s estate.

- _____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP
- _____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH) DESIGNATION

At death of party, ownership passes to surviving parties.
[Name One Or More Beneficiaries]:

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

_____ MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

[To Add Agency Designation To Account, Name One Or More Agents]:

[Select One And Initial]:

_____ AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

_____ AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES

(b) A contract of deposit that does not contain provisions in substantially the form provided in subsection (a) is governed by the provisions of this part applicable to the type of account that most nearly conforms to the depositor's intent.

Comment

This section provides short forms for single- and multiple-person accounts which, if used, bring the accounts within the terms of this part. A financial institution that uses the statutory form language in its accounts is protected in acting in reliance on the form of the account. See also Section 226 (discharge).

The forms provided in this section enable a person establishing a multiple-party account to state expressly in the account whether there are to be survivorship rights between the parties. The account forms permit greater flexibility than traditional account designations. It should be noted that no separate form is provided for a Totten trust account, since the POD designation serves the same function.

An account that is not substantially in the form provided in this section is nonetheless governed by this part. See Section 203 (types of account; existing accounts).

§205. Designation of Agent.

(a) By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party.

(b) Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated.

(c) Death of the sole party or last surviving party terminates the authority of an agent.

Comment

An agent has no beneficial interest in the account. See Section 211 (ownership during lifetime). The agency relationship is governed by the general law of agency of the state, except to the extent this part provides express rules, including the rule that the agency survives the disability or incapacity of a party.

A financial institution may make payments at the direction of an agent notwithstanding disability, incapacity, or death of the party, subject to receipt of a stop notice. Section 226 (discharge); see also Section 224 (payment to designated agent).

The rule of subsection (b) applies to agency designations on all types of accounts, including nonsurvivorship as well as survivorship forms of multiple-party accounts.

§206. Applicability of Part. The provisions of Subpart 2 concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of the account. Subpart 3 governs the liability and set-off rights of financial institutions that make payments pursuant to it.

Subpart 2. Ownership as Between Parties and Others

§211. Ownership During Lifetime.

(a) In this section, “net contribution” of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes any deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

(b) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

(c) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

(d) An agent in an account with an agency designation has no beneficial right to sums on deposit.

Comment

This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership. The section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them.

The assumption that no present change of beneficial ownership is intended may be disproved by showing that a gift was intended. For example, under subsection (c) it is presumed that the beneficiary of a POD designation has no present ownership interest during lifetime. However, it is possible that in the case of a POD designation in trust form an irrevocable gift was intended.

It is important to note that the section is limited to ownership of an account while parties are alive. Section 212 prescribes what happens to beneficial ownership on the death of a party.

The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party. Sections 221 and 226 protect a financial institution in that circumstance without reference to whether a withdrawing party may be entitled to less

than that party withdraws as against another party. Rights between parties in this situation are governed by general law other than this part.

“Net contribution” as defined by subsection (a) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

The last sentence of subsection (b) provides a clear rule concerning the amount of “net contribution” in a case where the actual amount cannot be established as between spouses. This part otherwise contains no provision dealing with a failure of proof. The omission is deliberate. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals, and not equal and undivided ownership that would be an incident of joint tenancy.

In a state that recognizes tenancy by the entireties for personal property, this section would not change the rule that parties who are married to each other own their combined net contributions to an account as tenants by the entireties. See Section 216 (community property and tenancy by the entireties).

§212. Rights at Death.

(a) Except as otherwise provided in this part, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 211 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent’s death, was beneficially entitled under Section 211, and the right of survivorship continues between the surviving parties.

(b) In an account with a POD designation:

(1) On death of one of two or more parties, the rights in sums on deposit are governed by subsection (a).

(2) On death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and there is no right of survivorship in the event of death of a beneficiary thereafter. If no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

(c) Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under Section 211 is transferred as part of the decedent’s estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

(d) The ownership right of a surviving party or beneficiary, or of the decedent’s estate, in sums on deposit is subject to requests for payment made by a party before the party’s death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent’s estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

Comment

The effect of subsection (a) is to make an account payable to one or more of two or more parties a survivorship arrangement unless a nonsurvivorship arrangement is specified in the terms of the account. This rule applies to community property as well as other forms of marital property. See Section 216 (community property and tenancy by the entireties). The section also applies to various forms of multiple-party accounts that may be in use at the effective date of the legislation. See Sections 203 (type of account; existing accounts) and 204 (forms).

By technical amendment effective August 5, 1991, the word “part” was substituted for “section” in the first sentence of subsection (a). The amendment clarified the original purpose of the drafters and Commissioners to permit a court to implement the intentions of parties to a joint account governed by Section 204(b) if it finds that the account was opened solely for the convenience of a party who supplied all funds reflected by the account and intended no present gift or death benefit for the other party. In short, the account characteristics described in this section must be determined by reference to the form of the account and the impact of Sections 203 and 204 on the admissibility of extrinsic evidence tending to confirm or contradict intention as signalled by the form.

Subsection (b) applies to both POD and Totten trust beneficiaries. See Section 201(8) (“POD designation” defined). It accepts the New York view that an account opened by “A” in A’s name as “trustee for B” usually is intended by A to be an informal will of any balance remaining on deposit at A’s death.

§213. Alteration of Rights.

(a) Rights at death under Section 212 are determined by the type of account at the death of a party. The type of account may be altered by written notice given by a party to the financial institution to change the type of account or to stop or vary payment under the terms of the account. The notice must be signed by a party and received by the financial institution during the party’s lifetime.

(b) A right of survivorship arising from the express terms of the account, Section 212, or a POD designation, may not be altered by will.

Comment

Under this section, rights of parties and beneficiaries are determined by the type of account at the time of death. It is to be noted that only a “party” may give notice blocking the provisions of Section 212 (rights at death). “Party” is defined by Section 201(6). Thus if there is an account with a POD designation in the name of A and B with C as beneficiary, C cannot change the right of survivorship because C has no present right to payment and hence is not a party.

§214. Accounts and Transfers Nontestamentary. Except [as provided in the statutes governing augmented estates or] as a consequence of, and to the extent directed by, Section 215, a transfer resulting from the application of Section 212 is effective by reason of the terms of the account involved and this part and is not testamentary or subject to estate administration.

Comment

The purpose of classifying the transactions contemplated by this part as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers on death is not to be determined by the requirements for wills. The section is consistent with Part 1 (Section 101) (provisions relating to effect of death).

§215. Rights of Creditors and Others.

[Deleted after adoption of §102.]

§216. Community Property and Tenancy by the Entireties.

(a) A deposit of community property in an account does not alter the community character of the property or community rights in the property, but a right of survivorship between parties married to each other arising from the express terms of the account or Section 212 may not be altered by will.

(b) This part does not affect the law governing tenancy by the entireties.

Comment

Section 216 does not affect or limit the right of the financial institution to make payments pursuant to Subpart 3 (protection of financial institutions) and the deposit agreement. See Section 206 (applicability of part). For this reason, Section 216 does not affect the definiteness and certainty that the financial institution must have in order to be induced to make payments from the account and, at the same time, the section preserves the rights of the parties, creditors, and successors that arise out of the nature of the funds in the account -- community or separate, or tenancy by the entireties.

Subpart 3. Protection of Financial Institutions

§221. Authority of Financial Institution. A financial institution may enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account, and may provide for a POD designation and an agency designation in either a single-party account or a multiple-party account. A financial institution need not inquire as to the source of a deposit to an account or as to the proposed application of a payment from an account.

Comment

The provisions of this subpart relate only to protection of a financial institution that makes payment as provided in the subpart. Nothing in this subpart affects the beneficial rights of persons to sums on deposit or paid out. Ownership as between parties, and others, is governed by Subpart 2. See Section 206 (applicability of part).

§222. Payment on Multiple-Party Account. A financial institution, on request, may pay sums on deposit in a multiple-party account to:

(1) one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when payment is requested and whether or not the party making the request survives another party; or

(2) the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary, unless the account is without right of survivorship under Section 212.

Comment

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. Section 226 (discharge). Paragraph (1) applies to both a multiple-party account with right of survivorship and a multiple-party account without right of survivorship (including an account in tenancy in common form). Paragraph (2) is limited to a multiple-party account with right of survivorship; payment to the personal representative or heirs or devisees of a deceased party to an account without right of survivorship is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

§223. Payment on POD Designation. A financial institution, on request, may pay sums on deposit in an account with a POD designation to:

- (1) one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when the payment is requested and whether or not a party survives another party;
- (2) the beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties; or
- (3) the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary.

Comment

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. Section 226 (discharge). Payment to the personal representative or heirs or devisees of a deceased beneficiary who would be entitled to payment under paragraph (2) is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

§224. Payment to Designated Agent. A financial institution, on request of an agent under an agency designation for an account, may pay to the agent sums on deposit in the account, whether or not a party is disabled, incapacitated, or deceased when the request is made or received, and whether or not the authority of the agent terminates on the disability or incapacity of a party.

Comment

This section is intended to protect a financial institution that makes a payment pursuant to an account with an agency designation even though the agency may have terminated at the time of the payment due to disability, incapacity, or death of the principal. The protection does not apply if the financial institution has received notice under Section 226 not to make payment or that the agency has terminated. This section applies whether or not the agency survives the party's disability or incapacity under Section 205 (designation of agent).

§225. Payment to Minor. If a financial institution is required or permitted to make payment pursuant to this part to a minor designated as a beneficiary, payment may be made pursuant to the Uniform Transfers to Minors Act.

Comment

Section 225 is intended to avoid the need for a guardianship or other protective proceeding in situations where the Uniform Transfers to Minors Act may be used.

§226. Discharge.

(a) Payment made pursuant to this part in accordance with the type of account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors. Payment may be made whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased when payment is requested, received, or made.

(b) Protection under this section does not extend to payments made after a financial institution has received written notice from a party, or from the personal representative, surviving spouse, or heir or devisee of a deceased party, to the effect that payments in accordance with the terms of the account, including one having an agency designation, should

not be permitted, and the financial institution has had a reasonable opportunity to act on it when the payment is made. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in a request for payment if the financial institution is to be protected under this section. Unless a financial institution has been served with process in an action or proceeding, no other notice or other information shown to have been available to the financial institution affects its right to protection under this section.

(c) A financial institution that receives written notice pursuant to this section or otherwise has reason to believe that a dispute exists as to the rights of the parties may refuse, without liability, to make payments in accordance with the terms of the account.

(d) Protection of a financial institution under this section does not affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts.

Comment

The provision of subsection (a) protecting a financial institution for payments made after the death, disability, or incapacity of a party is a specific elaboration of the general protective provisions of this section and is drawn from Uniform Commercial Code Section 4-405.

Knowledge of disability, incapacity, or death of a party does not affect payment on request of an agent, whether or not the agent's authority survives disability or incapacity. See Section 224 (payment to designated agent). But under subsection (b), the financial institution may not make payments on request of an agent after it has received written notice not to, whether because the agency has terminated or otherwise.

§227. Set-Off. Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party is indebted to a financial institution, the financial institution has a right to set-off against the account. The amount of the account subject to set-off is the proportion to which the party is, or immediately before death was, beneficially entitled under Section 211 or, in the absence of proof of that proportion, an equal share with all parties.

Part 3. TOD Security Registration

§301. Definitions. In this part, unless the context otherwise requires:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Devisee" means any person designated in a will to receive a disposition of real or personal property.

(3) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(4) "Person" means an individual, a corporation, an organization, or other legal entity.

(5) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(6) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(7) “Register,” including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) “Registering entity” means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) “Security” means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(10) “Security account” means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner’s death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner’s death.

(11) “State” includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

Comment

The definition of “security” is derived from UCC § 8-102 and includes shares of mutual funds and other investment companies. The defined term “security account” is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

“Survive” is not defined. No effort is made in this part to define survival as it is for purposes of intestate succession in UPC § 2-104 which requires survival by an heir of the ancestor for 120 hours. For purposes of this part, survive is used in its common law sense of outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of “survive” in joint tenancy registrations.

The definitions of “devisee,” “heirs,” “person,” “personal representative,” “property,” and “state” are taken from Section 1-201 of the Uniform Probate Code which, as revised in 1989, includes this part as Part 3 of Article VI.

§302. Registration in Beneficiary Form; Sole or Joint Tenancy Ownership. Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

Comment

This section is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of all co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual’s fractional interest in a co-owned

security normally will split their holding into separate registrations of the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term “individuals,” as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict individuals using this ownership form as to their choice of death beneficiary. The definition of “beneficiary form” in Section 301 indicates that any “person” may be designated beneficiary in a registration in beneficiary form. “Person” is defined so that a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

§303. Registration in Beneficiary Form; Applicable Law. A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity’s principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner’s address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

Comment

This section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on an enactment of this Act in X Company’s state of incorporation, or in the state of incorporation of X Company’s transfer agent. Or, an enactment by the state of the issuer’s principal office, the transfer agent’s principal office, or of the issuer’s office making the registration also would validate the registration. An enactment of the state of the registering owner’s address at time of registration also might be used for validation purposes.

The last sentence of this section is designed, as is Section 101, to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this part.

§304. Origination of Registration in Beneficiary Form. A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

Comment

As noted above in commentary to Section 302, this part places no restriction on who may be designated beneficiary in a registration in beneficiary form.

§305. Form of Registration in Beneficiary Form. Registration in beneficiary form may be shown by the words “transfer on death” or the abbreviation “TOD,” or by the words “pay on death” or the abbreviation “POD,” after the name of the registered owner and before the name of a beneficiary.

Comment

The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the

owner's death so that the sums realized may be "paid" to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid nonprobate death benefit or transfer on death.

§306. Effect of Registration in Beneficiary Form. The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

Comment

This section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant. See Section 310. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

§307. Ownership on Death of Owner. On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

Comment

Even though multiple owners holding in the beneficiary form here authorized hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary also should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 308 deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; Section 310 enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as "TOD A (20%), B (30%), C (50%)," would be improper. Though not included in the beneficiary forms described for illustrative purposes in Section 310, the Act enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms

might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration in beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any anti-lapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative.

See the Comment to Section 301 regarding the meaning of "survive" for purposes of this part.

§308. Protection of Registering Entity.

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with Section 307 and does so in good faith reliance (i) on the registration, (ii) on this part, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part.

(d) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

Comment

It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. This part does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subsection (c) would qualify as a notice under UCC § 8-403.

"Good faith" as used in this section is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," as specified in UCC § 2-103(1)(b).

The protections described in this section are designed to meet any questions regarding registering entity protection that may not be foreclosed by issuer protections provided in the Uniform Commercial Code. Because persons interested in this part may wish to be reminded of relevant UCC provisions, a brief summary follows.

"U.C.C. § 8-403, 'Issuer's Duty as to Adverse Claims' contains detailed provisions regarding duties of inquiry by an issuer of a certificated or uncertificated security who is requested to effect a transfer, and the availability and use of 30 day notices to force adverse claimants to start litigation if further delay in transfer is desired. U.C.C. § 8-201's definition of 'issuer' for purposes of 'registration of

transfer...' is simply 'a person on whose behalf transfer books are maintained'. U.C.C. § 8-403 is among the sections dealing with registration of transfers.

"U.C.C. sections 8-308 and 8-404(1) appear to exonerate an issuer who acts in response to transfer directions signalled by the 'necessary indorsement' on or with a certificated security or in response to 'an instruction originated by an appropriate person' in the case of an uncertificated security. Section 8-308 describes the meaning of 'appropriate person' in the case of a certificated security as 'the person specified by the certificated security . . . to be entitled to the security.' U.C.C. § 8-308(6) (1978). In the case of an uncertificated security, 'appropriate person' means the 'registered owner.' *Id.* § 8-308(7). The survivor of owners listed as joint tenants with right of survivorship is specifically defined as an authorized person. *Id.* § 8-308(8)(d). The U.C.C. aspect of the problem could be met by an additional sub-paragraph to section 8-308(8) that would include a TOD beneficiary as an 'appropriate person' when the beneficiary has survived the owner.

"No U.C.C. addition would be necessary if a TOD beneficiary designation were viewed as a contingent order for transfer at the owner's death that may be safely implemented as a direction from the owner as an 'authorized person.' The owner's death before completion of the transfer would not pose U.C.C. problems because section 8-308(10) provides: 'Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him does not become unauthorized for the purposes of this Article by virtue of any subsequent change of circumstances.'

"It might be questioned whether a TOD direction, which may be revoked before it is carried into effect and is also contingent on the beneficiary's survival of the registrant, is within the transfer directions contemplated by the U.C.C. framers for purposes of issuer protection. However, since section 8-202 explicitly protects issuers against problems arising because of restrictions or conditions on transfers, only the novelty of revocable directions for transfer on death gives pause.

"In general, article 8 of the U.C.C. reflects a careful attempt to protect implementation of a wide range of transfer instructions so long as the signatures are genuine and are those of owners acting in conformity with duly imposed rules of the issuer organization. . . . Hence, existing U.C.C. protections should be adequate, . . ." Wellman, *Transfer-On-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 823 n.90 (1987).

§309. Nontestamentary Transfer on Death.

A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part and is not testamentary.

Comment

Subsection (a) is comparable to Section 214. Subsection (b) is similar to Section 101(b).

Consideration should be given to the desirability of adapting the section as necessary to fit local principles regarding the rights of a surviving spouse to protection against disinheritance by nonprobate transfers effective at death.

Incident to adoption of new Section 102 by NCCUSL in 1998, former subsection (b) was deleted and the text of former subsection (a) became the entire text of the section. New 102 describes remedies against recipients of nonprobate transfers at death available to a decedent's probate exemption beneficiaries and creditors if the decedent's probate estate is inadequate to discharge these claims.

§310. Terms, Conditions, and Forms for Registration.

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for

cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(2) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN
TOD John S Brown Jr.

(3) Multiple owners-primary and secondary (substituted) beneficiaries: John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown or
John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

Comment

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under this part and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; i.e., that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 307.

Part 4. Short Title, Construction, Transitional Provisions

§401. Short Title. This [Act] may be cited as the Uniform Nonprobate Transfers on Death Act.

§402. Uniformity of Application and Construction. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Comment

This Act is a free-standing version of Article VI of the Uniform Probate Code as revised in 1989. To facilitate correlation with corresponding provisions of the Uniform Probate Code, the numbering of this Act generally follows that of the Uniform Probate Code.

§403. Supplementary General Principles of Law Applicable. Unless displaced by the particular provisions of this [Act], the principles of law and equity supplement its provisions.

§404. Severability Clause. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

§405. Effective Date and Transitional Provisions.

(a) This [Act] takes effect

(b) On the effective date of this [Act]:

(1) An act done before the effective date and any accrued right is not impaired by this [Act]. If a right is acquired, extinguished, or barred on the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right.

(2) Any rule of construction or presumption provided in Part 2 applies to accounts established before the effective date unless there is a clear indication of a contrary intent.

[(c) The rights of a party, beneficiary, or creditor in an account established before the effective date of this [Act] are governed by the law applicable before the effective date for a period of one year after the effective date and thereafter are governed by Part 2.]

(d) Part 3 applies to registrations of securities in beneficiary form made before or after the effective date, by decedents dying on or after the effective date.

Comment

Subsection (b) is drawn from Uniform Probate Code § 8-101. Subsection (b) is an exception to the general rule stated in Section 203 (existing accounts). Depending on the extent to which this Act affects rights in multiple-person accounts, a state may wish to provide delayed application in the form offered in optional subsection (c), during which parties to the account may make any changes in the form of the account that appear appropriate.