TRANSFER ON DEATH DEEDS: BENEFIT OR BURDEN? A PROPOSAL FOR TRANSFER ON DEATH DEED LEGISLATION IN NORTH CAROLINA*

INTRODUCTION

Real property is a unique concept upon which ideas of property ownership and testator rights have been added to form a multifaceted spectrum of law. An individual's right to own and devise real property is rooted in common law principles and secured by expectations of testamentary freedom.[1] In an effort to protect these rights, owners execute

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1. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 716 (1987) (stating that "the right to pass on property . . . has been part of the Anglo-American legal system since feudal times" (citing United

wills and trusts to maintain control of the distribution of their property after death. Once a will has been validated, probate ensures that justice is served by overseeing title transfers, creditor payments, and the distribution of property to beneficiaries.[2] For better or worse, probate has historically been a fixture in property law. But the idea of subjecting one's relatives and friends to the probate process has prompted some property owners to choose nonprobate methods of transferring real property.[3]

Contrary to popular belief, wills are not the most common method of transferring property.[4] Recent developments in property law have allowed owners to bypass the use of wills more easily, opening the door for nonprobate property transfer to avoid the arduous and expensive probate process.[5] One of these methods is the transfer on death deed ("TOD deed") or beneficiary deed.[6] Since Missouri first adopted TOD deeds in 1989,[7] they have gained popularity. TOD deeds allow an owner to record a deed that transfers ownership to a beneficiary or beneficiaries upon the owner's death.[8] After Missouri, no state adopted a TOD deed statute until 1997.[9] Now, seventeen states have passed a TOD deed statute with four of these

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States v. Perkins, 163 U.S. 625, 627–28 (1896))); *see also* EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 12:1 (2d ed. Supp. 2011) ("Where allowed by statute and public policy, every person has the right to dispose of his or her estate as the testator sees fit." (citations omitted)).

2. Probate is the judicial process "by which a testamentary document is established to be a valid will." BLACK'S LAW DICTIONARY 1321 (9th ed. 2009). Probate has three roles: "(1) it provides evidence of transfer of title to the new owners . . . ; (2) it protects creditors by providing a procedure for payment of debts; and (3) it distributes the decedent's property to those intended after the decedent's creditors are paid." JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 39 (8th ed. 2009) (emphasis omitted).

3. DUKEMINIER ET AL., *supra* note 2, at 38–39 (listing the "common modes of nonprobate transfer").

4. *Id.* (explaining that "[m]ost property transferred at death passes outside of probate through a nonprobate mode of transfer," including joint tenancy property, life insurance, contracts with payable-on-death ("POD") provisions, and interests in trust).

5. UNIF. REAL PROP. TRANSFER ON DEATH ACT Prefatory Note, 8B U.L.A. 126 (Supp. 2011). The types of assets available for nonprobate transfer to beneficiaries upon the transferor's death include "proceeds of life insurance policies and pension plans, securities registered in transfer on death (TOD) form, and funds held in pay on death (POD) bank accounts." *Id.*

6. Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 532 (2006). Some states, such as Arizona, Arkansas, and Colorado use the term "beneficiary deed." *Id.* at 532 n.8; *see* ARIZ. REV. STAT. ANN. § 33-405 (2010); ARK. CODE ANN. § 18-12-608 (2010); COLO. REV. STAT. § 15-15-401 (2010). This Comment will use the term "TOD deeds" to refer to both transfer on death deeds and beneficiary deeds.

7. *See* H.B. 25, 145th Gen. Assemb., Reg. Sess. (Mo. 1989) (codified as amended at MO. REV. STAT. § 461.025 (2007)).

8. § 5, 8B U.L.A. 129.

9. Kansas was the next state to adopt TOD deeds in 1997. *See* Act of May 15, 1997, ch. 176, 1997 Kan. Sess. Laws 1283 (codified as amended at KAN. STAT. ANN. §§ 59-3501 to -3507 (2005)).

statutes being passed in 2011 alone.[10] Other states have or are considering TOD deed bills. For example, in January 2011, the Nebraska legislature introduced a bill to enact the Uniform Real Property Transfer on Death Act[11] ("Uniform Act") and is still considering it at the time of this writing.[12] The extent of these recent enactments and introductions of TOD deed legislation makes it clear that support for TOD deeds is gaining momentum across the country and that North Carolina should follow suit.

The Uniform Act succinctly describes the purpose of the deed:

> 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.[13]

TOD deeds provide substantial advantages in that they simplify the recording of ownership transfer to a form, withhold its effectiveness until the owner's death, and allow the owner to retain the power of revocation.

In this regard, TOD deeds are similar to other TOD devices. For example, the Uniform Transfer on Death Security Registration Act,[14] which has been adopted in forty-nine states[15]—including North Carolina[16]—allows grantors to transfer their security assets upon death to beneficiaries

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10. To date, five states have enacted the Uniform Real Property Transfer on Death Act ("Uniform Act"). *Legislative Fact Sheet—Real Property Transfer on Death Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act (last visited Jan. 15, 2012). The remaining states have enacted their own TOD deed statutes. *See* Prefatory Note, 8B U.L.A. 126.

11. UNIF. REAL PROP. TRANSFER ON DEATH ACT, 8B U.L.A. 127 (Supp. 2011).

12. L.B. 536, 102d Gen. Assemb., 1st Reg. Sess. (Neb. 2011), *available at* http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB536.pdf. As of January 4, 2012, the bill was still being considered. *LB536—Adopt the Nebraska Uniform Real Property Transfer on Death Act*, NEB. LEGISLATURE, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=11984 (last visited Jan. 15, 2012). The Uniform Act was drafted and revised by the Uniform Law Commission ("ULC"). Michael Kerr, *Uniform Laws Update—Probate*, PROB. & PROP., July–Aug. 2009, at 12, 12.

13. § 16, 8B U.L.A. 144.

14. The idea of TOD securities registration gained popularity in 1987. Gary, *supra* note 6, at 531. *See generally* Richard V. Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 GA. L. REV. 789 (1987) (publishing an article on transfer on death securities in 1987). In 1989, the Uniform Transfer on Death Security Registration Act was approved by the National Conference of Commissioners. Gary, *supra* note 6, at 531.

15. *TOD Security Registration Act Summary*, UNIF. LAW COMM'N, http://uniformlaws.org/ActSummary.aspx?title=TOD%20Security%20Registration%20Act (last visited Jan. 12, 2012).

16. N.C. GEN. STAT. §§ 41-40 to -51 (2010).

without probate. The incongruity between the number of states that allow TOD security transfers versus TOD real property transfers suggests that more states should consider adopting a TOD deed statute, since TOD provisions have already been accepted in forty-nine states.[17]

This Comment advocates for the enactment of a TOD deed statute in North Carolina and proposes TOD deed legislation that will benefit the state and its residents. Part I of this Comment provides an overview of the Uniform Act and an analysis of how other states have structured their TOD deed statutes. This section also discusses legal issues and concerns that have developed subsequent to the implementation of these statutes. Part II provides a detailed analysis of the advantages of nonprobate transfer of real property, while Part III discusses the disadvantages of TOD deeds and how these disadvantages might be avoided or rectified. Part IV contends that adopting TOD deed legislation would be particularly advantageous to North Carolina for financial and public policy reasons. Part V proposes how TOD deed legislation should be drafted to provide the most advantageous implementation of TOD deeds. Lastly, this Comment concludes that North Carolina should adopt its own version of a TOD deed statute, thus providing its residents with a low-cost means of maintaining control of their property.

I. COMPARATIVE STATUTORY ANALYSIS

A. The Uniform Real Property Transfer on Death Act

The following section discusses the Uniform Act,[18] which serves as the model for TOD deed statutes and promulgates the requirements for creating and executing a TOD deed for real property only.[19] Under the Uniform Act, a TOD deed is revocable at any time and does not require probate.[20] The Uniform Act also requires a TOD deed to be recorded "in the public records in [the office of the county recorder of deeds] of the [county] where the property is located" before the owner's death.[21] The Uniform Act requires the owner to name a beneficiary, but does not require

17. If testators do not have a problem using TOD transfers for their financial assets, it should follow that testators are equally comfortable using TOD deeds when transferring real property. But, as previously discussed, the "tradition" of probate may be impeding this logical progression. *See supra* text accompanying notes 2–3.

18. § 1, 8B U.L.A. 127. The Uniform Act is periodically updated and current as of the 2009 Annual Meeting of the National Conference of Commissioners on Uniform State Laws. *See* Prefatory Note, 8B U.L.A. 126.

19. § 2, 8B U.L.A. 127.

20. §§ 5–7, 8B U.L.A. 129–30.

21. § 9, 8B U.L.A. 131.

that the deed be delivered to the beneficiary, nor does it require that the beneficiary be given notice of or accept the deed for the deed to be valid.[22]

A TOD deed under the Uniform Act has no effect during the life of the owner.[23] Once the owner has died, barring any exceptions,[24] the property is transferred to the beneficiary.[25] The beneficiary takes the property "subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death."[26]

The Uniform Act also provides a standard TOD deed form that the owner may fill out.[27] The form must be acknowledged[28] and recorded to be effective.[29] While the form serves to simplify the process of writing a TOD deed, it is optional,[30] and as long as a TOD deed includes the requirements listed under section 9 of the Uniform Act, the deed is considered valid.[31] If the owner has a will that conflicts with the TOD deed, the TOD deed will

22. § 10, 8B U.L.A. 132. Although notice to a beneficiary is not required, the Uniform Act suggests that a beneficiary should be notified if possible. § 16, 8B U.L.A. 143–44. Lack of notice to the beneficiary can cause future "complications" and can increase the possibility of fraud. § 16, 8B U.L.A. 144.

23. A TOD deed does not affect the rights or interests of the owner, beneficiary, secured or unsecured creditors, or future creditors. § 12, 8B U.L.A. 135. The transferor's or transferee's eligibility for public assistance will also be unaffected. *Id.* A TOD deed does not "subject the property to claims or process of a creditor of the designated beneficiary." *Id.*

24. The Uniform Act provides for possible state exceptions to the effectiveness of a TOD deed, such as revocation by divorce, survival (if the transferor survives the named beneficiary, the interest of the beneficiary will lapse), simultaneous death, etc. § 13, 8B U.L.A. 136. If the property is held under joint ownership, and the transferor is the last surviving joint owner, the deed is effective. § 13(c), 8B U.L.A. 136. However, if other joint owners survive the transferor, the TOD deed is not yet effective, and the surviving joint owners retain the property. *Id.*

25. § 13, 8B U.L.A. 136.

26. *Id.* Nevertheless, the designated beneficiary has the ability to disclaim all or part of his or her interest under the Uniform Disclaimer of Property Interests Act. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5(a)–(b) (amended 2002), 8A U.L.A. 166–67 (2003). "A person may disclaim, in whole or part, any interest in or power over property" and the disclaimer must be in writing or record, and signed. § 5(a), (c), 8A U.L.A. 166–67.

27. The form includes the owner's name and address, primary and alternative beneficiaries, and the owner's signature. § 16, 8B U.L.A. 143–44. The back of the standard form also contains a "Common Questions About the Use of this Form" section that answers questions for owners using a TOD deed. § 16, 8B U.L.A. 144.

28. The form must be acknowledged "before a notary public or other individual authorized by law to take acknowledgments." § 16, 8B U.L.A. 144.

29. To be valid, the form must be recorded in the county in which the property is located. § 16, 8B U.L.A. 144.

30. *Id.* The TOD deed form may contain modifications depending on state law, or other legal provisions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-405 (2010). The Uniform Act also cautions that the TOD deed form is not exhaustive and encourages transferors to seek advice from an attorney. § 16, 8B U.L.A. 144.

31. § 9, 8B U.L.A. 131.

control as long as the deed is "validly recorded and unrevoked by a subsequent deed."[32]

Should the owner no longer desire to use an unrecorded TOD deed, the deed may be torn up to indicate revocation.[33] If the deed has already been recorded, there are several actions that can revoke the deed, such as recording a new TOD deed.[34] The Uniform Act also provides an optional "Form of Revocation" that may be used.[35] Although this can make revocation more difficult than revoking a will, this process is similar to wills that are filed with the probate office during the life of the testator.

B. Transfer on Death Deed: State Statutes

After Missouri enacted the first TOD deed statute in 1989, sixteen states subsequently adopted some form of a TOD deed statute.[36] These states, including Kansas and Arizona, have enacted TOD deed statutes for policy reasons, such as assisting elder-law attorneys, providing a nonprobate alternative to a will, or creating an "ideal tool" for owners with modest-sized estates.[37] Several elements of TOD deed statutes are consistent among all seventeen states, including the requirement to record the deed and the power of revocation.[38] The following section compares the Uniform Act and various TOD deed statutes and discusses the notable concerns that have arisen since the enactment of those statutes.

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32. Gary, *supra* note 6, at 544.

33. § 16, 8B U.L.A. 144.

34. *Id.* The owner may revoke the deed with the following actions: "(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." *Id.*

35. § 17, 8B U.L.A. 145–46. Like the TOD deed form, the revocation must be recorded and acknowledged before it can be valid. *Id.* The form of revocation includes the owner's name and signature agreeing that the owner revokes "all . . . previous transfers of this property by transfer on death deed." § 17, 8B U.L.A. 145.

36. The following states, in chronological order, have adopted some form of a TOD deed statute: Missouri, Kansas, Ohio, New Mexico, Arizona, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana. Prefatory Note, 8B U.L.A. 126. The following states enacted the Uniform Act in 2011: Hawaii, Illinois, Nevada, North Dakota, and Oregon. *See supra* note 10. Although there are many differences between the Uniform Act and the state statutes, this section will focus on the most significant distinctions.

37. CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION: REVOCABLE TRANSFER ON DEATH (TOD) DEED 19–21 (Aug. 2006) [hereinafter CLRC TENTATIVE RECOMMENDATION], *available at* http://www.clrc.ca.gov/pub/Misc-Report/TR-BeneDeed.pdf.

38. *See, e.g.*, ARK. CODE ANN. § 18-12-608 (2010); IND. CODE ANN. § 32-17-14-16 (LexisNexis Supp. 2011); MONT. CODE ANN. § 72-6-121 (2009); WIS. STAT. ANN. § 705.15 (West 2010).

Some states have enacted the Uniform Act or maintained a generic TOD deed statute that is very similar to the Uniform Act,[39] while other states have added provisions to clarify issues that the Uniform Act has not addressed. For example, Indiana and Missouri have explicitly addressed the topic of agency.[40] The Uniform Act does not have any express provisions for agency and defers to other authorities such as the Uniform Power of Attorney Act on that issue.[41] Under its agency provision, the Indiana statute provides that "[a]n attorney-in-fact . . . or other agent acting on the behalf of the owner of property may make, revoke, or change a beneficiary designation" subject to certain stipulations.[42] On the other hand, Missouri does *not* allow an attorney-in-fact or other agent to "make, revoke or change a beneficiary designation" unless the agent's empowering document specifically authorizes this type of action.[43] The subtle difference that exists between these two agency provisions is an example of how TOD deed statutes can vary slightly yet have very different legal consequences.

Another state, Oklahoma, provides its own TOD deed form, but demands more detail to minimize the possibility of post-death challenges.[44] The Oklahoma form requires the owner to verify that she is "of competent mind and [has] the legal capacity to execute [the] document."[45] This provision can prevent individuals from questioning the owner's intent and the deed's effectiveness.[46] In addition to acknowledgement, the Oklahoma TOD deed form requires the signatures of two additional witnesses before a

39. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-405 (2010); *see supra* note 10.

40. *See* IND. CODE ANN. § 32-17-14-17 (LexisNexis Supp. 2011); MO. REV. STAT. § 461.035 (2007).

41. While the Uniform Act briefly mentions the topic of agency, it defers to the Uniform Power of Attorney Act and the Uniform Disclaimer of Property Interests Act for applicable law regarding agents acting on behalf of an owner. *See, e.g.*, UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 2 cmt. ¶ 7, 14 legis. note, 8B U.L.A. 128, 139 (Supp. 2011)

42. IND. CODE ANN. § 32-17-14-17(a) (LexisNexis Supp. 2011) (allowing the agent to act as long as he is not restrained by the rights established by the owner and complies with applicable law). The attorney-in-fact also has the ability to withdraw, sell, or transfer the property in the TOD deed regardless of its effect on the beneficiary's right to the property upon the owner's death, even if the action completely divests the beneficiary's ability to receive the property. § 32-17-14-17(b).

43. MO. REV. STAT. § 461.035 (2007). An agent may also obtain his or her authority through a court order. *Id.*

44. OKLA. STAT. ANN. tit. 58, § 1253 (West Supp. 2010). The Oklahoma TOD deed statute, passed in 2008, is entitled the "Nontestamentary Transfer of Property Act." tit. 58, § 1251. TOD deeds may be subject to a "post-death challenge" where the deed is contested as invalid because of the owner's lack of capacity or otherwise. Gary, *supra* note 6, at 544.

45. tit. 58, § 1253.

46. *See* Gary, *supra* note 6, at 544 (stating that an individual may challenge the validity of a TOD deed based on the contention that the owner lacked capacity).

notary public.[47] The addition of two witness signatures strengthens the deed's validity and adds protection from a possible post-death challenge.[48]

Overall, most TOD deed forms or TOD deed requirements are simple. For example, Indiana does not provide a standard TOD deed form, but only requires the following written statement to be acknowledged and recorded[49]: "(insert owner's name) conveys and warrants (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's name)."[50] As previously noted, Nebraska is one state currently considering enacting the Uniform Act, which already includes a standard TOD deed form.[51] As a recent state to introduce TOD deed legislation, Nebraska will likely be watched closely by academics and attorneys while proponents of the bill attempt to pass this legislation.

II. ADVANTAGES OF TRANSFER ON DEATH DEEDS

TOD deeds are a viable option for owners who would like to transfer real property outside of probate.[52] These deeds are particularly advantageous because they create an efficient, low-cost method of transferring small estates.[53] Although the use of a TOD deed may be unreasonable for owners with substantial estates,[54] owners with limited

47. tit. 58, § 1253; UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16, 8B U.L.A. 143 (Supp. 2011) ("The form has no effect unless it is acknowledged and recorded before [the owner's] death.").

48. *See* Gary, *supra* note 6, at 544.

49. *See* IND. CODE ANN. § 32-17-14-12 (LexisNexis Supp. 2011).

50. § 32-17-14-11 (internal quotation marks omitted).

51. *See supra* note 11 and accompanying text.

52. There are other methods to transfer assets without full probate, such as "small-estate transfer procedure[s]." *See* ALA. CODE § 43-2-692 (LexisNexis Supp. 2011) (permitting the distribution of decedent's personal property outside of probate under certain conditions, such as when the value of the estate is below a certain amount); Michael A. Kirtland & Catherine Anne Seal, *The Significance of the Transfer-on-Death Deed*, PROB. & PROP., July–Aug. 2007, at 42, 46, *available at* http://www.americanbar.org /content/dam/aba/publishing/probate_property_magazine/rppt_publications_magazine_2007_ja_KirtlandSeal.authcheckdam.pdf. These proceedings cannot always be used for the transfer of real property. *See, e.g.*, § 43-2-692; *cf.* OR. REV. STAT. § 114.515 (2007), *amended by* Act of July 1, 2011, ch. 595, § 22, 2011 Or. Laws 595 2011 (allowing small estate affidavits for both personal and real property).

53. Julie Bushyhead, Scholarly Article, *What You Need to Know About New HB 2639: The 'Nontestamentary Transfer of Property Act,'* 80 OKLA. B.J. 33, 35 (2009); *see also* David Major, Comment, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California's Trusts & Estates Attorneys Heading for the Hills*, 49 SANTA CLARA L. REV. 285, 286 (2009) (discussing the TOD deed debate within California).

54. Generally, those with substantial real property need a detailed will to properly divide the property. *See* Matthew H. Hoy, *Planning for Real Property, Including the Residence*, *in* 1 ADVISING THE ELDERLY CLIENT § 7:47 (A. Kimberley Dayton et al. eds., 2011); Kirtland & Seal, *supra* note 52, at 46 ("Transfer-on-death deeds are not a panacea for all estate planning issues.").

property should consider using the TOD deed.[55] In addition to their simplicity and financial benefits, TOD deeds provide owners with a greater level of flexibility, protection, and control than other forms of property transfer.

A. Avoiding Probate

One of the most obvious advantages to TOD deeds is avoiding probate. This results in fewer probate proceedings, which saves time and money for both the estate and probate courts.[56] With fewer proceedings to process, courts do not have to hire as many clerks and administrators. Further, the legal and court fees required in a probate proceeding are generally more costly than using a TOD deed to transfer property.[57] Nonprobate transfer also prevents inexperienced executors from enduring an arduous legal process.[58] Because court documents in a probate proceeding are available to the public, nonprobate provides financial and personal privacy, and protects the identity of the beneficiaries.[59] TOD deeds

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55. A detailed will is unnecessary when the only piece of real property is one's home. *See* Kirtland & Seal, *supra* note 52, at 46.

56. *See* Gary, *supra* note 6, at 542–43 (stating that "in any state a probate proceeding will cost more than the fees associated with a TOD deed"). The costs of probate also continue to rise in states such as North Carolina, where the maximum filing fee was only $3,000 before September 1, 2005, whereas the current maximum filing fee as of January 2012 has doubled to $6,000. *See* N.C. ADMIN. OFFICE OF THE COURTS, COURT COSTS AND FEES CHART 1 (2012) [hereinafter N.C. COSTS AND FEES], *available at* http://www.nccourts.org/Courts/Trial/Documents/court_costs_chart-1Jan2012-estates.pdf; Greg Herman-Giddens, *How to Avoid Probate*, N.C. ESTATE PLAN. BLOG (May 7, 2007, 11:42 AM), http://www.ncestateplanningblog.com/2007/05/articles/probate/how-to-avoid-probate. Before September 1, 2005, the filing fee was "four dollars per one thousand of property listed on the estate inventory" and was capped at three thousand dollars. Herman-Giddens, *supra*. The new cap is six thousand dollars. *Id.* The fewer cases that come through the probate court, the more quickly the probate court can process the existing probate cases.

57. Gary, *supra* note 6, at 541.

58. Herman-Giddens, *supra* note 56. To see an overview of the numerous fees, filings, and considerations that an executor must manage in Michigan, for example, see MICH. STATE CT. ADMIN. OFFICE, PROBATE COURT FEE AND DISTRIBUTION SCHEDULE (Feb. 23, 2011), *available at* http://courts.michigan.gov/scao/resources/other/pfee.pdf.

59. Dennis M. Horn & Susan N. Gary, *Death Without Probate: TOD Deeds—The Latest Tool in the Toolbox*, PROB. & PROP., Mar.–Apr. 2010, at 13, 13, *available at* http://www.americanbar.org/content/dam/aba/publishing/probate_property_magazine/rppt_publications_magazine_2010_ma_DeathWithoutProbate.authcheckdam.pdf (noting that some people avoid probate in order to maintain their personal privacy); Herman-Giddens, *supra* note 56 (explaining that probate allows the public to examine financial records, personal information, and names of beneficiaries). It is important to note, however, that many forms of nonprobate property transfer provide inadequate protection for owners and increase their vulnerability to creditors. *See* Teryl Zarnow, *At 82, She Fights for Aging Home Owners*, ORANGE COUNTY REG., Sept. 3, 2010, http://www.ocregister.com/articles/toups-264993-deed-california.html (describing an instance where using certain nonprobate forms of transferring property such as joint tenancy deeds "backfire[d]," and "the son decided to sell the

limit creditor intrusion during the owner's life by preventing the beneficiary from obtaining a present interest in the property.[60] Using TOD deeds also arguably allows family members to grieve properly without being concerned about probate and its filing deadlines, courts fees, and potential legal battles.

B. Low-Cost Alternative

In addition to the financial costs of probate, it is important to consider the financial costs of estate planning and the size and value of the real property.[61] Presumably, testators do not create wills or engage in estate planning until their later years.[62] Without a steady income, elderly testators may not have the financial resources to spend on sophisticated estate planning. TOD deeds can be executed without legal assistance; therefore, a TOD deed is a feasible solution for those who are unable to afford a lawyer.[63] Chuck DeVore—a former assemblyman who initiated TOD deed legislation in California—argues that TOD deeds "give people more control of their financial assets by letting them make decisions that don't require costly attorney fees."[64]

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house out from under the mother . . . [or] a daughter went into debt and her creditor filed a lien against her father's property"); *see also* Catherine Anne Seal & Michael A. Kirtland, *The Transfer-on-Death Deed in the Elder Law Setting*, 4 NAT'L ACAD. ELDER L. ATT'YS J. 71, 76 (2008) (describing an instance where a grantor created a joint ownership with his or her intended beneficiary of the real property to avoid probate, and the grantee died, unintentionally subjecting the grantor to the grantee's creditor's claims).

60. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT § 12, 8B U.L.A. 135 (Supp. 2011) ("During a transferor's life, a transfer on death deed does not . . . create a legal or equitable interest in favor of the designated beneficiary . . . .").

61. *See* Kirtland & Seal, *supra* note 52, at 46. Owners should consider using TOD deeds when their estate is limited, unencumbered, and has few beneficiaries. Hoy, *supra* note 54, § 7:47.

62. One source found that about seventy percent of Americans did not have a will. *Survey: Most Parents Haven't Prepared Wills*, JOURNALSTAR.COM (May 30, 2007, 7:00 PM), http://journalstar.com/lifestyles/article_a3493a61-9214-50ae-aadb-856f1db7820b.html. The study reported that parents are less likely to have prepared a will if they have minor children, because they are unable to decide on a legal guardian for their children. *Id.* Such a study would suggest that adults are more likely to write a will in their later years, once their children have reached adult age.

63. Cheryl Walker, *Transfer on Death Deed Bill Killed in Senate Committee, Author Vows to Fight On*, ORANGE COUNTY REG., July 8, 2008, http://www.ocregister.com/news/probate-140194-trust-lawyers.html ("Trust/Probate lawyers oppose this Deed . . . to the detriment of . . . those who cannot afford a lawyer. They insist only lawyers should do Estate Planning." (quoting Mary Pat Toups) (internal quotation marks omitted)).

64. Gary, *supra* note 6, at 543 (quoting Tim Willert, *Bill Would Simplify Transfer of Real Property*, S.F. DAILY J., May 26, 2005, at 3). If there is a question of whether TOD deeds have the ability to make a strong financial impact, one must simply look at the reaction of industry attorneys. Academics and proponents of TOD deeds point out that probate and estate lawyers often oppose TOD deed legislation and are "guarding their wallets." *See, e.g.*, *id.* at 543 n.66 (citing Tim Willert, *Bill Would Simplify Transfer of Real Property*, S.F. DAILY J., May 26, 2005,

C. *Owner Control & Protection*

Finally, the owner always has the option of revoking his or her TOD deed, which provides the owner with ultimate control, autonomy, and flexibility in the estate planning process.[65] When using a TOD deed, the owner has sole control over the transfer of his property as opposed to a joint tenancy or life estate where others may exercise that right. No one may prevent the owner from revoking the deed, not even the beneficiary.[66] A TOD deed does not create a "legal remainder interest," and the beneficiary has no present interest in the property.[67] By not creating a present interest in the beneficiary, the TOD deed does not become a

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at 3). In 2005, California passed a bill that required the California Law Revision Commission to research TOD deed statutes in other states and suggest whether California should also adopt similar legislation. *Id.* at 533 & n.12. The bill requiring the California Law Revision Commission to examine TOD deeds had originally proposed the creation of TOD deeds but was converted when the bill met strong opposition. Larry Doyle, *Beneficiary Deeds Legislation Passes Assembly—Again*, ACCORDING TO DOYLE (June 8, 2009, 8:21 PM), http://larrydoyleesq.blogspot.com/2009/06/beneficiary-deeds-legislation-passes.html. Based on the Commission's determination that TOD deeds would be beneficial to California, public comments were solicited on the legislation's "tentative recommendation." Gary, *supra* note 6, at 533. *See generally* CLRC TENTATIVE RECOMMENDATION, *supra* note 37 (advocating the use of TOD deeds in California). But, as a result of "strong opposition from committee members, staff, the California Land Title Association, [and] the California Judges Association," the bill failed to pass the Senate. Doyle, *supra*; *see* CAL. S. JUDICIARY COMM., AB 250 BILL ANALYSIS, Reg. Sess. (2008), *available at* http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0201-0250/ab_250_cfa_20080626_110355_sen_comm.html (arguing that the bill does not limit the use of TOD deeds to small estates, that using a TOD deed for a large estate would defeat its purpose, and that large estates would still require probate). Afterwards, DeVore tried for a third time to pass the TOD deed bill, and the bill again failed to pass the Senate. *See* Zarnow, *supra* note 59 (reporting that in August 2010, a TOD deeds bill in California failed to pass in the Senate). After three attempts to pass the TOD deed bill, DeVore "suggest[ed] that . . . trust and estate lawyers . . . have slowed consideration of the bill." Gary, *supra* note 6, at 543 (quoting Tim Willert, *Bill Would Simplify Transfer of Real Property*, S.F. DAILY J., May 26, 2005, at 3); Zarnow, *supra* note 59 (arguing that the TOD bill failed to pass as a result of "opposition from trust and probate lawyers").

65. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 6, 11, 8B U.L.A. 129, 132–33 (Supp. 2011); Gary, *supra* note 6, at 542. All seventeen states provide for the power of revocation at any time by the owner. *See, e.g.*, MONT. CODE ANN. § 72-6-121 (2011), *amended by* Act of Mar. 25, 2011, ch. 76, § 6, 2011 Mont. Laws 76; OKLA. STAT. ANN. tit. 58, § 1254 (West Supp. 2011), *amended by* Nontestamentary Transfer of Property Act of May 26, 2011, ch. 372, § 2, 2011 Okla. Sess. Law Serv. 2905 (West).

66. § 16, 8B U.L.A. 143.

67. § 12, 8B U.L.A. 135 ("During a transferor's life, a transfer on death deed does not . . . create a legal or equitable interest in favor of the designated beneficiary . . . ."); Gary, *supra* note 6, at 542.

completed gift, thus avoiding gift taxes.[68] As a result, the owner can change his or her beneficiary at any time.[69]

A TOD deed also prevents a beneficiary's creditors from accessing the owner's property,[70] creating an additional advantage over joint tenancies and life estates.[71] In a joint tenancy, each joint tenant possesses a present interest in the property, which allows creditors to satisfy claims against one joint tenant at the expense of the other.[72] As a result, creditors may use a jointly owned piece of property to satisfy claims against "Joint Tenant A" at the expense of "Joint Tenant B."[73] Alternatively, in a TOD deed, the lack of a beneficiary's present interest in the property prevents creditors from attaching the property if, for example, the named beneficiary passes away before the owner.[74] If instead a joint tenancy had been created, the owner's property would be in jeopardy of attachment by creditors in order to satisfy claims in the deceased beneficiary's probate.[75]

III. DISADVANTAGES OF TRANSFER ON DEATH DEEDS

Every method of property transfer has its drawbacks, and TOD deeds are no exception. Some states have already encountered problems with TOD deeds.[76] Two of the most common issues include improperly drafted deeds, and the failure to properly record the deed before the owner's death.[77] Kansas has dealt with problems concerning incapacitated beneficiaries where "a conservator must be appointed to manage or sell the property."[78] Arizona has faced similar issues with designating successor

68. Gary, *supra* note 6, at 535. Gift taxes are "imposed when property is voluntarily and gratuitously transferred. Under federal law, the gift tax is imposed on the donor, but some states tax the donee." BLACK'S LAW DICTIONARY 1595 (9th ed. 2009).

69. Gary, *supra* note 6, at 542.

70. *Id.*

71. TOD deeds are also considered a practical option for lesbian, gay, bisexual, and transgendered ("LGBT") individuals who want to pass property to their partner without public scrutiny or the possibility that a court would deny probate to their will. JOAN M. BURDA, ESTATE PLANNING FOR SAME-SEX COUPLES 61 (2004). *See generally In re* Kaufmann's Will, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964) (denying probate to Kaufmann's male lover on account of "undue influence").

72. *See* John V. Orth, *The Perils of Joint Tenancies*, 44 REAL PROP. PROB & TR. J. 427, 428–29 (2009).

73. *See* Kirtland & Seal, *supra* note 52, at 43. If Joint Tenant A has placed Joint Tenant B on the deed of a house, Joint Tenant B has the ability to use the house as collateral, and Joint Tenant A may lose his equitable interest in the property. *Id.* at 43–44.

74. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT § 12, 8B U.L.A. 135 (Supp. 2011).

75. Kirtland & Seal, *supra* note 52, at 43.

76. *See, e.g.*, CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 21.

77. New Mexico, for example, reported that invalid, unrecorded deeds at the death of transferor have been a problem. *See id.* at 22.

78. *Id.* at 19–20.

beneficiaries.[79] Other purported disadvantages of TOD deeds include creditor evasion, legal mistakes, fraud, increased litigation, and the lack of beneficiary rights.[80] These issues are not limited to TOD deeds, and most methods of property transfer or testamentary documents are subject to some, if not all, of these elements. Despite the potential drawbacks of TOD deeds, an owner may still find a TOD deed's benefits to outweigh its limitations. This section will address and refute TOD deeds' presumed disadvantages.

A. Effect on Creditors

While eliminating probate is a valid goal for property owners, there are concerns that the removal of probate will have a negative effect on creditors. During probate, creditors rely on notice from the supervised court probate process to assist them in filing claims against an estate.[81] By disallowing probate and, thus, notice to creditors, TOD deeds can make it more difficult for creditors to collect from the estate.[82] Generally, only unsecured creditors rely on notice from probate proceedings.[83] Protecting unsecured creditors is an important consideration when drafting TOD deed legislation and may increase support for TOD deeds in more states.[84]

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79. *Id.* at 21. Arizona has also dealt with whether a beneficiary can be an entity, and whether multiple beneficiaries can hold title to the property if the owner is unclear about beneficiary succession. *Id.*

80. *See, e.g.*, CAL. S. JUDICIARY COMM., AB 250 BILL ANALYSIS, Reg. Sess. (2008), *available at* http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0201-0250/ab_250_cfa_20080626_110355_sen_comm.html (expressing concern over the "possibility of countless litigation" if TOD deeds were used, and that owners may not be "sophisticated enough" to understand TOD deeds).

81. Gary, *supra* note 6, at 541–42 (citing UNIF. PROBATE CODE § 1-403 (amended 1997), 8 U.L.A. 69 (1998); *id.* § 3-801 (amended 1989), 8 U.L.A. 208); Steven Seidenberg, *Plotting Against Probate*, 94 A.B.A. J. 57, 59 (2008).

82. *See* Gary, *supra* note 6, at 541–42 (citing UNIF. PROBATE CODE § 1-403 (amended 1997), 8 U.L.A. 69 (1998); *id.* § 3-801 (amended 1989), 8 U.L.A. 208); Seidenberg, *supra* note 81, at 57, 59. From the owner's point of view, the lack of notice to creditors would probably serve as an advantage. *See* Kirtland & Seal, *supra* note 52, at 45.

83. *In re* Estate of Stephenson, 173 P.3d 448, 453 (Ariz. Ct. App. 2007) (holding that a secured creditor is not subject to probate and may enforce any security). The majority of creditor interests in homes are mortgages held by secured creditors. *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 38–39 (6th ed. 2009) (describing the process of secured creditors obtaining liens in real property). Any property acquired by the beneficiary is still subject to all the encumbrances, mortgages, and liens on the property, thus protecting secured creditors. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13(b), 8B U.L.A. 136 (Supp. 2011); *see, e.g.*, IND. CODE ANN. § 32-17-14-19 (LexisNexis Supp. 2011) ("A beneficiary of a transfer on death transfer takes the owner's interest in the property at the death of the owner subject to all conveyances, assignments, contracts, set offs, licenses, easements, liens and security interests . . . .").

84. *See infra* Part V.

Most states anticipated the potential for creditor evasion and promulgated "protective provisions" to ensure that TOD deeds would not be abused.[85] States have created statutory provisions that provide timely claims filed against the owner's estate can be attached to the property,[86] and other states have supplied creditors with additional time to file their claims.[87] As the model for most TOD deed statutes, the Uniform Act states that a TOD deed does not "affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed."[88] These statutory provisions protect creditors from being unable to recover debts owed by TOD deed grantors.[89] In light of the protective provisions contained in TOD deeds, concerns about the potential effect on creditors are rarely realized.

B. Legal Mistakes

Two unavoidable issues in any legal transaction are the anticipation and prevention of legal mistakes and complications. TOD deeds are no different. Because of the relative simplicity of a TOD deed, an owner may believe that there are few legal consequences associated with the use of the TOD deed and may make legal mistakes, particularly without the assistance of a lawyer.[90] The California Senate Judiciary Committee noted that one of the concerns raised by the Trusts and Estates Section of the State Bar of California was the lack of sophistication among users, and the potential for legal mistakes as a result.[91]

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85. Kirtland & Seal, *supra* note 52, at 45.

86. *Id.*

87. Seidenberg, *supra* note 81, at 59.

88. § 12, 8B U.L.A. 135.

89. Some academics argue that the creditor's risk of having insufficient time to recover assets from a decedent's estate is not unique to TOD deeds, and that there are many instances of property transfer where creditors are not notified. Seidenberg, *supra* note 81, at 59–60.

90. Gary, *supra* note 6, at 543.

91. *See* CAL. S. JUDICIARY COMM., AB 250 BILL ANALYSIS, Reg. Sess. (2008), *available at* http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0201-0250/ab_250_cfa_20080626_110355_sen_comm.html. Despite legislative concerns, other commonly used methods of nonprobate transfers of property such as joint tenancies or life estates can be equally detrimental. Gary, *supra* note 6, at 543; *see* Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 159 (2008); *see also* Kirtland & Seal, *supra* note 52, at 43 ("Many flaws exist . . . in the use of joint tenancy with right of survivorship . . . ."). When an owner adds beneficiaries to his deed to avoid probate, "tax and other unintended consequences can arise." *See* Kirtland & Seal, *supra* note 52, at 43. These types of strategies not only provide beneficiaries with present enforceable rights, but they are also irrevocable and can cause gift tax and other present interest problems. Schenkel, *supra*, at 159. In a joint tenancy, each joint tenant has the ability to "sever the estate," which means that the right of survivorship can be removed unilaterally by one joint tenant without acquiring the approval of the other. Orth, *supra* note 72, at 431 ("Despite the joint tenancy's usefulness in avoiding probate, the historical hodgepodge of rules surrounding joint tenancy make it a perilous

While it is advisable that property owners seek legal consultation before engaging in estate planning, the reality is that "denying property owners the right to use TOD deeds will not ensure that those owners will seek legal counsel."[92] Regardless of the form of property transfer used by a property owner, there will always be the risk of legal mistake or litigation. Therefore, this argument against TOD deeds is weak because it incorrectly presumes that TOD deeds will increase litigation despite the fact that legal mistakes are an inherent and, often, expected problem associated with property transfer.[93] Those who oppose TOD deeds, such as the California legislature, unfairly seek to protect property owners from themselves without considering the fact that owners are equally vulnerable when writing a will or creating a joint tenancy without proper guidance.

C. Beneficiary Complications

Another problem can arise if the grantor survives the beneficiary, and the interest of the designated beneficiary lapses,[94] or there are no successor beneficiaries.[95] If there are alternate beneficiaries listed in TOD deeds, these problems can be avoided. Under the Uniform Act, an alternate beneficiary is optional.[96] If the owner does not list a successor beneficiary, the interest lapses, or the court must decide whether there is an appropriate successor beneficiary.[97] One state that has dealt with this problem successfully is Arizona.[98] The original TOD deed form in Arizona did not provide for an alternate beneficiary in its standard form, which presumably contributed to its difficulties in designating successor beneficiaries.[99] To rectify this problem, Arizona amended its statute in 2006, and the form now requires an owner to designate whether the deed would become "null and void" or become part of the grantee beneficiary's estate in the event the

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estate for its owners." (citing Sathoff v. Sutterer, 869 N.E.2d 354, 356 (Ill. App. Ct. 2007))). These types of unintended consequences may be worse than litigation caused by TOD deed mistakes. Even if the problems created by TOD deeds were equally as detrimental as deceitful actions by joint tenants, the argument against TOD deeds on account of legal mistakes would be invalid. *See* Gary, *supra* note 6, 543–44. When the intent of the owner is to ensure property is transferred without probate, the added protection of a TOD deed creates a considerable advantage over using joint tenancies. *In re* Kasparek, 426 B.R. 332, 348 n.70 (B.A.P. 10th Cir. 2010) (stating that the option of TOD deeds in the state of Kansas eliminates the need to use joint tenancies in estate planning and "increases the reliability of land records").

92. Gary, *supra* note 6, at 544.

93. *See* EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 8:2 (2d ed. 1999).

94. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13, 8B U.L.A. 136 (Supp. 2011).

95. CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 21 (noting that Arizona has had issues with designating successor beneficiaries).

96. § 16, 8B U.L.A. 143 (allowing an optional alternate beneficiary on the TOD deed form).

97. *See* CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 42.

98. *Id.*

99. *See* ARIZ. REV. STAT. ANN. § 33-405 (2007).

beneficiary predeceases the owner.[100] Other states enacting TOD deeds should consider following the actions of Arizona in order to lessen complications involving beneficiaries. Yet, there may still be room for more anti-lapse refinement. For instance, perhaps the state anti-lapse provision should apply to TOD deeds. Only if the gift lapses will the deed be voided, and the property placed in the grantor's estate.

D. Fraud & Increased Litigation

Another concern with TOD deeds is the possible increase of "post-death challenges" or litigation that can arise after the testator's death, which can be instigated by claims of fraud, lack of effectiveness, or lack of capacity.[101] One legislative analysis has suggested that TOD deeds are a floodgate of fraudulent transfers waiting to happen, stating "for years the courts have been handling thousands of contest cases involving fraudulent transfers [and] challenges to the validity of testamentary instruments . . . ."[102] Admittedly, while the probate process can be grueling, one of its advantages is that the courts have the ability to minimize fraud and provide solutions to legal mistakes.[103] Preventing individuals from using TOD deeds and requiring probate, however, does not necessarily mean that mistakes are less likely.[104] Even without TOD deeds, owners can make mistakes writing wills without the assistance of a lawyer.[105] Regardless of the method of property transfer, there is always the possibility of a post-death challenge. Therefore, the involvement of courts and lawyers is "not [a concern] unique to TOD deeds."[106] As a result, the argument that post-death challenges are a disadvantage particular to TOD deeds is unpersuasive.

Another issue associated with fraud is the possibility of undue influence, particularly if the potential grantor is elderly or appears to lack

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100. *Id.*

101. Gary, *supra* note 6, at 544. The Uniform Act drafting committee also acknowledges that the possibility of fraud exists when using a TOD deed. *See* § 16, 8B U.L.A. 144. While the Uniform Act does not require owners to notify beneficiaries about a TOD deed, it does recommend notification, noting that "[s]ecrecy can cause later complications and might make it easier for others to commit fraud." *Id.* (providing answers to commonly asked questions about the use of the TOD deed form).

102. *See* CAL. S. JUDICIARY COMM., AB 250 BILL ANALYSIS, Reg. Sess. (2008), *available at* http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0201-0250/ab_250_cfa_20080626_110355_sen_comm.html (answering the question of whether TOD deeds were "fraught with possibilities for abuse").

103. Gary, *supra* note 6, at 541–42.

104. *See id.* at 543–44.

105. *See* ROSS & REED, *supra* note 93, § 8:2 (explaining that "[m]istake may result from inadvertence or intellectual lack or from the testator's innocent or negligent conduct").

106. *See* Gary, *supra* note 6, at 544.

mental capacity.[107] According to Mary Pat Toups, a lawyer from California, TOD deeds would limit this type of elder abuse.[108] In part, the responsibility of preventing coercion lies with the attorney drafting the TOD deed.[109] As required in any other estate planning process, an attorney should not only question the reasons behind a client's desire to create a TOD deed but should also refrain from drafting the deed until he or she is satisfied that the client understands the legal effects of a TOD deed, and that the client is creating the deed with his or her own free will.[110] The mental capacity required by the Uniform Act to make or revoke a TOD deed is the same capacity required to make a will.[111] If the client was unduly influenced, the TOD deed may be considered invalid.[112] Although undue influence and the lack of capacity are relevant concerns, these issues must be considered when drafting any legal document and are no more problematic in the context of TOD deeds.

Before implementing a TOD deed statute, states should conduct a full cost–benefit analysis, as California did during its own legislative discussions on TOD deeds.[113] The argument that TOD deeds increase litigation would only be relevant if the use of TOD deeds did not already benefit court efficiency. Technically, the number of probate cases would be decreased by the use of TOD deeds,[114] and only some of these TOD deeds

107. Kirtland & Seal, *supra* note 52, at 46 (warning of undue influence when an elderly client "has been brought to the attorney's office by an adult child, other relative, or a friend who also will become the grantee-beneficiary under the deed"); *see also* Gary, *supra* note 6, at 543 ("The TOD option also may protect owners from unscrupulous relatives."). The Uniform Act also warns against succumbing to pressure to complete a TOD deed. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16, 8B U.L.A. 144 (Supp. 2011).

108. Gary, *supra* note 6, at 543. Toups states that the elderly are often "persuaded to transfer their homes to their children, who then threaten to evict them so they can sell the property." *Id.* Joint tenancy deeds are often used as a "probate avoidance" technique. Kirtland & Seal, *supra* note 52, at 43. Estate attorneys are seeing an increased number of "aging parents" creating a joint tenancy with right of survivorship with their adult children in an effort to avoid probate. *Id.* Sometimes the parents or children mistakenly believe that including an adult child on the deed will protect the property from Medicaid recovery. *Id.*

109. Kirtland & Seal, *supra* note 52, at 46.

110. *Id.*

111. § 8, 8B U.L.A. 130. Mental capacity includes being "capable of knowing and understanding . . . the nature and extent of his or her property . . . and [being] capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property." § 8 cmt., 8B U.L.A. 130–31.

112. Some statutes specifically state that evidence of fraud, duress, undue influence, lack of capacity, or mistake can invalidate a TOD deed. *See, e.g.*, IND. CODE ANN. § 32-17-14-14 (LexisNexis Supp. 2011).

113. *See, e.g.*, CAL. S. JUDICIARY COMM., AB 250 BILL ANALYSIS, Reg. Sess. (2008), *available at* http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0201-0250/ab_250_cfa_20080626_110355_sen_comm.html (asking whether the "creation of the [revocable] TOD deed . . . [would] cause more litigation rather than simplify the transfer of real property").

114. *See* § 16, 8B U.L.A. 144 (reiterating that probate is not required for a TOD deed).

would end up in litigation. TOD deeds would only be non-beneficial if every TOD deed ended up in litigation, negating any positive effect that nonprobate transfer might have on court efficiency.[115] This situation is unlikely, given the acknowledgement and recording requirements of a TOD deed.[116] There are also other ways to prevent fraud when drafting the standard TOD deed form, such as creating a durable power of attorney and making sure a transferor understands the legal implications of executing a TOD deed.[117]

Overall, the perception that TOD deeds increase litigation is unfounded. As of 2006, Missouri and Kansas—the first two states to enact TOD deeds—had very few cases involving TOD deeds.[118] Missouri also reported that in its seventeen years of using TOD deeds, there were no reports of abuse, and attorneys had a generally positive attitude toward TOD deeds.[119] Missouri's experience is a good example of how expectations of increased litigation and fraud over TOD deeds are unfounded and reinforces the fact that the possibility of fraud or litigation is no greater for TOD deeds than for wills or other testamentary documents.[120]

IV. TRANSFER ON DEATH DEED LEGISLATION IN NORTH CAROLINA

Based on the analysis above, the benefits of using TOD deeds outweigh their costs. TOD deeds benefit states by reducing probate costs for their residents. Individuals owning limited property feel these cost reductions most strongly. North Carolina has a large population of low-income individuals in the socioeconomic class most likely to benefit from the use of TOD deeds. This population is most harmed by the current cost of probate. While a TOD deed may not be suitable for all property owners, it is easily adaptable to North Carolina's current property transfer scheme and would provide North Carolina residents with a reasonable estate planning alternative to the extensive, formal requirements of probate. As such, North Carolina is an ideal candidate for TOD deed legislation.

115. Some experts suggest that post-death challenges are less likely to arise from a TOD deed than a will. *See* Gary, *supra* note 6, at 544 (citing Gretchen R. Sydlowski, *Home Sweet Home: Estate Planning and the Primary Residence*, 61 J. MO. B. 208, 210 (2005), *available at* http://www.mobar.org/5b3dae97-2485-4d06-844f-0a92dc94b124.aspx).

116. *See, e.g.*, §§ 9, 16, 8B U.L.A. 131, 144 (requiring a TOD deed to be recorded in the public records prior to the transferor's death).

117. Kirtland & Seal, *supra* note 52, at 46; *see also* § 16, 8B U.L.A. 144 ("Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.").

118. *See* CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 18–20.

119. *Id.* at 18–19.

120. *See supra* notes 104–06 and accompanying text.

A. *Socioeconomics*

As previously discussed, TOD deeds are particularly advantageous for owners with a small amount of property.[121] Depending on a state's socioeconomic structure, the state may not benefit from a TOD deed statute; however, this is not the case for North Carolina. TOD deeds are particularly useful for transferring simple property at death; thus it is important to evaluate whether a significant portion of the state's population would benefit from the use of TOD deeds.

If household income is an accurate predictor of the extent of property ownership among state residents, then a substantial portion of North Carolina residents who would benefit from the TOD deed option. In 2009–2010, the national average median income was $50,022,[122] and the median income in North Carolina was $43,176.[123] Among the seventeen states that have TOD deed statutes, the average median household income was $48,706, with Colorado at the highest median with $58,648 per household and Arkansas at the lowest median with $37,856 per household.[124] North Carolina's median household income is below both the national median income and the median income for all but two of the seventeen TOD deed states. Quantitatively speaking, North Carolina is a good candidate for TOD deeds precisely because a large portion of its population could benefit from this low-cost alternative.

B. *North Carolina Probate Costs*

One of the main reasons to use TOD deeds in North Carolina is the financial and economic benefit for property owners. In January 2012, the initial court fees for a North Carolina probate proceeding jumped from $89 to $120.[125] This may not seem like a lot of money to the average individual, but for estates with minimal financial assets, this can be a burdensome fee. Additionally, the estate assets fee continues to rise in North Carolina. Before September 1, 2005, the maximum filing fee was $3,000, and as of January 2012, the amount doubled to $6,000.[126] These fees reflect a general trend of increasing costs in North Carolina, and the costs will only continue

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121. *See* Bushyhead, *supra* note 53, at 35.

122. *Income of Households by State Using 2-Year-Average Medians*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/income/data/statemedian/index.html [hereinafter CENSUS] (last visited Jan 12, 2012).

123. *Id.*

124. *Id.*

125. *See* N.C. COSTS AND FEES, *supra* note 56, at 1.

126. *Id.*; Herman-Giddens, *supra* note 56. The formula to calculate this fee is 0.40/100.00 of the gross value of the assets/property listed on the estate inventory. *See* N.C. COSTS AND FEES, *supra* note 56, at 1. The minimum fee is $15. *Id.*

to grow.[127] Through the use of TOD deeds, North Carolina property owners could ensure that their small estates would not be subject to burdensome court and probate fees.

C. *Creditors*

Without probate, some creditors might claim that nonprobate transfers would negatively affect their claims against debtors, but this would not be a problem in North Carolina. In August 2009, North Carolina passed section 28A-29-1 of the North Carolina General Statutes to "establish a procedure for providing notice to creditors without estate administration when a decedent dies leaving no property subject to probate."[128] Prior to the passage of the statute, lawyers would frequently advise their clients to publish a "Notice to Creditors" by opening a probate proceeding.[129] With this law currently in place, TOD deeds would not have a deleterious effect on creditors in North Carolina.

D. *Critics & Red Tape*

Another question to consider is the ease or difficulty of passing TOD deed legislation in North Carolina. State legislators, academics, and prominent attorneys are among those who oversee the process of implementing such legislation.[130] Typically, attorneys do not encounter clients who would benefit from TOD deeds and, therefore, may not be aware of the positive and practical aspects of implementing such a statute. For example, the typical firm client, who has the financial means to pay for elaborate estate planning, would not be affected by probate in the same way as an individual with fewer assets. As such, lawyers could be potentially biased against such legislation.

Even if the opposition by lawyers is heavy,[131] the North Carolina General Assembly should adopt TOD deed legislation. Reports have shown that distrust of TOD deeds is generally unfounded, and those who oppose

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127. Herman-Giddens, *supra* note 56; Greg Herman-Giddens, *NC Probate Fees Filings Increase*, N.C. ESTATE PLAN. BLOG (July 2, 2010), http://www.ncestateplanningblog.com /2010/07/articles/probate/nc-probate-filing-fees-increase/.

128. Act of Aug. 7, 2009, 2009 N.C. Sess. Laws 863 (codified as N.C. GEN. STAT. 28A- 29-1 (2010)). The Act became effective on October 1, 2009 and "applies to estates of persons dying on or after that date." *Id.*

129. Greg Herman-Giddens, *NC Adopts Law for Notice to Creditors When No Probate Is Required*, N.C. ESTATE PLAN. BLOG (Aug. 29, 2009), http://www.ncestateplanningblog .com/2009/08/articles/probate/nc-adopts-law-for-notice-to-creditors-when-no-probate-required/.

130. The Trusts Drafting Committee of the North Carolina Statutes Commission meets several times a year to draft and discuss legislative changes to estate planning in North Carolina. The author was invited to attend one of these meetings on November 17, 2011.

131. *See* Gary, *supra* note 6, at 543 n.66 (citing Tim Willert, *Bill Would Simplify Transfer of Real Property*, S.F. DAILY J., May 26, 2005, at 3).

TOD deeds may find that there is little legal impact once a TOD deed statute is enacted.[132]

E. State Interest & Policy

One of the most important factors to consider when drafting new legislation is its potential effect on state interest and policy. The state's goal and purpose, theoretically, is to implement statutes that will promote its interests and assist its residents, regardless of their wealth. Probate lawyers have fought vehemently to prevent the passage of TOD deed legislation in several states.[133] Unfortunately, by trying to protect themselves, these lawyers are hurting an economic bracket of the population that could benefit from this legislation.

Probate not only drains money from the testator's estate, but as a result of lengthy proceedings, it also expends exorbitant amounts of state judicial resources and time.[134] In addition to fairness and accuracy, courts favor efficiency. Efficiency requires both a prudent use of time and money. In the last few years, North Carolina has been in the midst of a budget crisis during some of the most economically difficult years since the Great Depression[135] and may be unable to withstand the weight of court proceedings. In 2011, North Carolina's state budget suffered from a $3.7 billion shortfall.[136] In May 2009, many North Carolina judges agreed to take a voluntary pay cut to help weather the budget storm.[137] During that same time, the total clerk staff was only ninety percent of what was required.[138] The imminent threat to public funds is burdening the efficiency of the North Carolina judicial system as a whole.

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132. CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 18–23 (providing an overview of the nine states that had TOD deed statutes at the time and finding that the deeds were generally useful with few major problems).

133. *See, e.g.*, Gary, *supra* note 6, at 543 n.66 (citing Tim Willert, *Bill Would Simplify Transfer of Real Property*, S.F. DAILY J., May 26, 2005, at 3).

134. For example, in 2007, national estimates of personal representative fees totaled almost $1.3 billion, and attorneys' fees totaled $915 million. *See* DUKEMINIER ET AL., *supra* note 2, at 46 (noting that formal probate can be time-intensive and expensive).

135. Rob Christensen, *A Better Way: Cut State Pay*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 26, 2010, at 1B.

136. Chris Fitzsimon, *How to Attack a $3.7 Billion Shortfall: N.C. Policy Watch*, CHARLOTTE OBSERVER, Jan. 23, 2011, http://www.charlotteobserver.com/2011/01/23/2000788/how-to-attack-a-37-billion-shortfall.html.

137. Dan Galindo, *Most State Judges Agree to Voluntary Pay Cut*, WINSTON-SALEM J. (N.C.), May 13, 2009, at B1 ("Of the state's 396 trial and appeals judges, 368 have agreed to a voluntary 0.5 percent salary cut . . . .").

138. N.C. COURTS, STATISTICAL AND OPERATIONAL REPORT: HUMAN RESOURCES REPORT 3 (2008–2009) [hereinafter HUMAN RESOURCES], *available at* http://www.nccourts.org/Citizens/Publications/Documents/statsum_08-09.pdf (finding that the 2008–2009 clerk staffing level was still too low to even manage the workload from a decade prior in 2000–

The current economic crises and the aforementioned statistics show that the state cannot afford to expend money wastefully. In light of the state's current economic status, the state legislature should consider TOD deeds and realize the importance of drafting a TOD deed statute in the near future.

Furthermore, despite the potential opposition to a TOD program, North Carolina has historically been willing to pass laws that favor the non-probate transfer of assets. In 2005, North Carolina passed the Uniform Transfer on Death Security Registration Act, which provided for the ability to transfer securities without probate.[139] With the passage of this Act, in addition to the passage of section 28A-29-1 (Notice to Creditors Without Estate Administration) in 2009,[140] North Carolina has demonstrated its willingness to consider and facilitate nonprobate forms of asset transfers.

V. PROPOSAL FOR DRAFTING A NORTH CAROLINA TRANSFER ON DEATH DEED

In the past decade, the Uniform Act and various state TOD deed statutes have provided a substantial framework upon which North Carolina can and should create its own statute. One of the most important aspects of passing TOD deed legislation is to ensure that such legislation is workable and is drafted to increase the possibility that the legislature will pass the bill. While the Uniform Act serves as a foundation, changes and additions to the Uniform Act when drafting North Carolina's statute are necessary to increase the protection of grantors and beneficiaries and to ensure that TOD deeds serve as a beneficial and inexpensive method of property transfer in North Carolina.

Like the Uniform Act, one of the first requirements of a North Carolina TOD deed statute should be to create an optional TOD deed form.[141] Many states have included an optional standardized form within

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2001). In North Carolina's fiscal year of 2008–2009, the courts "would have required an additional 71 district court judges and 321 deputy and assistant clerks [also known as 'clerk staff'] in order to devote proper time to and dispose of all filings over the course of the year." *Id.* North Carolina probate is presided over by the clerks of the Superior Court, who are also "*ex officio* judges of probate," and are supported by the clerk staff. N.C. COURTS, STATISTICAL AND OPERATIONAL REPORT: JUDICIAL BRANCH STRUCTURE REPORT 3 (2008–2009) [hereinafter JUDICIAL BRANCH], *available at* http://www.nccourts.org/Citizens/Publications/Documents/statsum_08-09.pdf.

139. Uniform TOD Security Registration Act, 2005 N.C. Sess. Laws 1535 (codified at N.C. GEN. STAT. §§ 41-40 to -51 (2010)).

140. Herman-Giddens, *supra* note 129.

141. Most states that have not adopted the exact Uniform Act have a copy of an example TOD deed form written out in the statute itself. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-405 (2010); ARK. CODE ANN. § 18-12-608 (2010); COLO. REV. STAT. § 15-15-404 (2010); KAN. STAT. ANN. § 59-3502 (2005); MINN. STAT. § 507.071 (2010); MONT. CODE ANN. § 72-6-121

the statute to assist the owner in the construction of his or her TOD deed.[142] When used, the TOD deed form can serve a "channeling function,"[143] thus minimizing the possibility that a court will question the document's validity.[144] At a minimum, the North Carolina TOD deed form should provide for the owner's name, the legal description of the property, a primary beneficiary, the owner's signature, and acknowledgement.[145] The TOD deed form should also contain statements verifying that the document is a TOD deed and is revocable.[146]

To protect the owner from legal mistake, the proposed form should also provide detailed notice of the legal consequences of a TOD deed. For example, the Oklahoma TOD deed form provides in substantially clear and unambiguous language in capital letters that the TOD deed "REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY [THE] OWNER FOR [THE] INTEREST IN [THIS] REAL ESTATE."[147] Such a warning would be particularly effective in a TOD deed form, given the problems that states have had with owners failing to record their deeds.[148] Such obvious clauses in the TOD deed form would also be helpful to the owner, who might otherwise overlook important information while sifting through the TOD deed statute. To avoid legal mistakes, it would be practical for North Carolina to include these clauses on the form.

A North Carolina TOD deed statute should also address owner agency. As noted earlier, the Uniform Act has no specific provisions for dealing with an attorney-in-fact.[149] Therefore, any North Carolina TOD deed legislation should include a provision that specifically authorizes an owner's agent to perform any action that an owner is authorized to execute

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(2009); NEV. REV. STAT. ANN. § 111.109 (West 2010); N.M. STAT. ANN. § 45-6-401 (2010); OKLA. STAT. ANN. tit. 58, § 1253 (West Supp. 2011).

142. *See, e.g.*, COLO. REV. STAT. § 15-15-404 (2011).

143. DUKEMINIER ET AL., *supra* note 2, at 225 (noting that "it is easier to determine a person's wishes at death if those wishes are recorded in a standardized form").

144. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975). Professor Langbein suggests that "standardization of testation" is beneficial to the testator, because it provides a convenient method of expressing testamentary intent and confidence in the effectiveness of the written document. *Id.*

145. *See, e.g.*, UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16, 8B U.L.A. 143 (Supp. 2011).

146. *Id.*

147. OKLA. STAT. ANN. tit. 58, § 1253 (West Supp. 2011) (providing additional notice to the owner that the deed is revocable at any time and can be "WITHDRAWN OR RESCINDED WHETHER OR NOT MONEY OR ANY OTHER CONSIDERATION WAS PAID OR GIVEN"). The Colorado beneficiary deed provides the following clause: "CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE." COLO. REV. STAT. § 15-15-405 (2011).

148. *See supra* note 77 and accompanying text.

149. *See supra* note 41 and accompanying text.

under the TOD deed, such as the power of revocation.[150] Although not legally necessary,[151] a section on owner agency on the TOD deed form is practically necessary because it provides the owner with a clear understanding of the implications of retaining an attorney-in-fact and using a TOD deed. The small differences between the agency provisions in the Indiana and Missouri statutes are good examples of how a misunderstanding of agency power can have an unintended effect on the estate.[152] If the goal of a TOD deed is to provide property owners with autonomy, then the state legislature must ensure that the owners have been notified of additional powers created by the TOD deed.

Undue influence is a problem that can be minimized with the use of TOD deeds.[153] To increase the TOD deed's effectiveness in preventing undue influence, the owner of a TOD deed in North Carolina should be required to verify his or her competency and legal capacity in writing.[154] The clause should be written as follows: "I, [insert name of owner], confirm that I am of competent mind and proper legal capacity, and I am executing this TOD deed free from undue influence."[155] Witnesses should also be required to sign a similar clause verifying that the owner is of "sound mind" and is exercising his or her freedom of testamentary intent.

Because fraud is frequently used as a reason to oppose TOD deeds, the North Carolina legislature should implement fraud-minimizing procedures. To do so, the state should provide for additional witnesses on the TOD deed form, even though the Uniform Act only requires acknowledgement before a notary public.[156] A few TOD deed states, for example, Oklahoma, have already incorporated additional witnesses into their forms.[157] By increasing the number of witnesses to the deed execution, there is more evidence for courts to determine whether a TOD deed is valid in the event of a post-death challenge.[158] To prevent fraudulent TOD deeds, North Carolina should require two witnesses to sign a TOD deed in addition to acknowledgement.[159]

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150. *See supra* note 42 and accompanying text.

151. *See supra* note 41.

152. *See supra* notes 42–43.

153. *See supra* note 117 and accompanying text.

154. *See, e.g.*, OKLA. STAT. ANN. tit. 58, § 1253 (West Supp. 2011) (requiring that the owner be "of competent mind and [have] the legal capacity to execute this document").

155. *See, e.g., id.*

156. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16, 8B U.L.A. 143–44 (Supp. 2011).

157. tit. 58, § 1253. In addition to requiring a notary public signature, Oklahoma requires the signatures of two additional witnesses below the owner's signature. *Id.*

158. *See* Gary, *supra* note 6, at 544 (discussing post-death challenges).

159. Traditionally, the execution of a will has been considered valid when signed by two witnesses or acknowledged before a notary public. UNIF. PROBATE CODE § 2-502 (amended

To secure a TOD deed, an owner should be required to record his or her TOD deed within a certain period of time after execution.[160] The Uniform Act does not contain any time requirements for recording the deed, except that it must be "before the transferor's death."[161] A thirty-day "recording period" would be a practical solution to ensure that the deed is recorded before the grantor's death and could help prevent fraud or undue influence.[162] Some argue that a time requirement has the potential to "frustrate an owner's intent" if the owner is unable to record the deed within the required time frame.[163] The recording period may be necessary, however, not only to prevent fraud, but also to ensure that owners are serious about their testamentary intentions and following through with the TOD deed. If for any reason an owner were unable to record the deed within the designated time period, the owner would simply have to execute another deed, thus creating a new recording period in which the owner may record the deed.[164]

As mentioned previously, securing a beneficiary can be complicated if the owner survives the beneficiary, and thus the interest of the designated beneficiary lapses.[165] To address this problem, a North Carolina TOD deed statute could first apply the anti-lapse statute to the deed, then require that an alternative beneficiary be named in the event that the primary beneficiary does not survive the owner. It is important to prevent the owner from having no beneficiaries, which could result in the property being given to an unintended beneficiary.

To help ensure its passage, North Carolina TOD deed legislation would have to provide a way for probate and estate lawyers to maintain a reasonable level of business, despite an increase in nonprobate transfers of real property.[166] While a decrease in probate transfers cannot be avoided, there is a way to protect industry lawyers. One way to accomplish this would be to use the TOD deed form to promote legal consultation. For example, the following clause would be helpful if written in capital letters in the beginning of the form: "PLEASE NOTE THAT THIS IS A LEGAL

2008), 8 U.L.A. 103 (Supp. 2011). Although a TOD deed is not a will per se, it may be helpful for a TOD deed to adhere to certain traditional concepts of valid property transfer.

160. *See* CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 27 (outlining arguments both for and against a short-term time limit).

161. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 9, 8B U.L.A. 131 (Supp. 2011).

162. *See* CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 27.

163. *See* Gary, *supra* note 6, at 547.

164. Some might argue that as a result, using a TOD deed is no easier than probate, though that claim would be unfounded based on the findings in this Comment.

165. *See* § 13(a)(2), 8B U.L.A. 136.

166. *See* Zarnow, *supra* note 59 (noting that trust and probate attorneys opposed TOD deed legislation in California).

DOCUMENT. IF YOU ARE CONSIDERING THE USE OF THIS FORM, IT IS ADVISABLE TO CONSULT WITH AN ATTORNEY."

Although one of the advantages of TOD deeds is its ability to provide individuals with a non-lawyer estate planning option,[167] this does not mean that it is impractical for a property owner to seek a lawyer's supervision when executing a TOD deed.[168] A concerted effort to increase awareness about the importance of consulting a lawyer, however minimal, may improve the perception of TOD deeds among industry attorneys.[169] While owners would have to pay attorneys a small fee for their services, encouraging legal consultation before executing a TOD deed would ultimately benefit North Carolina residents. Presumably, a small estate-planning fee for the ability to use TOD deeds would be preferable to having no TOD deed option at all.

CONCLUSION

TOD deeds provide a cost-effective alternative for individuals to transfer real property without going through the lengthy and expensive probate process. Implementing TOD deeds would not only serve important state interests in North Carolina by increasing court efficiency and lowering state costs, but the option would also provide the state's residents with increased financial autonomy, given the rising probate fees and the budget crisis in the state. The goal of enacting a TOD deed statute in North Carolina is to provide property owners with a choice. Although not every property owner with a modest estate would decide to use a TOD deed, it is important to provide a flexible option to property owners who would choose to use a TOD deed. For all these reasons, North Carolina should enact a TOD deed statute.

JENNIFER W. JIANG**

167. *See, e.g.*, CLRC TENTATIVE RECOMMENDATION, *supra* note 37, at 22 (noting that in New Mexico, many people use the standard TOD deed form and do not seek the advice of an attorney before executing a TOD deed).

168. New Mexico's legislation suggests that retaining an attorney to draft the TOD deed is "wise" and helps to ensure that the TOD deed will be properly drafted and recorded. *Id.*

169. *See* Zarnow, *supra* note 59 (discussing how the perceptions of estate attorneys can negatively impact TOD deed legislation).

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