

## UTAH UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

Utah Code Ann. §§ 75-6-401 to 419

Effective May 8, 2018

### I. Origins of the Act and Summary of Purpose

The original draft of the Uniform Act was promulgated by the Uniform Law Commission in 2009 with the intent to “provide a simple process for non-probate transfer of real estate.” Since its completion, the Uniform Act has been adopted in 16 jurisdictions as follows: Alaska, District of Columbia, Hawaii, Illinois, Maine, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia. Another 5 jurisdictions currently have the Act in the process of adoption.

The Uniform Law Commission’s website aptly summarizes the purposes of the Act:

“The act allows an owner of real property to designate a beneficiary to automatically receive the property upon the owner’s death without probate. 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.”

Utah’s enactment (hereinafter, the “Act”) primarily follows the Uniform Act with some minor exceptions. **The Act is built on the underlying premise that certainty of title is essential.**

### II. Overview of the Act

#### A. Transfer on Death Deed (“TODD”) Authorized.

1. An individual may transfer property to a beneficiary via a TODD effective at transferor’s death.
2. **Class gifts are not permitted.** This is a Utah specific change. A class gift would require a court proceeding to determine beneficial interests. The intent in using a TODD is to avoid probate. This change helps to assure that the TODD is effective at the filing of a death certificate without any further court involvement.
3. The transferor may choose the form of ownership of the beneficiaries.
  - a) Tenants in Common
  - b) Joint Tenancy

- c) Life estate with remainder
  - d) Reservation of mineral rights
  - e) Etc.
- 4. Contingent beneficiary interests are permitted.
- B. The capacity required to make a TODD is the same as that required for making a Will.
- C. TODD are always revocable, even if the TODD states otherwise.
- D. TODD are non-testamentary, and as such do not have to be executed with the formalities of a will or be probated.
- E. Requirements for a Valid TODD:
  - 1. Meet same requirements as a recordable deed.
  - 2. State that the transfer is to occur at the transferor's death; and
  - 3. Be property recorded with the country recorder **before the transferor's death**. No exception is provided for this third element. You cannot have an effective unrecorded TODD or desk drawer TODD.
  - 4. A TODD does **NOT** require delivery or consideration.
- F. Revocation of TODD.
  - 1. May be accomplished by:
    - a) A TODD that revokes the prior TODD either expressly or by inconsistency.
    - b) An instrument that expressly revokes the TODD.
    - c) An inter vivos deed either expressly or by inconsistency.
  - 2. **You cannot revoke a TODD in a Will.**
  - 3. You cannot revoke a TODD by action such as tearing up the deed
  - 4. A revocation must be **acknowledged after** the TODD and **recorded before the transferor's death**.
  - 5. Revocation when there is more than one Transferor:
    - a) Revocation by one transferor does not revoke the TODD of the other transferor with respect to their interest in the property.
    - b) If the transferors on the TODD are **joint tenants** with rights of survivorship, then the revocation is only effective if revoked by **all** of the living joint owners. This restriction can be easily circumvented by one joint tenant with respect to their interest in the property by severing the joint tenancy first and then revoking.

6. The Act specifically provides that Utah's nonademption statutes are not applicable to the revocation of a TODD. This avoids the beneficiary of a TODD claiming a right to a substitute devise from the decedent's estate due to a revocation of the TODD. This is a Utah specific change and not in the Uniform Act.

7. The Uniform Act Comments contain a number of instructive examples of revocations which are included in Exhibit A.

G. Effect of TODD during Life of Transferor.

1. Transferor retains all rights in property, including right to sell or encumber the property.

2. Does not affect the interest or rights of a subsequent transferee or purchaser.

3. Does not affect transferor's creditors, secured or unsecured.

4. Does not affect transferor's or beneficiaries' eligibility for public assistance.

5. Does not create legal or equitable interest in beneficiary.

6. Does not expose property to beneficiary's creditors.

H. Effect of TODD at Death of Transferor.

1. Property is transferred to beneficiaries on death of transferor in accordance with TODD and is deemed to have occurred at transferor's death. An affidavit is filed similar to the affidavit of surviving joint tenant to complete the chain of title.

2. Beneficiary must survive transferor, otherwise transfer lapses. Utah's anti-lapse statute does not apply and no substitute gift is created if the beneficiary predeceases.

3. Default ownership, if not otherwise specified in TODD, is tenants in common.

4. If one of multiple concurrent beneficiaries' shares lapse, remaining beneficiaries take pro rata in proportion to their interests in the remainder of the property.

5. If Transferors are joint owners, then on death of one of the joint owners transfers the property to the remaining joint owners first, then to TODD beneficiaries at death of last joint owner.

6. TODD transfers no covenant or warranty of title.

7. Property passing by TODD is still subject to:

a) Inclusion as part of the augmented estate for elective share purposes (Utah Code Ann. § 75-2-205).

- b) The survival statute (Utah Code Ann. § 75-2-702).
  - c) The slayer's statute (Utah Code Ann. § 75-2-803).
  - d) Statutory revocation based on divorce. (Utah Code Ann. § 75-2-804)
- I. A beneficiary may disclaim their interest in a TODD.
- J. Liability for Creditor Claims and Statutory Allowances of the Transferor:
  - 1. Only the estate can come after the TODD property if the probate estate is insufficient to meet allowed creditor claims.
  - 2. Liability must be apportioned among TODD properties in proportion to the property values.
  - 3. A proceeding to enforce this liability must be commenced within 12 months of death.
  - 4. The estate may expressly waive the claim.
  - 5. This is the section that gives title insurer's heartburn. They will not insure the property until this period is passed or the estate expressly waives the claim. To expressly waive the claim, a probate must be opened. This circumvents the intent to avoid probate.**
- K. A form of TODD and revocation of TODD are contained in the statute along with question and answers. Exhibit B attached to this outline contains nicely cleaned up copies of the statutory forms provided by Charles Livsey.
- L. Though the Act becomes effective on May 8, 2018, any transfer on death deed that meets the requirements of the act is effective, even if signed prior to the effective date, as long as the Transferor dies on or after May 8, 2018.

### **III. Summary of Limitations to Consider**

- A. There is a one-year limitation on ability to liquidate the property following the death of the transferor due to the inability to obtain title insurance during this period.
- B. Any form of beneficiary designation under a TODD must identify the beneficiary by name, and cannot use a class gift or a designation such as "to my descendants per capita at each generation." This severely limits the ability to deal with the "what if" scenarios that often cause incorrect distribution of inheritances in self-help estate planning.
- C. Naming underage or disabled beneficiaries may avoid probate at death, but will still subject the assets to guardianship and conservatorship proceedings at death.
- D. No ability to have spendthrift protection and protect the property from a beneficiaries' creditors.
- E. No ability to preserve governmental benefits for a supplemental needs persons.

F. Multiple co-owner beneficiaries under a TODD must unanimously agree on the disposition of real estate after the death of the transferor, or face a partition action to resolve the conflict.

#### **IV. Potential Uses**

A. If an individual is unwilling to do comprehensive estate planning, they should use the TODD instead of opting for outright transfers, joint transfers, or undelivered deeds. It carries far fewer restrictions and risks than the other alternative probate avoidance options.

B. If a client's real estate is subject to frequent refinancing and the one-year limitation on liquidation poses no concern, the naming of the client's revocable living trust as the beneficiary of the real estate under a TODD may provide simplicity for the client's refinancing efforts during life.

C. Exhibit C attached to this outline contains a helpful table for comparing a TODD to a trust and a helpful flow chart for decision making (provided by Rustin P. Diehl).

#### **V. Conclusions**

There are two things that people tend to want to avoid – lawyers and probate. The aversion to lawyers (or perhaps just the aversion to paying them) and the desire to avoid probate often lead the public to self-help estate planning options. Though a TODD is far from a perfect estate planning alternative for real estate, it is superior to transfers in joint tenancy, outright transfers during life, and undelivered deeds. However, like most self-help options, it is not superior to properly prepared comprehensive estate planning. Use of the TODD in the hands of experienced estate planning counsel may provide some additional flexibility previously unavailable in our estate plans if the limitations inherent in the TODD pose no problem for the estate plan.

#### **VI. Exhibits**

A. Exhibit A – Examples of Revocations from Uniform Act

B. Exhibit B – Form Deed and Revocation (provided by Charles Livsey)

C. Exhibit C – RLT vs TODD Table and Flowchart (provided by Rustin P. Diehl)

#### **VII. Disclaimer**

The information contained in this handout and presented at the presentation is provided as a service to the attorneys of the Utah Bar. While every attempt has been made to provide quality information, neither Jeff B. Skoubye or Skoubye Nielson & Johansen, LLC makes any claims, promises, warranties or guarantees about the accuracy, completeness, or adequacy of the information contained in this handout or the presentation.

## EXHIBIT A

### Revocation examples from the Uniform Act:

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

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

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

*Example 4.* T executes and acknowledges a transfer on death deed for Blackacre. T later executes and acknowledges an inter vivos deed conveying Blackacre and expressly revoking the transfer on death deed. Both instruments are recorded. Because the inter vivos deed contains an express revocation provision and is acknowledged later than the transfer on death deed, the inter vivos deed revokes the transfer on death deed. The revocation occurs when the inter vivos deed is recorded.

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

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

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

*(Comment by Jeff on Example 7: Under the Utah enactment, the TODD is revoked, the gift adeems, and the non-ademption statute will not give rise to a replacement pecuniary gift).*

Recorded at the request of:  
\_\_\_\_\_, Esq.  
Ray Quinney & Nebeker, P.C.  
36 South State Street, Suite 1400  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

Mail tax notice to:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SPACE ABOVE FOR COUNTY RECORDER'S USE

PARCEL NO. \_\_\_\_\_

**UTAH REVOCABLE TRANSFER ON DEATH (TOD) DEED**

**NOTICE TO OWNER**

You should carefully read all information on the other pages of this form. You may want to consult a lawyer before using this form. THIS FORM MUST BE RECORDED BEFORE YOUR DEATH, OR IT WILL NOT BE EFFECTIVE. The beneficiary must be a named person.

**IDENTIFYING INFORMATION**

OWNER OR OWNERS MAKING THIS DEED:

[Printed Name]  
[Mailing Address]  
[Mailing Address]

[Printed Name]  
[Mailing Address]  
[Mailing Address]

**LEGAL DESCRIPTION OF THE PROPERTY**

[insert description here]

**PRIMARY BENEFICIARY**

I designate the following beneficiary if the beneficiary survives me:

[Printed Name]  
[Mailing Address]  
[Mailing Address]

**ALTERNATE BENEFICIARY**

If the primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me:

[Printed Name]  
[Mailing Address]  
[Mailing Address]

**TRANSFER ON DEATH**

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

**SIGNATURE OF OWNER(S) MAKING THIS DEED**

\_\_\_\_\_

Date

\_\_\_\_\_

[Name]

\_\_\_\_\_

Date

\_\_\_\_\_

[Name]

STATE OF UTAH                    )  
                                          : ss.  
COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by \_\_\_\_\_ and \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

## **COMMON QUESTIONS ABOUT THE USE OF THIS FORM**

### **WHAT DOES THE TRANSFER ON DEATH (TOD) DEED DO?**

When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

### **HOW DO I MAKE A TOD DEED?**

Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each county where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

### **IS THE “LEGAL DESCRIPTION” OF THE PROPERTY NECESSARY?**

Yes.

### **HOW DO I FIND THE “LEGAL DESCRIPTION” OF THE PROPERTY?**

This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the county recorder for the county where the property is located. If you are not absolutely sure, consult a lawyer.

### **CAN I CHANGE MY MIND BEFORE I RECORD THE TOD DEED?**

Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

### **HOW DO I “RECORD” THE TOD DEED?**

Take the completed and acknowledged form to the office of the county recorder of the county where the property is located. Follow the instructions given by the county recorder to make the form part of the official property records. If the property is in more than one county, you should record the deed in each county.

### **CAN I LATER REVOKE THE TOD DEED IF I CHANGE MY MIND?**

Yes. The TOD deed is revocable. No one, including the beneficiaries, can prevent you from revoking the deed.

### **HOW DO I REVOKE THE TOD DEED AFTER IT IS RECORDED?**

There are three ways to revoke a recorded TOD deed:

- (1) Complete and acknowledge a revocation form, and record it in each county where the property is located.
- (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each county where the property is located.
- (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

**I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO?**

Do not complete this form under pressure. Seek help from a trusted family member, a friend, or a lawyer.

**DO I NEED TO TELL THE BENEFICIARIES ABOUT THE TOD DEED?**

No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

**IF I SIGN A TOD DEED AND DESIGNATE MY TWO CHILDREN AS BENEFICIARIES, AND ONE OF THEM DIES BEFORE ME, DOES THE INTEREST OF MY CHILD THAT DIES BEFORE ME PASS TO HIS OR HER CHILDREN?**

No. Everything will go to your surviving child unless you record a new transfer on death deed to state otherwise. If you have questions regarding how to word a new transfer on death deed, you are encouraged to consult a lawyer.

**I HAVE OTHER QUESTIONS ABOUT THIS FORM. WHAT SHOULD I DO?**

This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.

DRAFT

Recorded at the request of:  
\_\_\_\_\_, Esq.  
Ray Quinney & Nebeker, P.C.  
36 South State Street, Suite 1400  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

Mail tax notice to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SPACE ABOVE FOR COUNTY RECORDER'S USE

PARCEL NO. \_\_\_\_\_

## FULL REVOCATION OF TRANSFER ON DEATH DEED

### NOTICE TO OWNER

THIS REVOCATION MUST BE RECORDED BEFORE YOU DIE OR IT WILL NOT BE EFFECTIVE. This revocation is effective only as to the interests in the property of owners who sign this revocation.

### IDENTIFYING INFORMATION

OWNER(S) MAKING THIS REVOCATION:

[Printed Name]  
[Mailing Address]  
[Mailing Address]

[Printed Name]  
[Mailing Address]  
[Mailing Address]

### LEGAL DESCRIPTION OF THE PROPERTY

[insert description here]

### REVOCATION

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

SIGNATURE OF OWNER(S) MAKING THIS REVOCATION:

\_\_\_\_\_  
Date

\_\_\_\_\_  
[Name]

\_\_\_\_\_  
Date

\_\_\_\_\_  
[Name]

STATE OF UTAH            )  
                                      : ss.  
COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
2018, by \_\_\_\_\_ and \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

DRAFT

## **COMMON QUESTIONS ABOUT THE USE OF THIS FORM**

### **HOW DO I USE THIS FORM TO REVOKE A TRANSFER ON DEATH (TOD) DEED?**

Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in the office of the county recorder of each county where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

### **HOW DO I FIND THE “LEGAL DESCRIPTION” OF THE PROPERTY?**

This information may be on the TOD deed. It may also be available in the office of the county recorder for the county where the property is located. If you are not absolutely sure, consult a lawyer.

### **HOW DO I “RECORD” THE FORM?**

Take the completed and acknowledged form to the office of the county recorder of the county where the property is located. Follow the instructions given by the county recorder to make the form part of the official property records. If the property is located in more than one county, you should record the form in each of those counties.

### **I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO?**

Do not complete this form under pressure. Seek help from a trusted family member, a friend, or a lawyer.

### **CAN THIS FORM BE USED FOR A PARTIAL REVOCATION OF A PREVIOUSLY FILED TOD DEED?**

No. This form is to be used for full revocation of a deed. In the case of a partial revocation, a new TOD deed must be filed.

### **I HAVE OTHER QUESTIONS ABOUT THIS FORM. WHAT SHOULD I DO?**

This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.

Exhibit C

## Transfer on Death Deed vs. Revocable Trust

### Matrix of Issues

Issue	Revocable Trust	Transfer on Death Deed
Need to sell property without 1-year delay after death?	Yes can sell immediately without probate	1 year delay unless file probate and Personal Representative waive estate claims
Underage Beneficiary?	Can protect property in trust	May violate transfers to Minors Law
Large Numbers of Beneficiaries (5 or more)?	Simple, one-signature transfer by trustee	Requires each beneficiary to sign for transfer
Beneficiary may have creditors?	Can protect inheritance in spendthrift trust	Beneficiary's creditor can take away the inherited property
Beneficiary disabled or potentially disabled?	Can protect beneficiary's inheritance in trust without disqualifying from government disability program	Inherited property may disqualify beneficiary from government disability and/or be spent down
Beneficiary deceased or potentially deceased	Deceased beneficiary's descendants can receive beneficiary's share.	Beneficiary's descendants disinherited and cut-off
Potential Contest against deed validity	Trust with Pour-over will has greater protection from claims with formality of witness	Less formality in execution could leave open to incapacity or undue influence claims
Need full fiduciary authority to resolve property issues?	Trustee has the same authority to resolve property issues as an owner.	Designated beneficiary does not have authority to resolve issues.

# Transfer On Death Deed VS. Revocable Trust

