

## Title Insurance and Transfer on Death Deeds

### Description

People want to avoid probate, to make it as easy and inexpensive as possible to transfer assets to designated beneficiaries after they pass away. For years people have been able to do this with their intangible personal property assets, i.e., bank accounts, retirement accounts, annuities, etc. They designate in writing who inherits the money upon death of the owner of the account. If they fail to do that the assets go to their estate.

In Virginia, prior to transfer on death deed legislation in 2013, revocable living trusts were the primary vehicle used to accomplish this goal for real estate. Living trusts are cumbersome because people forget they hold the property in trust so often they don't properly convey their interest when they want to do something with the property during their lifetime. Oftentimes their family members can't find the original trust agreement which may mean a court order is needed to convey an interest when no successor trustee and no beneficiary is named in the deed. Prior to using living trusts people sometimes would put property into land trusts under Va. Code Â§55.1-117 (f/k/a 5517) which had problems similar to revocable living trusts.

Another way property owners tried to avoid probate was to add someone on title as either a co-owner, or as the actual owner with the donor reserving a life estate. You don't need much imagination or experience in the industry to think of the problems this can cause. The "owner" no longer has control of the real estate. The child/children/donee owns it and they may have debts. At least the new owner couldn't refinance without the life tenant's signature on the deed of trust.

Effective July 1, 2013 Virginia adopted the Uniform Real Property Transfer on Death Act (URPTODA) which solves these problems. It's not perfect but is much better than prior attempts to accomplish the same goal: transfer real estate to a beneficiary without probate. This article summarizes the statutes, raises some questions and discusses how a transfer on death (TOD) deed impacts title insurance underwriting.

### I. Summary of Virginia TOD statutes<sup>2</sup>

1. The provisions apply to a TOD deed made by the transferor on, before or after July 1, 2013,
  - when the transferor dies on or after July 1, 2013. (Va. Code Â§ [64.2-622](#)).

COMMENT as to title insurance: We occasionally see a deed that tries to be a TOD deed recorded prior to 7/1/13. If it meets the requirements in the Code, it's valid as long as the property owner died on or after July 1, 2013.

<sup>2</sup>Va. Code Â§ [64.2-622](#) et seq. See also the Uniform Laws Commission [explanation with comments](#) for more details.

2. **A TOD deed is revocable, even if it says it is not.** (Va. Code Â§ [64.2-625](#)).

COMMENT as to title insurance: Normally title underwriters and abstractors rely on what they read in deeds. In this case you must know the statute overrides what is written in a deed. ALL TOD deeds can be revoked. See below for methods of revocation.

3. Although the TOD deed has no effect until the death of the transferor and the only mental capacity required in order to sign a TOD deed is the same as that required to make a will, the TOD deed is nontestamentary. (Va. Code §§ [64.2-626](#), [64.2-627](#)).

COMMENT as to title insurance: The mental capacity to make a will is the lowest level of mental capacity under the law. You only have to know: (1) who the “natural objects of your affection” are, i.e., your family members; (2) what property you own; and (3) that you are making a legal document (normally that you are making a will). You don’t have to leave property to relatives, you just have to know they exist. You can’t be confused about people who predeceased you, i.e., you need to understand they are dead and not able to be the beneficiary of a TOD deed. You basically need to understand what you are doing with this document, but you don’t need to have the capacity needed to make a contract.

How mental capacity is defined depends on the context: business contract, deeds, medical procedures, wills, etc. Mostly in title insurance we deal with business contracts and deeds. People can still make a bad deal, can agree to sell real estate for a much lower price than someone else would, but that doesn’t mean they lacked mental capacity. It can be a case by case determination.

Determining capacity is important because if someone lacked capacity the TOD deed could be overturned in court. Having a low threshold for capacity for TOD deeds is important, and usually not something with which the title agent would be involved. Just be aware of it, especially if you also act as a notary.

Also, by making TOD deeds nontestamentary they don’t have to meet the formalities needed for a will.

4. The TOD document must meet all the requirements of a deed in order to be recorded, except that there need not be any notice, delivery or acceptance, nor any consideration. (Va. Code §§ [64.2-628](#), [64.2-629](#)).

COMMENT as to title insurance: Most title agents aren’t involved or aware of the requirements listed above. Normally the only way this would impact title to real estate is when a deed is recorded after someone passes away. In those cases, you have to prove there has been delivery and acceptance prior to the death of the grantor.

Title agents are aware of the other requirements that are needed for a deed to be recorded, all of which still apply with TOD deeds, including the substantive requirements of naming a grantor and grantee, containing granting language, the legal description of the property, the signature of the grantor(s), and an acknowledgement.<sup>3</sup> In addition, all of the Clerk’s requirements to record a document are still in effect: font size, cover sheet, pages numbered, name of preparer, tax ID number, exemption code for TOD deeds,<sup>4</sup> grantee’s address, etc.

<sup>3</sup> *The Uniform Laws Committee stated “In the context of transfer on death deeds, the requirement of acknowledgment fulfills at least four functions. First, it cautions a transferor that he*

*or she is performing an act with legal consequences. Such caution is important where, as here, the transferor does not experience the wrench of delivery because the transfer occurs at death. Second, acknowledgment helps to prevent fraud. Third, acknowledgment facilitates the recording of the deed. Fourth, acknowledgment enables the rule in [Va. Code Â§64.2-630] that a later acknowledged deed prevails over an earlier acknowledged deed.â•*

5. **The TOD deed must be recorded prior to the transferorâ??s death.** (Va. Code Â§ [64.2-628\(3\)](#)).

COMMENT as to title insurance: Distinguished from the comments in # 4 above, the Code is clear. If a TOD deed is involved it must be recorded prior to the death of the transferor. This raises questions, especially during the coronavirus pandemic. What if the deedâ??s been delivered to the clerkâ??s office but not yet actually recorded? The Code reads â??A transfer on death deed: 3. Shall be recorded before the transferorâ??s death in the land records of the clerkâ??s office of the circuit court in the jurisdiction where the property is locatedâ?•. It is not optional. But it can give rise to litigation. Contact your company underwriter for guidance when this type of question arises.

6. If no consideration is paid, the TOD deed is exempt from recordation tax. (Va. Code Â§ [64.2628\(5\)](#)).

COMMENT as to title insurance: See [Va. Code Â§ 58.1-811\(J\)](#) for the Code section for exemption from recordation taxes.

7. If property is held as tenants by the entirety or as joint tenants with a right of survivorship, all co-tenants must sign the TOD deed for it to be effective. This does not apply to property held by multiple parties as tenants in common. (Va. Code Â§Â§ [64.2-621](#), [64.2-628\(6\)](#)).

COMMENT as to title insurance: In most cases joint tenants can sever the joint tenancy by conveying their interest to another person. In this case since the transfer of title would be at the moment of death, the joint tenancy remains effective, unless both joint tenants signed the TOD deed. Tenancy by the entirety always requires both spouses to sign to convey title. Question: If one such co-tenant recorded a TOD deed while property was still owned as tenants by the entirety or joint tenancy with survivorship, then survived the co-owner, would the after acquired title statute vest title in the TOD beneficiary upon death of the originally surviving co-tenant? Clearly it would be better for the surviving co-tenant to record a TOD deed after the survivor is the sole owner.

8. Revocation of a TOD deed may occur, in whole or in part, through:
- a. An inter vivos transfer of the property (i.e., the transferor (grantor) sells it or gives it to someone else by deed recorded before he or she dies);
  - b. A deed of revocation;
  - c. A TOD naming a subsequent beneficiary (though any revocation document must be recorded prior to the death of the transferor). (Va. Code Â§ [64.2-630\(A\)](#)).

COMMENT as to title insurance: People change their mind. It happens all the time. Changing your mind with a TOD deed can be simple as long as the revocation document is recorded prior to the

death of the grantor. A TOD deed can be changed in part to remove one or more of multiple beneficiaries named in a recorded TOD deed. Items a and b are self-explanatory. But c can cause a problem. We have seen powers of attorney signed and notarized the same day naming two different agents and revoking all prior powers of attorney. Clearly one is valid and one is not. The issue is how to determine this.

With a TOD deed the **last** deed recorded prior to death may be the valid, enforceable deed, rather than the first one recorded. This is the anthesis of our “race-notice” rule. Certainly, looking at the date competing deeds were notarized would be indicative of who is supposed to be the owner, regardless of recordation order. However, as mentioned above, we have had powers of attorney dated and notarized the same day with no indication of which came first naming different agents. Each power of attorney revoked all prior ones. Such a power of attorney problem can be cured by having both agents sign the document. We know one is correct, but not which one. It will take agreement of the beneficiaries under such an issue with a TOD deed, or a judicial determination if parties fail to agree.

<sup>4</sup> [Va. Code Â§ 58.1-811\(J\)](#)

9. Where there are multiple transferors, revocation of a TOD deed is governed by a different rule:

a. One transferor revoking an interest will not affect the TOD designation of a co-owner. If the current owners hold title as joint tenants and both are designated as TOD beneficiaries, both must sign the deed revoking the designation, or must convey during their lifetime. (Va. Code Â§ [64.2-630\(B\)](#)).

COMMENT as to title insurance: Just as both joint tenants needed to sign in order to grant a TOD interest to a third party, both must agree to revoke the TOD deed. Multiple owners/transferors who own as tenants in common may revoke their interest individually.

10. Revocation must be recorded prior to the death of the transferor(s) and is not effective if the original TOD deed, or a copy of the recorded TOD deed, is marked to indicate that the transferor changed her mind. (Va. Code Â§ [64.2-630\(C\)](#)).

COMMENT as to title insurance: A TOD deed can’t be terminated by marking it up and recording the marked-up copy. The statute makes it absolutely clear a deed to revoke the TOD deed must be recorded. Simply recording another TOD deed with a different beneficiary will be effective as revocation.

11. Effect of the TOD deed during the transferor’s life:

a. A TOD deed is only effective after the death of the transferor.

b. A TOD deed has no effect on the right of the transferor to sell, gift or encumber the real estate (e.g., to have a deed of trust recorded).

c. The fact that a third party has actual knowledge of the TOD deed does not affect the ownership interest of the transferor (i.e., he can do what he wants with the real estate).

d. No interest is vested in the transferee during the life of the transferor. The transferee has no legal or equitable interest during the life of the transferor; his creditors cannot attach any interest

in the real estate. (Va. Code Â§ [64.2-631](#)).

COMMENT as to title insurance: This statute points out a lot of the beauty of TOD deeds. There is NO EFFECT on the ownership by the transferor/grantor/donor during the transferor's lifetime. She can sell it, pledge it as collateral for a loan, put easements across it, give it away, do anything she wants to with the real estate during her lifetime. She can tell the transferee about the deed or keep quiet.

One downside is how tax assessor offices (and sometimes the Clerk's offices) deal with the change in title. They often say the beneficiary is now an owner and list them on the tax records. This is incorrect. The beneficiary has zero interest in the property. They don't become an owner until the owner passes away. It's a matter of educating the folks in the tax office.

12. Effect of the transfer on death deed after the transferor's death:

- a. Property interest conveys at the moment of death to the beneficiary in the most recent, recorded, unrevoked TOD deed.
- b. The beneficiary must survive the transferor.
- c. Multiple beneficiaries take title in equal undivided shares with no right of survivorship. However, if one of multiple beneficiaries fails to take title for any reason (predeceased transferor, disclaims, slayer statute applies, etc.) then surviving named beneficiaries take that beneficiary's interest in proportional shares.
- d. Divorce or annulment revokes a TOD deed, unless the deed specifically says otherwise.
- e. Beneficiaries take subject to all conveyances, encumbrances, assignments, contacts, mortgages, liens, and other interests to which the property is subject at the transferor's death. (Va. Code Â§ [64.2-632 \(B\)](#))
- f. A TOD deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.** (Va. Code Â§ [64.2-632](#)).

COMMENT as to title insurance: This section has a lot of varied information in it. Clearly the beneficiary has no interest until the transferor dies. But as with any real estate in Virginia involving a death, title transfers at the moment of death. Questions: Who informs the beneficiary they now own the real estate? Does an administrator or executor (who may be a family member not fond of the transferee) have a fiduciary obligation to do so, when they become aware of the TOD deed? It's easy to envision real estate being foreclosed or sold at a tax sale because the beneficiary had no knowledge of their ownership interest. The tax office and lender would keep sending notices to the property address. They would not know where/how to contact the beneficiary and have no obligation to do anything about finding them.

The requirement to survive the owner is easy to understand. There is no specific reference to simultaneous death provision, but the provisions of the Virginia Simultaneous Death Act<sup>5</sup> apply to both probate and nonprobate transfers of title. All beneficiaries take in equal interests as tenants in common. Questions: What if the TOD deed specifies otherwise? Will the statute or the intention

of the transferor control? If one beneficiary dies before the transferor the remaining named beneficiaries share that interest in equal shares. It does not pass to the heirs of the deceased beneficiary because this is a non-testamentary event.

The statute states “Divorce or annulment revokes a TOD deed, unless the deed specifically says otherwise.” • Questions: To whom does this refer? The logical assumption is it refers to the spouse of the transferor if that spouse is the beneficiary. If a married beneficiary/child and spouse are named as beneficiaries, does the deed fail if they have divorced? What if the transferor had multiple children and the deed showed children and their spouses as beneficiaries, but only one couple divorced? The code says the TOD deed is revoked upon divorce. But it isn’t clear as to whose divorce triggers implementation of this section. From title insurance underwriting you get everyone who possibly has an ownership interest to sign a deed, both under the TOD deed which may be revoked and under the will or intestate rules, whichever apply. But it remains an interesting question that will be resolved by either the courts or by a statutory clarification.

When someone acquires title by a TOD deed, they own it with all of its liens (judgments of transferor, deeds of trust, easements, etc.), problems and benefits.

A TOD deed conveys without warranty of any kind, even if the TOD deed says otherwise. The reason for this according to the Uniform Laws Committee report is to make it consistent with the fact that wills do not convey title with any warranty and a TOD deed is a will substitute, even though it’s nontestamentary in nature. Title underwriters rely on warranty deeds to cure problems that may exist in the history of ownership, to hold prior owners responsible for title defects. Owner’s policies include continuation of coverage for property that has title transferred due to death of the owner.<sup>6</sup>

Additional matters to consider include homicide of the owner by the beneficiary (slayer statute)<sup>7</sup> and elective share rights of a surviving spouse (augmented estate issue).<sup>8</sup>

<sup>5</sup> Va. Code Uniform Simultaneous Death Act Â§ [64.2-2200](#) et seq.

13. A beneficiary may disclaim all or part of his interest following disclaimer rules set out in Va. Code Â§ [64.2-2600](#) et seq. (Va. Code Â§ [64.2-633](#)).

COMMENT as to title insurance: Even though a TOD is a nontestamentary event any beneficiary can disclaim any interest in the real estate.

14. Property is subject to claims of creditors of the transferor, but a proceeding to enforce the liability must be commenced not later than one year after the transferor’s death. (Va. Code Â§ [64.2-634](#)).

COMMENT as to title insurance: As with most other estate matters, keeping in mind that courts favor the free transferability of real estate, creditors who want to make a claim against the transferor only have a year after date of death to do so. This means the real estate remains subject to the debt of the deceased prior owner. But real estate falls at the bottom of the list of assets to be sold to pay the debts of the decedent. With the TOD legislation someone in Virginia can arrange for the majority of their assets to pass to someone else without probate. Only tangible personal property remains as a probate asset. If someone has inherited cash often it’s spent before a claim arises. Only real estate remains as an identifiable asset from which a creditor may

collect what's due.

15. A statutory form is provided in Va. Code Â§ [64.2-635](#) for a TOD deed and a revocation form is provided in Â§ [64.2-636](#).

COMMENT as to title insurance: Use the statutory form. Be careful about insuring other forms. Language in the optional deed form says "After this transfer on death deed is recorded, it can be revoked only by an effective revocatory instrument recorded prior to the death of the transferor and may not be revoked by a revocatory act taken against or on the original or a copy of the recorded transfer on death deed." Agents often question whether this means a deed of revocation must be recorded. Looking at the TOD Code sections as a whole it appears only a conveyance to someone else is needed to effectively revoke a TOD deed. To be sure an agent may require that the deed to another specifically revoke the TOD deed. In fact, attorneys may want to alter their deed forms to include a TOD revocation as standard language in all deeds.

## II. Potential Issues from a Real Estate Perspective

The potential issues identified below are not listed in any particular order, nor do they comprise a comprehensive list of every question regarding URPTODA's provisions. They may have been addressed in the comments above, but bear repeating. The practical solution in most cases is for all parties with any possible interest to sign the TOD deed, or for one or more of the parties to disclaim its interest. Talk with your underwriter if any of these issues arise.

1. **Issue:** Even if consideration is paid, the owner may revoke the TOD deed. A situation could arise where the estate is liable for breach of contract, but someone else ends up with the real estate. The real estate is still subject to claims of the estate. See Va. Code Â§Â§ 64.2-625, 64.2-628(5), 64.2-634, and Items 2, 6 and 14, noted in Part I, above.

<sup>6</sup> ALTA Homeowner's Policy Condition 2 (b)(5) "anyone who receives Your Title by a transfer effective on Your death as authorized by law"; ALTA Owner's Policy Condition 1(d)(i)(A) "successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin."

<sup>7</sup> Va. Code Â§[64.2-2501](#)

<sup>8</sup> Va. Code Â§[64.2-300](#) et seq(died before 1/1/17); Â§[64.2-308.1](#) et seq(died on or after 1/1/17)

2. **Issue:** If the owner has recorded a TOD deed, and later contracts to sell the property to a third party, but dies before the (contracted-for) deed can be recorded, Va. Code Â§ [64.2-523](#) prevails, converting the asset to personalty. Va. Code Â§ [64.2-630\(A\)](#) requires that any revocation document be recorded prior to the death of the transferor (see Item 8, above). What happens if settlement occurs, but the seller/record owner dies before the deed is recorded?

3. **Issue:** Assume a situation where the transferor has signed the TOD deed and it is at the courthouse to be recorded but is not recorded before the transferor's actual time of death. Pursuant to the statutes, delivery of the deed is not sufficient; recordation is the key. What happens, then, if the Clerk's office is backed up with recordation issues? Perhaps the transferor should have a will to corroborate the TOD deed.

4. **Issue:** What if inconsistent TOD deeds are notarized the same day? Normally, Virginia is a "race/notice" state, such that the earlier of recorded documents would prevail. However, with

respect to TOD deeds, the latest/last deed recorded would prevail. Can you imagine years after the TOD deed is recorded trying to establish which document was notarized first? See Va. Code Â§ [64.2-630\(A\)](#) and Item 8(c), above.

5. **Issue:** No requirement to survive by 120 days exists in the TOD statutes, but such a requirement does exist under the statutes relating to probate and nonprobate transfers. Transfer occurs at the moment of death. The statutes are silent as to whether the TOD deed may add conditions. What if the donor requires survivorship by 30 days? See Va. Code Â§ [64.2-632](#) and Item 12(b), above.

6. **Issue:** Imagine a TOD deed is recorded for no consideration. Are augmented estate interests of spouse triggered? Or does the transfer occur after death, such that only the spouse's elective share might be triggered? Or neither? Does the five-year period for augmented estates run from the date of death of the transferor since the beneficiary has no interest in the property until the death? Was the gift made during the transferor's lifetime? See Va. Code Â§ [64.2-302](#) et seq.

7. **Issue:** Since there is no notice, delivery or acceptance, what happens when:

a. The Executor signs a contract and the title search discovers a TOD deed to another person?

b. The new owner, unaware of the TOD deed, receives no notice of tax bills, and property is subsequently sold for unpaid real estate taxes?

c. The Executor is aware of a TOD deed to someone not otherwise an heir? Does the Executor have a duty to tell the beneficiary of the TOD deed? As it is not part of the estate, does the Executor or Administrator have any obligation to inform anyone about a TOD deed?

8. **Issue:** As mentioned in Item 11, above, circuit court clerk's offices and tax authorities don't know how to address a TOD beneficiary. Many tax records show the TOD beneficiary as the owner or co-owner for tax assessment purposes. Clerks have rejected deeds because the TOD beneficiary, the grantee on the prior deed, didn't sign the current deed. Both of these issues can be resolved by talking with the appropriate government official, or by asking your underwriter to contact them about TOD legislation.

### III. Underwriting a Transfer on Death transaction

These matters need to be checked whether you are dealing with a TOD owner in the current transaction or it applies to a TOD deed in the chain of title.

1. Determine date of death of the owner and date most recent TOD deed was recorded. We have had deeds where owner signed deed and it was recorded the day before he died. The Code is clear the deed must be recorded prior to death to be effective. Delivery to the grantee is not sufficient. We must make sure those claiming to own under the TOD deed, actually do own it, i.e., that all the statutory requirements have been met.

It's possible to have a TOD deed executed in January but not recorded until March, while another TOD deed was executed and recorded in February. Technically the statute says the last/most recent TOD deed recorded controls, but actually this just sets the situation up for litigation. If this occurs your title underwriter may require ALL beneficiaries to sign.

2. If property is held as tenants by the entirety or as joint tenants with a right of survivorship, all co-tenants must sign the TOD deed for it to be effective. This is normal for tenants by the entirety but not for joint tenant situations. Make sure all owners have agreed, or they have previously severed their joint tenancy.
3. Have the owners sign the Estate Indemnity Agreement if death was less than 1 year ago. Creditors of the deceased owner may make a claim against the estate, including the TOD property, but must file suit within a year after the transferor's death. Therefore, as with the death of any owner, your underwriter may have an estate indemnity agreement that needs to be signed, which can include holding proceeds in escrow until the year is up or paying an extra-hazardous risk premium to have proceeds paid to beneficiaries prior to that time.
4. A prior owner's policy may not be effective to cure any defect covered by the Mutual Indemnity Agreement among title underwriters. You need to ask for a letter of indemnity, but do not expect to receive one. A TOD deed transfers property without covenant or warranty of title even if the deed contains a contrary provision. (Va. Code Â§ [64.2-632](#)). Title insurance is only effective when the insured has liability. If a deed is conveyed without warranty, there is no liability. If the beneficiary accepts the gift, it comes with all existing problems, of whatever nature. Decedent's title policy may not cover the beneficiary regardless of continuation of coverage language in the owner's policy. Each underwriter will interpret the provision individually.

As TOD deeds become more common new problems will arise and be resolved. A future dialogue on this issue and the evolution of this concept will be fascinating.



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1. Education
2. Title Examination

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