March 27, 2024

Comment Re: S.8306/A.8806, Part O, Sec. 7 (Transfer on Death Deeds)

INTRODUCTION

This comment is submitted by the Trusts and Estates Law Section ("TELS") of the New York State Bar Association. TELS is generally in favor of establishing a procedure for Transfer on Death ("TOD") deeds in New York but has certain questions and concerns regarding the Part O of S.8306/A.8806, as written. We respectfully request that the Executive and Legislature consider this memorandum and the specific concerns described Section D. The following includes a detailed analysis of the public policy and TELS' concerns, but generally the legislation should be revised to provide:

1. whether testamentary capacity is the appropriate level of mental capacity to execute a TOD deed;
2. whether a transferor may name a class of beneficiaries in a TOD deed;
3. that a designated beneficiary may neither serve as a witness nor perform the required notarial act;
4. that the individual performing the notarial act may also serve as a witness;
5. whether an agent may execute the TOD deed on behalf of the transferor;
6. that a trust or charity may be designated as a beneficiary;
7. allow the designated beneficiary to record a TOD deed within some timeframe following the transferor's death;
8. greater clarity around the role of the attorney in executing a TOD deed.

DISCUSSION

A. What is a Transfer-on-Death Deed?

In general, a transfer-on-death ("TOD") deed, which is also sometimes referred to as a "beneficiary deed," "beneficiary real-estate deed," "TOD instrument," or "deed upon death," allows the owner of real property the ability to designate one or more persons, trusts, or entities as the beneficiary to receive such real property upon the owner's death. *See, e.g.*, Wright & Emrick, *Tearing Down the Wall: How Transfer-On-Death Real Estate Deeds Challenge the Inter Vivos/Testamentary Divide*, 78 Md. L. Rev. 511, 516-18 (2019) ("Wright & Emrick"). Like a payable-on-death designation for a bank account, the beneficiary designated in the TOD deed automatically becomes the owner of the real property upon the owner's death.

B. Current TOD Deed Laws in New York and Other States

Currently, New York law does not allow for TOD deeds or some equivalent. Although New York State does not recognize TOD deeds, the majority of states and the District of Columbia do. They are as follows:

Alaska	Indiana	New Mexico	Virginia

Arizona	Kansas	North Dakota	Washington
Arkansas	Maine	Ohio	West Virginia
California	Minnesota	Oklahoma	Wisconsin
Colorado	Missouri	Oregon	Wyoming
District of Columbia	Mississippi	South Dakota	
Hawaii	Montana	Texas	
Illinois	Nebraska	Utah	
Florida (called a Lady Bird Deed)	Nevada		

Dr. Gerry W. Beyer, *Transfer on Death Deeds Survey*, ACTEC (rev. July 21, 2022), https://www.actec.org/assets/1/6/Transfer_on_Death_Deeds_Survey.pdf?hssc=1; State Transfer on Death Deed Chart, Practical Law Checklist w-006-7811 (Westlaw).

The following states do not currently recognize TOD deeds or some equivalent:

Alabama	Maryland	South Carolina
Connecticut*	Massachusetts	Tennessee
Delaware*	Michigan	Vermont
Georgia	New Hampshire*	
Idaho	New Jersey	
Iowa	New York*	
Kentucky*	North Carolina*	
Louisiana	Pennsylvania	
	Rhode Island*	

*This state has proposed TOD deed legislation pending.

The general trend of the various states appears to favor enactment of TOD deed legislation -- especially since 2009. In 2009, the Uniform Law Commission ("ULC") promulgated The Uniform Real Property Transfer of Death Act (the "Act") in 2009. The ULC's website describes the Act as follows:

> The [Act] provides a simple process for the non-probate transfer of real estate. The [Act] allows an owner of real property to designate a beneficiary to automatically receive the property upon the owner's death without a probate procedure. The property passes by means of a recorded transfer on death (TOD) deed. During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed.

Real Property Transfer on Death Act, Uniform Law Commission,

https://www.uniformlaws.org/committees/community-home?communitykey=a4be2b9b-5129-448a-a761-a5503b37d884#LegBillTrackingAnchor. Many states have based their own legislation on the Act and many others have introduced legislation since the Act's promulgation.

C. Advantages and Disadvantages of Transfer-on-Death Deeds

Common arguments in favor of TOD deeds in New York State include:

1. **Retention of Ownership and Control**. In contrast to a deed conferring a joint tenancy with right of survivorship or a legal remainder interest, a TOD deed creates no present interest in the designated beneficiary. *See* Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues,* 41 Real Prop. Prob. & Tr. J. 529, 542 (2006) ("Gary"). Therefore, the current owner of the real property remains the owner until their death. Additionally, a TOD deed is typically completely revocable/amendable during the owner's lifetime. *Id.*

2. **Probate Avoidance/Cost Savings.** Because a TOD deed removes the need for a personal representative to probate or otherwise petition a Court to administer the property designated for a beneficiary, a TOD deed eliminates the costs associated with bringing a probate or administration proceeding (as to that specific property, of course). Gary at 542.

3. **Tax Considerations**. As stated above, designating a beneficiary of real property via a TOD deed is not a current transfer of ownership, therefore, no federal gift tax is triggered when such designation is made. *Id.* at 543. Unlike conferring title to a joint owner with right of survivorship, the designation made in a TOD deed does not trigger the gift tax as would be the case involving a completed gift. *See* Wright & Emrick, at 519.
   The execution of the TOD deed has no effect on the owner's cost basis. *See, e.g.*, Lucy Wood, *Transfer on Death Deeds in Texas: High Time for the Todd*, 9 EST. PLAN. & COMMUNITY PROP. L. J. 59, 73 (2016) (citing IRC 1014). When the beneficiary inherits the property designated via TOD deed, the property inherited will receive a date of death basis adjustment pursuant to IRC Section 1014. *See id.*

4. **Protection Against Elder Abuse.** Some practitioners posit that a statute authorizing TOD deeds could curb elder abuse in apparent recurring situations where an elderly individual is persuaded to transfer his/her homes to his/her child, who then threatens to evict the elderly individual so the child can sell the property. Gary at 544 (citing Tim Willert, *Bill Would Simplify Transfer of Real Property*, S.F. DAILY J., at 3 (May 26, 2005).

Common arguments against the enactment of TOD deeds in New York State:

1. **Legislation Often Lacks Formality of Wills.** Some practitioners argue that the enactment of TOD deeds is disadvantageous because the execution of TOD deeds, being a quasi-testamentary act, should carry the strict formalities of a Will execution. *See*

Wright & Emrick at 517.

2. **Title Insurance Issues.** In some states, title insurance policies may become invalidated once the TOD deed is recorded. Also, title companies will not issue title insurance to the beneficiary until three years after the transferor's death because of the risks of legal challenges, which can cause the sale of a property to be delayed due to the beneficiary's inability to obtain insurance. *See* Gary at 545.

3. **Potential Drafting/Execution Errors**. People may use TOD deeds without consulting lawyers and may make mistakes when completing and/or executing them. *Id.* at 544.

4. **TOD Deeds Militate Against Longstanding Common Law.** "In American and English common law, a deed should not be used to transfer a decedent's title to real property at death. For a deed to be valid, the words of grant must indicate the grantor's intent to presently convey a present or future interest in the land." 2 Patton and Palomar on Land Titles § 333 (3d ed.).

D. Concerns Regarding the Proposed Part O

1. *Is Testamentary Capacity the Appropriate Level of Mental Capacity to Execute a TOD Deed?*

The legislative proposal explicitly states, "the capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will." Many existing TOD deed statutes do not explicitly state the level of capacity required to execute a TOD deed. Many practitioners and commentators agree that testamentary capacity as the appropriate level of mental capacity to execute a TOD deed. *See* Gary at 548 (noting that the level presumably should be the same as testamentary capacity because "a TOD deed, like a will, has effect only at death," citing the RESTATEMENT (THIRD) OF PROPERTY: Wills and Other Donative Transfers); *cf.* D.C. Law § 19-604.08 ("The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will."). However, TELS questions whether the capacity to make a transfer on death deed should differ at all from the capacity to execute any other type of deed in New York.

In New York, a person has the requisite capacity to make a valid deed unless that person is "wholly, absolutely, and completely unable to understand and appreciate the nature of the transaction at the time of the execution of the deed." 43 N.Y. JUR. 2d Deeds § 25 (citing *Larkin v. Rejebian*, 271 A.D. 910 (3d Dep't 1946). Indeed, is it "not necessary that the grantor should understand the exact legal import and effect of the words employed by the deed, so long as the grantor understands that he or she is making a conveyance and that the instrument the grantor is executing is a conveyance as understood and intended by him or her." *Id.* (citing *Broat v. Broat*, 18 N.Y.S.2d (Broome County, Sup. Ct. 1940).

Would it be more appropriate for the Revised Proposed Legislation to state that the mental capacity required to execute a TOD deed is the same level of capacity to execute, for example, a standard warranty deed? Or would it be more appropriate for the Revised Proposed Legislation to

state that the mental capacity required is akin to that of the mental capacity required to execute documents at a bank allowing an individual to designate a bank account as transfer on death (i.e., the mind of the person executing the beneficiary designation was "so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction"? *See Vermylen v. Genworth Life Ins. Co. of N.Y.*, 28 Misc.3d 1236(A) (N.Y. Sup. Ct. 2010). This question should be given further thought before the Legislature were to adopted Part O.

2. *May Transferors Designate a Class of Beneficiaries?*

Although Part O is clear that a transferor may designate multiple beneficiaries of a particular property, it does not explicitly state whether a transferor may name a class of beneficiaries, for example, "my issue, per stirpes." In some states (e.g., California), TOD deeds do not allow for the naming of a class of beneficiaries (i.e., "my issue, per stirpes"). *See* CANHR, *Fact Sheet – Transferring Your Home with a Transfer on Death Deed (TOD) – What You Need to Know*, FS_MEDICAL_TOD_Need_To_Know.pdf (canhr.org) ("CANHR Fact Sheet"). By comparison, Missouri does allow for the designation of class beneficiaries. Mo. Stat. § 461.045 (i.e., "lineal descendants per stirpes").

Any New York law on TOD should either explicitly allow or disallow for these types of designations, rather than remain silent on the issue in order to provide clarity to the public. To the extent the Revised Proposed Legislation ultimately allows for the designation of a class of beneficiaries, such as "issue, per stirpes," query who determines the composition of that class.

3. *A Designated Beneficiary Must Not be Permitted to Serve as a Witness nor Perform the Notarial Act Required.*

This must be clearly delineated in the Revised Proposed Legislation. The same concept is present in the General Obligations Law with respect to powers of attorney and will prevent fraud and undue influence. *See* General Obligations Law ("GOL") § 5-1501B.

4. *May the Individual Performing the Notarial Act Also Serve as a Witness?*

The Committee recommends that the following language be added to the § 425 7(c) of the Revised Proposed Legislation: "The person who takes the acknowledgment under this paragraph may also serve as one of the witnesses." This is the case under the General Obligations Law relating to the execution of powers of attorney. *See* GOL § 5-1501B.

5. *May an Agent May Execute a TOD Deed on Behalf of the Transferor?*

The Revised Proposed Legislation should clarify whether the transferor may direct another individual (for example, an agent pursuant to a power of attorney) to execute a TOD deed on their behalf and what is required in that scenario. For example, consider the General Obligations Law: "when a person signs at the direction of a principal he or she shall sign by writing or printing the principal's name, and printing and signing his or her own name." *See* GOL § 5-1501B.

6. *Allow Trust or a Charity be Designated as a Beneficiary.*

The initial version of the Revised Proposed Legislation explicitly listed different type of trusts that could be named a designated beneficiary. We recommend that § 424(d) of the Revised Proposed Legislation be amended to explicitly include "a trust" and "a charity" in the list of items that define the term "Person" and by extension, the different types of "designated beneficiary."

7. *Should a TOD Deed (or the Revocation Thereof) Be Recorded to Be Effective?*

Although, most states require that a TOD deed be recorded to be deemed effective (s*ee, e.g.*, D.C. Law § 19-604.16 ("This form must be recorded before your death, or it will not be effective.")), the general rule in New York is the that "an unrecorded deed . . . is valid as between the parties and as against the whole world." *See* 92 N.Y. JUR. 2d Records and Recording § 137 (citing, e.g., *Schmidt v. Hoyt*, 1 Edw. Ch. 652 (N.Y. Ch. 1833). The rules regarding TOD deeds deviate from the general rule regarding effectiveness of deeds in New York. By requiring a transferor to record a TOD deed, it eliminates any aspect of privacy that a transferor may have wished for in avoiding probate, as the TOD deed (an estate planning tool) will be made public record upon recordation. The recording requirement is contrary to New York law regarding the effectiveness of deeds and eliminates a transferor's ability to conduct their estate planning in private. On the other hand, adding the formality of the recordation requirement militates against fraud and chain of title confusion. A middle ground, perhaps, is to allow the designated beneficiary (and/or the personal representative of the transferor's estate) the ability to record a TOD deed within some timeframe (e.g., nine (9) months) following the transferor's death. This will allow a transferor the ability to keep their estate planning affairs private until death, while achieving the goal of requiring recordation of the deed at some point.

8. *Being that the Execution of a TOD Deed is "Quasi-Testamentary" Act, Should It Be Executed Under the Supervision of an Attorney? Should this At Least Be Recommended in the Form?*

In New York, courts will afford a presumption of due execution if a Last Will and Testament is executed under the supervision of an attorney-at-law. Although this presumption is court-made law (*see, e.g., Matter of Moskowitz,* 116 A.D.3d 958 (2d Dept. 2014)), the Committee questions whether the Revised Proposed Legislation should explicitly state that if the execution of a TOD deed is witnessed by an attorney-at-law, it is afforded a presumption of due execution. At the very least, the Committee suggests that the form of TOD deed provided for in the statute be revised to provide the following warning in bold, capitalized lettering:

"<u>CAUTION TO THE TRANSFEROR</u>: YOU SHOULD CAREFULLY READ ALL INFORMATION ON THE OTHER SIDE OF THIS FORM. IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER OF YOUR OWN CHOOSING TO EXPLAIN IT TO YOU. IT IS RECOMMENDED THAT THIS FORM BE EXECUTED UNDER THE SUPERVISION OF AN ATTORNEY."

CONCLUSION

TELS appreciates the opportunity to share these comments on the proposal to establish Transfer on Death deeds in New York State. Please reach out to NYSBA Policy Manager Lena Faustel with any questions. She can be reached at lfaustel@nysba.org and 518-487-5675.