

**THE FUTURE IS NOW
SUMMER RECORDING INSTITUTE:
USING TRANSFER ON DEATH DEEDS**

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I. INTRODUCTION

Death and taxes may be unavoidable, but for many people probate is no longer necessary. Increasingly, much of the property that transfers at death does so through nonprobate means. Various methods exist to transfer real property outside probate. One technique involves use of the transfer on death deed. Building on the pay-on-death concept, this tool was created in Minnesota in 2008. In Minnesota, transfer on death deeds are codified under Minnesota Statutes, § 507.071. Transfer on death deeds also exist in the same or similar fashion in approximately twenty-three other states, plus the District of Columbia¹.

The Minnesota Transfer on Death Deed statute is a road map of how to use transfer on death deeds in Minnesota. These materials outline the provisions of the transfer on death deed statute and highlight the problems and questions most often asked about how to use transfer on death deeds in Minnesota.

II. WHY USE A TRANSFER ON DEATH DEED?

Many people will say they want to avoid probate, even when they do not know what probate means. While it is true that using a transfer on death deed offers an easy and effective alternative to creating a revocable trust, transfer on death deeds are not a panacea for all estate planning issues.

Unlike some other estate planning tools, it is easy for most people to understand that a transfer on death deed allows them to designate a beneficiary or beneficiaries to receive their property, but only after they have passed away. The beneficiary will have no right to their property when they are alive, and the grantor owners retain full power to transfer or encumber the property or to revoke the transfer on death deed during. The beneficiaries will still owe money if there is a mortgage, and that a transfer on death deed will not protect their property if one or both of them applies for medical assistance in the future. Most importantly, a transfer on death deed must be recorded to make it valid—a transfer on death deed cannot be filed away in a drawer to be recorded after death.

For many people, transfer on death deeds are attractive because they are relatively easy to understand, affordable and flexible. Nonetheless, in complicated situations, other estate planning mechanisms, such as trusts, may be more appropriate.

III. STATUTORY PROVISIONS

Minnesota's transfer on death deed is codified at Minnesota Statutes, section 507.071. The statute constitutes a comprehensive road map for understanding and drafting transfer on death deeds in Minnesota.

¹ Other states that allow transfer on death deeds include Alaska, Arizona, Arkansas, Colorado, Hawaii, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Wyoming, plus the District of Columbia.

A. Definitions

Subdivision 1. **Definitions.** For the purposes of this section the following terms have the meanings given:

(a) "Beneficiary" or "grantee beneficiary" means a person or entity named as a grantee beneficiary in a transfer on death deed, including a successor grantee beneficiary.

(b) "County agency" means the county department or office designated to recover medical assistance benefits from the estates of decedents.

(c) "Grantor owner" means an owner, whether individually, as a joint tenant, or as a tenant in common, named as a grantor in a transfer on death deed upon whose death the conveyance or transfer of the described real property is conditioned. Grantor owner does not include a spouse who joins in a transfer on death deed solely for the purpose of conveying or releasing statutory or other marital interests in the real property to be conveyed or transferred by the transfer on death deed.

(d) "Owner" means a person having an ownership or other interest in all or part of the real property to be conveyed or transferred by a transfer on death deed either at the time the deed is executed or at the time the transfer becomes effective. Owner does not include a spouse who joins in a transfer on death deed solely for the purpose of conveying or releasing statutory or other marital interests in the real property to be conveyed or transferred by the transfer on death deed.

(e) "Property" and "interest in real property" mean any interest in real property located in this state which is transferable on the death of the owner and includes, without limitation, an interest in real property defined in chapter 500, a mortgage, a deed of trust, a security interest in, or a security pledge of, an interest in real property, including the rights to payments of the indebtedness secured by the security instrument, a judgment, a tax lien, both the seller's and purchaser's interest in a contract for deed, land contract, purchase agreement, or earnest money contract for the sale and purchase of real property, including the rights to payments under such contracts, or any other lien on, or interest in, real property.

(f) "Recorded" means recorded in the office of the county recorder or registrar of titles, as appropriate for the real property described in the instrument to be recorded.

(g) "State agency" means the Department of Human Services or any successor agency.

(h) "Transfer on death deed" means a deed authorized under this section.

Comments:

a. "Beneficiary." A beneficiary can be any person or entity, including without limitation, the trustee of a revocable trust or a charitable organization.

b. “Grantor owner” and “Owner.” There is a critical distinction between the definition of “Grantor owner” and “Owner”. A grantor owner has an ownership interest in the property to be conveyed by transfer on death deed and executes the transfer on death deed. An owner has an ownership interest in the property and does not execute a transfer on death deed. Spouses of grantor owners who join in a transfer solely for the purpose of conveying their statutory or marital interest are not owners or grantor owners.

The term “grantor owner” is limited to an individual. It does not include a corporation, estate, trust, partnership, limited liability company, association, government, or any entity other than an individual.

c. *Contract for Deeds.* A transfer on death deed can be used to transfer a seller’s or purchaser’s interest in a contract for deed, including the right to receive payments under a contract for deed. To avoid confusion about what interests transfer upon death, it is best to include a statement in the transfer on death deed that it is intended to convey the seller’s right to receive payments under a contract for deed, including the contract for deed recording data.

Example: Henry C. Smith, a single person (“Grantor Owner”), hereby conveys and quitclaims to Arlene J. O’Conner (“Grantee Beneficiary”), effective on the date of death of the Grantor Owner, all of Grantor Owner’s interest the following described property, including without limitation, rights to payments under the contract for deed recorded on January 14, 2010 as Document Number 00343677 in the Office of the County Recorder of St. Louis County, Minnesota:

B. Effect of Deed

Subd. 2. Effect of transfer on death deed. A deed that conveys or assigns an interest in real property, to a grantee beneficiary and that expressly states that the deed is only effective on the death of one or more of the grantor owners, transfers the interest to the grantee beneficiary upon the death of the grantor owner upon whose death the conveyance or transfer is stated to be effective, but subject to the survivorship provisions and requirements of section 524.2-702. A transfer on death deed must comply with all provisions of Minnesota law applicable to deeds of real property including, but not limited to, the provisions of sections 507.02, 507.24, 507.34, 508.48, and 508A.48. If a spouse who is neither a grantor owner nor an owner joins in the execution of, or consents in writing to, the transfer on death deed, such joinder or consent shall be conclusive proof that upon the transfer becoming effective, the spouse no longer has or can claim any statutory interest or other marital interest in the interest in real property transferred by the transfer on death deed. However, such transfer shall remain an interest as identified in section 256B.15 for purposes of complying with and satisfying any claim or lien as authorized by subdivision 3.

Comments:

a. Survivorship. A transfer on death deed is subject to the survivorship provisions and requirements of section 524.702. A grantee beneficiary named in a TODD who fails to survive by 120 hours the grantor owner upon whose death the conveyance to the beneficiary becomes effective is deemed to have predeceased the grantor owner.

b. Applicable Law. A transfer on death deed is a deed that is subject to all provisions of Minnesota law applicable to deeds of real property, including but not limited to the applicable provisions cited in subdivision 2. This means that a transfer on death deed must contain the same essential elements and formalities, other than a present intention to convey, as are required for any other properly recordable deed under Minnesota law. The essential elements of a transfer on death deed include commonly include the names of the grantor owner(s), a clause transferring title, a legal description of the property to be conveyed, and the grantor owner's signature. The transfer on death deed must be acknowledged by the grantor owner before a notary public or other individual authorized by law to take acknowledgments.

If the grantor owner is married, no conveyance of the homestead is valid without the signatures of both spouses.

c. Marital Interests. If a spouse who is neither a grantor owner nor an owner joins in the execution of, or consents in writing to, the transfer on death deed, such joinder or consent is conclusive proof that upon the transfer becoming effective, the spouse no longer has or can claim any statutory interest or other marital interest in the interest in real property. Once the spouse releases his or her marital interests, there is no provision in the statute allowing the spouse to revoke his or her consent.

The following language may be used for the joinder of or consent to a transfer on death deed by the spouse who is neither a grantor owner nor an owner:

Example 1: Helen M. McDonald, Spouse of the Grantor Owner, hereby consents to this deed.

Example 2: Helen M. McDonald, the Grantor Owner's spouse, joins in this transfer on death deed solely for the purpose of conveying or releasing statutory or other marital interests in the described real property to be conveyed or transferred by this transfer on death deed.

Both statements in these examples are effective. In the author's opinion, Example 2 is preferable because it informs the spouse that he or she is releasing an interest in real property.

C. Rights of Creditors

Subd. 3. **Rights of creditors and rights of state and county under sections 246.53, 256B.15, 256D.16, 261.04, and 514.981.** The interest transferred to a beneficiary under a transfer on death deed after the death of a grantor owner is transferred subject to all effective conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, judgments, tax liens, and any other matters or encumbrances to which the interest was subject on the date of death of the grantor owner, upon whose death the transfer becomes effective including, but not limited to, any claim by a surviving spouse who did not join in the execution of, or consent in writing to, the transfer on death deed, and any claim or lien by the state or county agency authorized by sections 246.53, 256B.15, 256D.16, 261.04, and 514.981, if other assets of the deceased grantor's estate are insufficient to pay the amount of any such claim. A beneficiary to whom the interest is transferred after the death of a grantor owner shall be liable to account to the state or county agency with a claim or lien authorized by section 246.53, 256B.15, 256D.16, 261.04, or 514.981, to the extent necessary to discharge any such claim remaining unpaid after application of the assets of the deceased grantor owner's estate, but such liability shall be limited to the value of the interest transferred to the beneficiary. To establish compliance with this subdivision and subdivision 23, the beneficiary must record a clearance certificate issued in accordance with subdivision 23 in each county in which the real property described in the transfer on death deed is located.

Comment:

a. Claims and Liens. The interest conveyed by the grantor owner to the beneficiary is subject to all effective mortgages, liens and encumbrances made by the grantor owner in place prior to the grantor's death, including medical assistance or public assistance claims or liens. The statute does not otherwise provide for payment of unsecured claims.

b. Medical Assistance. The statute is not a medical assistance planning tool. Using a transfer on death deed will not make the real property an unavailable asset for medical assistance purposes. A transfer on death deed will have no effect on a person's eligibility for medical assistance.

D. Multiple Grantee Beneficiaries

Subd. 4. **Multiple grantee beneficiaries.** A transfer on death deed may designate multiple grantee beneficiaries to take title as joint tenants, as tenants in common or in any other form of ownership or tenancy that is valid under the laws of this state.

Comment:

a. Multiple Beneficiaries. If the grantor owner chooses to name

two or more beneficiaries, the transfer on death deed should indicate how the beneficiaries will take title to the property, e.g. joint tenants or tenants in common. If the grantor owner fails to designate how the beneficiaries will take title, the beneficiaries will take title as tenants in common.

E. Successor Grantee Beneficiaries

Subd. 5. **Successor grantee beneficiaries.** A transfer on death deed may designate one or more successor grantee beneficiaries or a class of successor grantee beneficiaries, or both. If the transfer on death deed designates successor grantee beneficiaries or a class of successor grantee beneficiaries, the deed shall state the condition under which the interest of the successor grantee beneficiaries would vest.

Comment:

a. Class Gift. Naming a class of beneficiaries does not avoid probate, but may be appropriate in limited circumstances, e.g. when designating a class of successor grantee beneficiaries.

Notwithstanding the freedom of disposition contained in the statute, grantor owners are encouraged as a practical matter to avoid formulating dispositions that would complicate title.

The following language may be used to designate a class of successor grantee beneficiaries:

Example: Jacob C. Roland and Marilyn A. Roland, husband and wife (“Grantor Owners”), hereby convey and quitclaim to Christine L. Roland, John A. Roland Doe and Elizabeth C. Roland (“Grantee Beneficiaries”), if effective on the death of the last of the Grantor Owners to die, the following described real property:

Lot 1, Block 1, HILLSIDE ADDITION, St. Louis County, Minnesota.

If any of the Grantee Beneficiaries die before the date of death of the last of the Grantor Owners to die, Grantor Owners convey and quitclaim the interest of the deceased Grantee Beneficiary in such real property to his or her descendants who survive the deceased Grantee Beneficiary, per stirpes, or if none, we convey and quitclaim the interest of the deceased Grantee Beneficiary in equal shares to the Grantee Beneficiaries who survive the Grantor Owners.

The designation of a class of successor beneficiaries in this example is valid, but it will not avoid probate. In this author's opinion, using a revocable trust in this situation would be preferable.

F. Multiple Joint Tenant Grantors

Subd. 6. **Multiple joint tenant grantors.** If an interest in real property is owned as joint tenants, a transfer on death deed executed by all of the owners and, if required by section 507.02, their respective spouses, if any, that conveys an interest in real property to one or more grantee beneficiaries transfers the interest to the grantee beneficiary or beneficiaries effective only after the death of the last surviving grantor owner. If the last surviving joint tenant owner did not execute the transfer on death deed, the deed is ineffective to transfer any interest and the deed is void. An estate in joint tenancy is not severed or affected by the subsequent execution of a transfer on death deed and the right of a surviving joint tenant owner who did not execute the transfer on death deed shall prevail over a grantee beneficiary named in a transfer on death deed unless the deed specifically states that it severs the joint tenancy ownership.

Comments:

a. Severance of Joint Tenancy. Execution of a transfer on death deed by joint tenants does not sever the joint tenancy unless the transfer on death deed specifically states that it does sever the joint tenancy.

b. Joint Tenants. If the interest in real property was owned in joint tenancy, all or at least the last surviving joint tenant must execute the transfer on death deed.

c. Spouses. This subdivision makes it clear that a transfer on death deed with multiple joint tenant grantor owners must be executed by all grantor owners and, if required by section 507.02, their respective spouses, if any.

G. Execution by Attorney-in-Fact

Subd. 7. **Execution by attorney-in-fact.** A transfer on death deed may be executed by a duly appointed attorney-in-fact pursuant to a power of attorney which grants the attorney-in-fact the authority to execute deeds.

Comment:

a. Attorney-in-fact. When a transfer on death deed is executed by an attorney-in-fact, an original or certified copy of the Power of Attorney and an Affidavit by Attorney-in-Fact must also be recorded with the transfer on death deed.

H. Recording Requirements

Subd. 8. **Recording requirements and authorization.** A transfer on death deed is valid if the deed is recorded in a county in which at least a part of the real property described in the deed is located and is recorded before the death of the grantor owner upon whose death the conveyance or transfer is effective. A transfer on death deed is not effective for purposes of section 507.34, 508.47, or 508A.47 until the deed is recorded in the county in which the real property is located. When a transfer on death deed is presented for recording, no certification by the county auditor as to transfer of ownership and current and delinquent taxes shall be required or made and the transfer on death deed shall not be required to be accompanied by a certificate of real estate value. A transfer on death deed that otherwise satisfies all statutory requirements for recording may be recorded and shall be accepted for recording in the county in which the property described in the deed is located. If any part of the property described in the transfer on death deed is registered property, the registrar of titles shall accept the transfer on death deed for recording only if at least one of the grantors who executes the transfer on death deed appears of record to have an ownership interest or other interest in the real property described in the deed. No certification or approval of a transfer on death deed shall be required of the examiner of titles prior to recording of the deed in the office of the registrar of titles.

Comments:

a. Recording Requirements. A transfer on death deed must be recorded prior to the death of the Grantor Owner upon whose death the transfer is effective.

b. Multiple Parcels. A transfer on death deed that includes real property in more than one county is valid once it is recorded in at least one of the counties. Nonetheless, it should be recorded in each of the counties where any part of the real property is located in order to provide record notice against other recorded instruments.

I. Deed to Trustee

Subd. 9. **Deed to trustee or other entity.** A transfer on death deed may transfer an interest in real property to the trustee of an inter vivos trust even if the trust is revocable, to the trustee of a testamentary trust or to any other entity legally qualified to hold title to real property under the laws of this state.

Comment:

a. Deed to Trust or Other Entity. A transfer on death deed can be used to transfer real property to a trust or other entity, such as a charitable organization.

The following language may be used to transfer an interest in real property to the trustee of an inter vivos trust:

Example: I, Elizabeth M. Docter, a single person, Grantor Owner, hereby convey and quitclaim to Elizabeth M. Docter or successor, as

trustee of the Elizabeth M. Docter Revocable Trust under Agreement dated October 1, 2010, Grantee Beneficiary, all of her interest in real property in St. Louis County, Minnesota, legally described as follows:....

b. Testamentary Trust. Although the statute permits a grantor owner to use a transfer on death deed to transfer real property to the trustee of a testamentary trust, this author has not been able to identify a reason to do so. A transfer to the trustee of a testamentary trust will not avoid probate.

J. Revocation

Subd. 10. **Revocation or modification of transfer on death deed.** (a) A transfer on death deed may be revoked at any time by the grantor owner or, if there is more than one grantor owner, by any of the grantor owners. A revocation revokes the transfer on death deed in its entirety. To be effective, the revocation must be recorded in the county in which at least a part of the real property is located before the death of the grantor owner or owners who execute the revocation. The revocation is not effective for purposes of section 507.34, 508.47, or 508A.47 until the revocation is recorded in a county in which the real property is located.

(b) If a grantor owner conveys to a third party, subsequent to the recording of the transfer on death deed, by means other than a transfer on death deed, all or a part of such grantor owner's interest in the property described in the transfer on death deed, no transfer of the conveyed interest shall occur on such grantor owner's death and the transfer on death deed shall be ineffective as to the conveyed or transferred interests, but the transfer on death deed remains effective with respect to the conveyance or transfer on death of any other interests described in the transfer on death deed owned by the grantor owner at the time of the grantor owner's death.

(c) A transfer on death deed is a "governing instrument" within the meaning of section 524.2-804 and, except as may otherwise be specifically provided for in the transfer on death deed, is subject to the same provisions as to revocation, revival, and nonrevocation set forth in section 524.2-804.

Comments:

a. Recording requirements. For a revocation of a transfer on death deed to be effective, it must be recorded prior to the death of the grantor owner.

b. Revocation in its entirety. If there is more than one Grantor Owner, a revocation of a transfer on death deed by one or more of the Grantor Owners revokes the transfer on death deed in its entirety. An unintentional revocation of the entire transfer on death deed by one Grantor Owner can be avoided by recording separate deeds for each of the Grantor Owners.

K. Antilapse

Subd. 11. **Antilapse; deceased beneficiary; words of survivorship.** (a) If a grantee beneficiary who is a grandparent or lineal descendant of a grandparent of the grantor owner fails to survive the grantor owner, the issue of the deceased grantee beneficiary who survive the grantor owner take in place of the deceased grantee beneficiary. If they are all of the same degree of kinship to the deceased grantee beneficiary, they take equally. If they are of unequal degree, those of more remote degree take by right of representation.

(b) For the purposes of this subdivision, words of survivorship such as, in a conveyance to an individual, "if he or she survives me," or, in a class gift, to "my surviving children," are a sufficient indication of intent to condition the conveyance or transfer upon the beneficiary surviving the grantor owner.

Comments:

a. Antilapse. If a grantee beneficiary fails to survive the grantor owner and the grantor owner does not designate a successor grantee beneficiary, the statute designates the successor grantee beneficiaries for the grantor owner. Adopting the provisions of the Uniform Probate Code, the issue of the deceased grantee beneficiary who survive the grantor owner will take in place of the grantee beneficiary.

b. Survivorship. If the grantor owner makes a class gift, such as "to my grandchildren who survive me" without naming each grandchild in the deed, a court action will be required to identify the beneficiaries under the class gift.

L. Lapse

Subd. 12. **Lapse.** If all beneficiaries and all successor beneficiaries, if any, designated in a transfer on death deed, and also all successor beneficiaries who would take under the antilapse provisions of subdivision 11, fail to survive the grantor owner or the last survivor of the grantor owners if there are multiple grantor owners, if the beneficiary is a trust which has been revoked prior to the grantor owner's death, or if the beneficiary is an entity no longer in existence at the grantor owner's death, no transfer shall occur and the transfer on death deed is void.

Comment:

a. Lapse. If all beneficiaries and all successor beneficiaries fail to survive the grantor owner, title will remain in the name of the grantor owner as though no transfer on death deed had ever been recorded.

M. Multiple Transfer on Death Deeds

Subd. 13. **Multiple transfer on death deeds.** If a grantor owner executes and records more than one transfer on death deed conveying the same interest in real property or a greater interest in the real property, the transfer on death deed that has the latest acknowledgment date and that is recorded before the death of the grantor owner upon whose death the conveyance or transfer is conditioned is the effective transfer on death deed and all other transfer on death deeds, if any, executed by the grantor owner or the grantor owners are ineffective to transfer any interest and are void.

Comment:

a. Priority. If a grantor owner records more than one transfer on death deed conveying the same interest in real property (or a greater interest in the real property), the transfer on death deed that has the latest acknowledgment date and that is recorded before the death of the grantor owner is the effective transfer on death. Even though Minnesota is a race-notice jurisdiction, all other transfer on death deeds conveying the same interest in real property are void.

N. Nonademption

Subd. 14. **Nonademption; unpaid proceeds of sale, condemnation, or insurance; sale by conservator or guardian.** If at the time of the death of the grantor owner upon whose death the conveyance or transfer is stated to be effective, the grantor owner did not own a part or all of the real property described in the transfer on death deed, no conveyance or transfer to the beneficiary of the nonowned part of the real property shall occur upon the death of the grantor owner and the transfer on death deed is void as to the nonowned part of the real property, but the beneficiary shall have the same rights to unpaid proceeds of sale, condemnation or insurance, and, if sold by a conservator or guardian of the grantor owner during the grantor owner's lifetime, the same rights to a general pecuniary devise, as that of a specific devisee as set forth in section 524.2-606.

Comment:

a. Partial conveyance of real property. When part but not all of the real property described in the transfer on death deed is sold during the grantor owner's lifetime, the transfer on death deed remains valid as to the unsold portion of the real property described in the deed.

O. Nonexoneration

Subd. 15. **Nonexoneration.** Except as otherwise provided in subdivision 3, a conveyance or transfer under a transfer on death deed passes the described property subject to any mortgage or security interest existing at the date of death of the grantor owner, without right of exoneration, regardless of any statutory obligations to pay the grantor owner's debts upon death and regardless of a general directive in the grantor owner's will to pay debts.

Comment:

a. Nonexoneration. Essentially adopting provisions of section 524.2-607 of the Uniform Probate Code, the real property transfers to the grantee beneficiary subject to any mortgage or security interest existing at the date of the death of the grantor owner, regardless of any statutory obligations to pay the grantor owner's debts upon death and regardless of a general directive in the grantor owner's will to pay debts.

P. Disclaimer

Subd. 16. **Disclaimer by beneficiary.** A grantee beneficiary's interest under a transfer on death deed may be disclaimed as provided in sections 524.2-1101 to 524.2-1116, or as otherwise provided by law.

Comment:

a. Disclaimer. The interest disclaimed will be distributed as if the disclaimant had died immediately preceding the death that caused the transfer on death deed to become effective. Depending upon the relationship of the parties, and any survivorship language in the transfer on death deed, the antilapse provision may impact distribution under the transfer on death deed after the disclaimer.

Q. Effect on Other Conveyances

Subd. 17. **Effect on other conveyances.** This section does not prohibit other methods of conveying property that are permitted by law and that have the effect of postponing ownership or enjoyment of an interest in real property until the death of the owner. This section does not invalidate any deed that is not a transfer on death deed and that is otherwise effective to convey title to the interests and estates described in the deed that is not recorded until after the death of the owner.

Comment:

a. Nonexclusivity. This subdivision makes it clear that the statute is nonexclusive. Transfer on death deeds do not affect any method of transferring property otherwise permitted under Minnesota law.

R. Notice, Consent, and Delivery Not Required

Subd. 18. **Notice, consent, and delivery not required.** The signature, consent or agreement of, or notice to, a grantee beneficiary under a transfer on death deed, or delivery of the transfer on death deed to the grantee beneficiary, is not required for any purpose during the lifetime of the grantor owner.

Comment:

a. Notice and delivery. This subdivision makes it clear that a transfer on death deed is effective without notice or delivery to the grantee beneficiary during the grantor owner's lifetime. This does not mean that the grantee beneficiary is required to accept the property. The grantee beneficiary may disclaim the property, as explained in subdivision 16.

S. Nonrevocation

Subd. 19. **Nonrevocation by will.** A transfer on death deed that is executed, acknowledged, and recorded in accordance with this section is not revoked by the provisions of a will.

Comment:

a. Revocation. Although the grantor owner may be confused about whether a will can revoke a transfer on death deed, the law is clear. The transfer on death deed, if validly executed and recorded (and unrevoked) will control, and the grantor owner's will has no effect on the transfer on death deed.

There is a sound reason for the rule that a transfer on death deed may not be revoked by the grantor owner's will. A transfer on death deed operates to convey real property, for which certainty of title is essential. This certainty would be difficult, if not impossible, to achieve if an unrecorded document, such as the grantor's will, could revoke a recorded transfer on death deed.

T. Proof of Survivorship and Clearance from Public Assistance Claims and Liens; Recording

Subd. 20: **Proof of Survivorship and Clearance from Public Assistance Claims and Liens; Recording.** An affidavit of identity and survivorship with a certified copy of a record of death as an attachment may be combined with a clearance certificate under this section and the combined documents may be recorded separately or as one document in each county in which the real estate described in the clearance certificate is located. The affidavit must include the name and mailing address of the person to whom future property tax statements should be sent. The affidavit, record of death, and clearance certificate, whether combined or separate, shall be prima facie evidence of the facts stated in each, and the registrar of titles may rely on the statements to transfer title to the property described in the clearance certificate.

Comment:

a. Affidavit. The statute does not contain a suggested form to constitute an Affidavit of Identity and Survivorship. This author recommends using Minnesota Uniform Conveyancing Blanks Form 50.2.3 *Affidavit of Identity and Survivorship for Transfer on Death Deed*, which has been approved by the Commissioner of Commerce.

Do not use Minnesota Uniform Conveyancing Blanks Form 50.2.2 *Affidavit of Identity and Survivorship*. Form 50.2.2 is for joint tenants and life tenants. It does not contain any of the defined transfer on death deed terms and, without modification, is not effective to establish identity and survivorship for grantee beneficiaries.

b. Clearance Certificate. Combining and recording the Affidavit of Identity and Survivorship, certified copy of a death certificate, and clearance certificate as one document is best practice. This practice avoids the possibility of languishing medical assistance claims. Use of Minnesota Uniform Conveyancing Blanks Form 10.8.9 *Clearance Certificate for Public/Medical Assistance Claim* is recommended.

U. After-acquired Property

Subd. 21. **After-acquired property.** Except as provided in this subdivision, a transfer on death deed is not effective to transfer any interest in real property acquired by a grantor owner subsequent to the date of signing of a transfer on death deed. A grantor owner may provide by specific language in a transfer on death deed that the transfer on death deed will apply to any interest in the described property acquired by the grantor owner after the signing or recording of the deed.

Comment:

a. After-acquired property. A transfer on death deed is not effective to transfer any interest in the real property acquired by the grantor owner after the date of signing the deed unless the grantor owner designates in the transfer on death deed that it will apply to any interest described in the real property acquired by the grantor owner after signing or recording the transfer on death deed.

The following language may be used to transfer an interest in real property acquired by the grantor owner after the date of signing the transfer on death deed:

Example: When effective, this instrument conveys any and all interest in the described real property acquired by the grantor owner before, on, or after the date of this instrument.

V. Anticipatory Alienation Prohibited

Subd. 22. **Anticipatory alienation prohibited.** The interest of a grantee beneficiary under a transfer on death deed which has not yet become effective is not subject to alienation; assignment; encumbrance; appointment or anticipation by the beneficiary; garnishment; attachment; execution or bankruptcy proceedings; claims for alimony, support, or maintenance; payment of other obligations by any person against the beneficiary; or any other transfer, voluntary or involuntary, by or from any beneficiary.

Comment:

a. *Anticipatory alienation.* Because the grantee beneficiary has no interest in the property while the grantor owner is alive, the grantee beneficiary's creditors also have no interest prior to the death of the grantor owner.

W. Clearance for Public Assistance Claims and Liens

Subd. 23. **Clearance for public assistance claims and liens.** Any person claiming an interest in real property conveyed or transferred by a transfer on death deed, or the person's attorney or other agent, may apply to the county agency in the county in which the real property is located for a clearance certificate for the real property described in the transfer on death deed. The application for a clearance certificate and the clearance certificate must contain the legal description of each parcel of property covered by the clearance certificate. The county agency shall provide a sufficient number of clearance certificates to allow a clearance certificate to be recorded in each county in which the real property described in the transfer on death deed is located. The real property described in the clearance certificate is bound by any conditions or other requirements imposed by the county agency as specified in the clearance certificate. If the real property is registered property, a new certificate of title must not be issued until the clearance certificate is recorded. If the clearance certificate shows the continuation of a medical assistance claim or lien after issuance of the clearance certificate, the real property remains subject to the claim or lien. If the real property is registered property, the clearance certificate must be carried forward as a memorial in any new certificate of title. The application shall contain the same information and shall be submitted, processed, and resolved in the same manner and on the same terms and conditions as provided in section 525.313 for a clearance certificate in a decree of descent proceeding, except that a copy of a notice of hearing does not have to accompany the application. The application may contain a statement that the applicant, after reasonably diligent inquiry, is not aware of the existence of a predeceased spouse or the existence of a claim which could be recovered under section 246.53, 256B.15, 256D.16, 261.04, or 514.981. If the county agency determines that a claim or lien exists under section 246.53, 256B.15, 256D.16, 261.04, or 514.981, the provisions of section 525.313 shall apply to collection, compromise, and settlement of the claim or lien. A person claiming an interest in real property transferred or conveyed by a transfer on death deed may petition or move the district court, as appropriate, in the county in which the real property is located or in the county in which a probate proceeding affecting the estate of the grantor of the transfer on death deed is pending, for an order allowing sale of the real property free and clear of any public assistance claim or lien but subject to disposition of the sale proceeds as provided in section 525.313. On a showing of good cause and subject to such notice as the court may require, the court without hearing may issue an order allowing the sale free and clear of any public assistance claim or lien on such terms and conditions as the court deems advisable to protect the interests of the state or county agency.

Comment:

a. *Clearance Certificate.* Any person claiming an interest in real property conveyed or transferred by a transfer on death deed, or the person's attorney or other

agent, may apply to the county agency in the county in which the real property is located for a clearance certificate for the real property described in the transfer on death deed. This application shall be made in the county in which the real property is located regardless of the county in which the grantor owner resided at death.

X. Form of Transfer on Death Deed

Subd. 24. **Form of transfer on death deed.** A transfer on death deed may be substantially in the following form:

Transfer on Death Deed

I (we) (grantor owner or owners and spouses, if any, with marital status designated), grantor(s), hereby convey(s) and quitclaim(s) to (grantee beneficiary, whether one or more) effective (check only one of the following)

.... on the death of the grantor owner, if only one grantor is named above, or on the death of the last of the grantor owners to die, if more than one grantor owner is named above, or

.... on the death of (name of grantor owner)

..... (must be one of the grantor owners named above), the following described real property:

(Legal description)

If checked, the following optional statement applies:

....When effective, this instrument conveys any and all interests in the described real property acquired by the grantor owner(s) before, on, or after the date of this instrument.

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

(acknowledgment)

Comment:

a. Statutory Forms. Although perfectly acceptable, this author does not recommend using the statutory form in this subdivision. This author recommends using

the Uniform Conveyancing Blanks Forms 10.8.1, 10.8.2 or 10.8.3, which are well-drafted and a bit easier to use.

Y. Form of Instrument of Revocation

Subd. 25. **Form of instrument of revocation.** An instrument of revocation may be substantially in the following form:

Revocation of Transfer on Death Deed

The undersigned hereby revokes the transfer on death deed recorded on,
....., as Document No. (or in Book of, Page) in the office of the
(County Recorder) (Registrar of Titles) of County, Minnesota, affecting real
property legally described as follows:

(legal description)

Dated:

.....

Signature

(acknowledgment)

Z. Jurisdiction

Subd. 26. **Jurisdiction.** In counties where the district court has a probate division, actions to enforce a medical assistance lien or claim against real property described in a transfer on death deed and any matter raised in connection with enforcement shall be determined in the probate division. Notwithstanding any other law to the contrary, the provisions of section 256B.15 shall apply to any proceeding to enforce a medical assistance lien or claim under chapter 524 or 525. In other counties, the district court shall have jurisdiction to determine any matter affecting real property purporting to be transferred by a transfer on death deed.

Comment:

a. Probate Court. This subdivision makes it clear that disputes concerning transfer on death deeds shall be determined in the probate division of the district court. In counties that do not have a probate division, the district court has jurisdiction.

IV. OTHER COMMON ISSUES

A. State Deed Tax

No state deed tax is due upon recording a transfer on death deed. Transfer on death deeds are exempt from state deed tax under Minnesota Statutes, section 287.22 (15). Because a transfer on death deed is exempt from deed tax, the word “Exempt” or words “NO DEED TAX DUE pursuant to Minn. Stat. 287.22(15)” should be inserted in the space for deed tax on the deed, rather than “None”. Also, there is no need to recite on the transfer on death deed that “the consideration for this transfer is \$500 or less”.

Because there is no deed tax, no certificate of real estate value is required, there is no need to pay conservation fees, and no well disclosure certificate is required.

B. Delinquent Property Taxes

Pursuant to Minnesota Statutes, section 272.12, transfer on death deeds may be recorded without payment of delinquent property taxes. The deed may be recorded without certification by the County Auditor as to transfer of ownership and current and delinquent taxes.

C. Estate Taxes

The entire value of the real property conveyed by a transfer on death deed will be included in the grantor owner's estate upon death.

D. Gift Tax

Since the transfer is not effective until the grantor owner's death, there is no gift at the time the transfer on death deed is executed or recorded. The grantor owner is not required to file a gift tax return.

E. Capacity

The statute is silent as to what capacity is required to make a transfer on death deed, but there are two possibilities. The first possibility is testamentary capacity, which refers to whether someone has the capacity to make a will (or will substitute). Testamentary capacity is a less stringent standard than the capacity to contract. The second possibility is contractual capacity—the ability to reasonably comprehend the nature and effect of the act and the business being transacted. In either case, the legal presumption is that a person has the requisite capacity to sign legal documents and make personal decisions.

F. Subdivision

Using a transfer on death deed does not circumvent applicable laws, e.g. zoning and subdivisions ordinances.

V. ALTERNATIVES TO TRANSFER ON DEATH DEEDS

A. Joint Tenancy or Life Estate

Joint tenancies or transfers reserving a life estate are common, inexpensive, non-probate methods used to transfer real property upon the death of the owner. The difference between a joint tenancy and a transfer on death deed is that joint tenancy creates current ownership rights and a transfer on death deed does not. Transfers reserving a life estate solve part of the ownership problem created by the use of joint

tenancy. The owner retains control of the property during lifetime. However, both require the joinder of the other “owners” in order to sell or refinance the property during the owner’s lifetime.

B. Revocable (Living) Trust

Using a revocable trust allows the owner to change his or her mind and change the beneficiary at any time and the beneficiaries creditors cannot reach the trust assets during the owner’s life time. Unlike a will or a deed, the trust document remains private both during the owner’s lifetime and after death. For some, the owner’s the ability to keep dispositive provisions private is an important aspect of using a revocable trust.

For many people, the biggest disadvantage of using a revocable trust is the cost. In addition, assets must be transferred to the trust during the owner’s lifetime to avoid probate. If the owner fails to transfer the assets into the trust before death, those assets will have to go through probate anyway.

C. Probate

The potential cost and delays and public nature of the process are the primary disadvantage of transferring property through probate. However, it is the opinion of this author that probate in Minnesota is a relatively inexpensive process with limited supervision. Nonetheless, probate avoidance is an appropriate goal, particularly in a simple estate.