

MEMORANDUM

To: Drafting Committee for the Uniform Real Property Transfer on Death Act

From: Thomas P. Gallanis

Date: November 3, 2008

Re: Summary of Issues Raised

This memorandum provides a brief summary of the issues raised during the first reading of our Act at the ULC annual meeting in Big Sky, Montana, and other issues that have been drawn to the committee's attention.

Section 101. Short Title

No issues.

Section 102. Definitions

No issues.

Section 103. Applicability

No issues.

Section 104. Nonexclusivity

No issues.

Section 201. Transfer on Death Deed Authorized

Should the Comment discourage the use of class gifts or conditions on the ground that they potentially involve court proceedings?

Section 202. Transfer on Death Deed Revocable

This provision is new and responds to a question about whether the TOD deed can be made irrevocable. The committee answered in Big Sky that the deed cannot be made irrevocable.

Section 203 (former Section 202). Transfer on Death Deed Nontestamentary

No issues.

Section 204 (former Section 203). Capacity of Transferor

A commissioner suggested a sentence in the Comment that the deed is not affected if the transferor subsequently loses capacity.

A commissioner suggested that, contrary to the Restatement, we should use the higher standard of capacity for inter vivos transfers, as providing additional safety.

Section 205 (former Section 204). Requirements

1. A commissioner encouraged us to be explicit that the TOD deed must comply with the recordation requirements of state law.

2. Should we stick with the requirement of recordation before death or instead give a grace period (e.g., *n* days after the transferor's death)?

Section 206 (former Section 205). Notice, Delivery, Acceptance, Consideration Not Required

Our drafts have taken the position that the transfer is automatic but can be disclaimed. Should we instead require acceptance in order to avoid environmental issues?

A commissioner suggested that, as soon as the TOD deed is recorded, there should be notice of the TOD deed provided to the transferor's heirs and devisees.

Section 207 (former Section 206). Revocation

1. The Comment should emphasize the distinction between revocation and ademption by extinction.

2. Should the Comment distinguish revocation from additional acts that make the deed ineffective (e.g., disclaimer) or that change the beneficiaries (e.g., lapse)?

3. The Comment should give examples of revocation by inconsistency. Should the concept of revocation by inconsistency extend to the transfer of an interest less than fee (e.g., a mineral interest)?

4. Should the Comment emphasize that a revoked deed need not be expunged, but rather that the later instrument simply supersedes the former instrument?

5. Should the Comment say more than it already does about revocation by an agent after the principal's incapacity?

6. A commissioner thought that, contrary to the position of UPC §6-213(b) on POD account designations, the TOD deed should be revocable by will.

Section 208 (former Section 207). Effect of Deed During Transferor's Lifetime

1. We should make clear that the recording of a TOD deed does not:
- a. affect the rights of creditors or transferees of the transferor or the designated beneficiary;
 - b. affect the rights of pre-existing as well as of future creditors of the transferor or the designated beneficiary;
 - c. affect the rights of creditors whether or not they have an interest in the property;
 - d. trigger a due-on-sale clause in a mortgage;
 - e. trigger the "time-clock" for the execution of a disclaimer.

2. We should consider whether to implement a procedure for notifying the designated beneficiaries, either during life or at death. Is this workable? Could the taxing authority be the notification mechanism, at least if the beneficiary is an individual?

Section 209 (former Section 208). Effect of Deed at Transferor's Death

1. Should the opening clause of the section ("Except as otherwise provided..."), which refers to the elective share, also refer to dower? (Dower does not exist in uniform law and exists only in 5 jurisdictions: Arkansas, D.C., Kentucky, North Carolina, and Ohio.)

2. Should we add the words "by operation of law" in Section 209(a)(1)? The revision, now in progress, of the Ohio TOD deed statute includes these words, which may help with ALTA title insurance language in transferring the title from the transferor to the beneficiary.

3. We should re-evaluate the rule in subsection (b) about the interests to which the beneficiary is subject. There are at least three options:

a. the beneficiary takes subject to all of the transferor's inter vivos conveyances and encumbrances, whether or not recorded;

or b. the beneficiary takes subject only to the inter vivos conveyances and encumbrances recorded before the transferor's death (and if we choose this option, we should say more about the effect of off-record instruments, which would not affect title but might give rise to an action against the transferor's estate for compensation);

or c. the beneficiary takes subject to inter vivos conveyances and encumbrances, except where the recording act would protect the beneficiary.

The current draft adopts option (c).

4. We should consider whether this section should be subject to the state's antilapse statute. The Uniform Probate Code extends antilapse protection broadly to will substitutes. But antilapse does cause a period of uncertainty about the identity of the beneficiaries.

Section 210 (former Section 209). Disclaimer

Concerns were raised about the availability of disclaimer before the transferor's death, especially in connection with environmental hazards.

Section 211 (former Section 210). No Covenants or Warranties

We should consider whether the transferor should be allowed to put in covenants or warranties.

(former Section 211). Protection of Bona Fide Purchasers or Encumbrancers

We should consider whether this section should be deleted as re-stating existing law.

Should there be a BFP from a TOD deed beneficiary, if the property is subject to off-record creditors and allowances?

(former Section 212). Proof of Death

We should consider whether this section should be deleted, as each state has an established procedure for proving death. Note that prior uniform acts refer to “proof of death” without elaboration. On the other hand, there is a revision underway of Ohio’s TOD deed statute that would provide detailed affidavit procedures for effectuating the transfer.

Our annual-meeting draft stated: “Proof of the death of a transferor or a beneficiary of a transfer on death deed must be established in the same manner as proof of the death of a joint tenant [under [cite state statute]].” (If we want to reinstate this provision, the word “designated” should be added before “beneficiary”.)

(former Section 213). Proceeding to Contest Transfer on Death Deed

1. Should the subsection specifying the grounds of contest (including “other invalidating cause[s]”) be deleted as merely re-stating existing law?

2. Should the procedural detail be deleted as unwise for a uniform law, or should it spell out the full procedure? A commissioner urged the latter option.

3. Should we include a statute of limitations (and should it be reduced if there has been actual notice to the transferor’s heirs and devisees)?

4. Should we require marshaling of other assets before reaching the TOD deed property? Some states, though not uniform law, give real property a preference.

Section 212 (former Section 214). Liability of Beneficiary for Creditor Claims and Statutory Allowances

1. In Alternative B, should we continue to follow the basic approach of UPC §6-102 in imposing personal liability on the beneficiary or should we take a different approach by imposing a lien against the property? Personal liability would avoid complicating title.

2. Should we provide an option for the beneficiary to discharge liability by returning the property? Such an option raises the question of waste: what happens if the beneficiary harms the property before returning it?

3. Should we include a statute of limitations in Alternative B?

4. A commissioner suggested we should say more about how this section would work, including whether an estate would have to be opened and by whom, and how the section would work with the apportionment of the estate tax.

Article 3

1. Should the act contain forms in the statutory text, in the Comment, or not at all?

2. Should we delete, retain or expand the “Common Questions”? Concerns were raised that the “Common Questions” could work against a transferor who is being pressured to sign.

3. Should the forms continue to discourage class gifts?

4. Should the deed form provide that it revokes all prior TOD deeds? What about the transferor who wishes to revoke in part or by inconsistency?

5. Should the forms have instructions to the beneficiary, as well as instructions to the transferor?

6. Should the revocation form continue to provide the option of providing the recording information of the deed, or are transferors too likely to mess this up?
7. Should the deed and revocation form be two parts of the same form, so that the transferor can tear off the former and retain the latter for future use?
8. Should the boilerplate have a “Do Not Record” notation, to save costs, or will this confuse transferors?
9. Should the forms do more to encourage users to consult lawyers?

Article 4

No issues.