

***Making Your Client's Probate Estate Disappear:
An Estate Planner's Guide to Payable on Death Designations
and Transfer on Death Registrations***

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In addition to more common methods of non-probate transfers such as beneficiary designations and joint ownership with survivorship, payable on death (POD) designations and transfer on death (TOD) registrations allow an owner of certain types of property to designate a beneficiary to whom that property will pass, without probate, upon the owner's death. A POD designation or TOD registration is fully revocable during the owner's lifetime and provides the designated beneficiary with no legal rights with respect to the property prior to the owner's death.

The pour-over will/revocable trust format is now preferred to straight wills in many jurisdictions.¹ A revocable trust can enhance the privacy of an estate plan, facilitate management of assets upon incapacity or death and, if the trust is funded at death, avoid the costs and delays sometimes associated with probate. However, some clients do not like to hold assets directly through a revocable trust during their lifetime because they believe it adversely affects their personal financial statements,² because they are uncomfortable with the idea of their assets being held in the name of their trust rather than in their individual name or because certain assets might be costly or cumbersome to transfer during life. These clients may instead want to utilize POD designations or TOD registrations to designate his or her revocable trust as the beneficiary to whom that property will pass upon the client's death.

Moreover, for clients whose assets are consolidated into a limited number of accounts and other interests, POD designations and TOD registrations may enable the client to transfer all of his or her substantial assets to named beneficiaries and, thereby, essentially act as a will substitute. If a client effects POD designations and TOD registrations for all possible categories of assets, the assets that will actually pass through probate may be few or none.

POD designations and TOD registrations may also be of particular interest to unmarried domestic partners, because they allow for a non-probate transfer without any gift tax implications, since no immediate gift is made. Additionally, because POD designations and TOD registrations are revocable, in the event that the relationship ends, there are no ownership issues to be sorted out.

Additionally, high net worth clients often hold assets in multiple jurisdictions, and POD designations and TOD registrations can facilitate transfer of many assets without the need for ancillary probate or lifetime transfers to a revocable trust or family entity. Accordingly, an estate planner must have an understanding of what types of non-probate transfers might be available to his or her clients in various jurisdictions.

¹ However, in some jurisdictions, the deadlines imposed on creditors with respect to estates do not apply to revocable trusts; accordingly, probate may have the advantage of fixing the claims against a decedent's estate at an earlier date.

² If assets are transferred directly to a client's revocable trust then in order for those assets to appear on the client's financial statement it will have to be a consolidated financial statement. Since POD designation and TOD registration do not take effect until the client's death, there will be no change to the client's financial statement during life.

This article will outline which assets and in which jurisdictions may be transferred via POD designations and TOD registrations, and will summarize some methods for effecting such designations and registrations. Additionally, this article will highlight some of the issues that should be considered in advising clients to take advantage of POD designation and/or TOD registration.

I. POD Designation of Accounts with Financial Institutions

All states and the District of Columbia permit some form of designation that allows an account with financial institutions to be paid to a specified individual at death in lieu of the transfer of those accounts during lifetime.³ However, some states limit the types of accounts that may be designated in this manner. Most states have statutes that expressly provide for "payable on death" account designations. Other states have codified the common law "Totten Trust" concept, either in addition to or in the place of providing for "payable on death" account designations.⁴ The Totten Trust format provides for revocable designations of accounts using "trustee" and "beneficiary" labels. In the absence of special circumstances, a Totten Trust terminates, and the depositor/trustee holds the deposit free of any trust, if depositor/trustee survives the beneficiary.

POD designation of accounts will generally be affected by using the designation "payable on death" or "POD" on the bank signature card or account agreement. A Totten Trust will generally be affected by using the following designation on the bank signature card or account agreement: "in trust for", "ITF", "as trustee for" or "ATF". The financial institution will generally provide sample language for these designations; however, since applicable state law may require a specific format, when advising clients estate planners should review the state law provisions to ensure that the bank format complies with any such requirements. Similarly, some financial institutions may, as a matter of institutional practice, permit only POD designation or Totten Trust even though the other is permissible under applicable law.

In addition to avoiding probate, using a POD designation (or Totten Trust) format may allow for multiple accounts at the same financial institution to be separately insured. Under the Federal Deposit Insurance Act most deposits in financial institutions are insured up to the

³ See generally ALA. CODE § 5-24-1 et seq.; ALASKA STAT. § 13.33.223; ARIZ. REV. STAT. § 14-6223; ARK. CODE § 23-47-204; CAL. PROBATE CODE § 5120 et seq.; COLO. REV. STAT. § 15-15-223; CONN. GEN. STAT. § 36a-296; DEL. CODE § 924; D.C. CODE § 19-602.01 et seq.; FLA. STAT. § 655.82; GA. CODE § 7-1-810 et seq.; HAW. REV. STAT. § 560-6-101 et seq.; IDAHO CODE § 15-6-110; 205 ILL. COMP. STAT. § 625; IND. CODE § 32-17-11-1 et seq.; IOWA CODE § 524.805; KAN. STAT. ANN. §§ 9-1215, 17-2263 and 17-5828; KY. REV. STAT. § 391.300 et seq.; LA. REV. STAT ANN. § 766.1; ME. REV. STAT. tit. 18-A, § 6-110; MD. CODE FIN. INST. § 1-204; MICH. COMP. L. § 487.702; MASS. GEN. L. ch. 167D, § 6; MINN. STAT. § 524.6-201 et seq.; MISS. CODE § 81-5-62; MO. REV. STAT. § 461.001; MONT. CODE § 72-6-223; NEB. REV. STAT. § 30-2718(a); NEV. REV. STAT. § 663.025; N.H. REV. STAT. Ch. 384-D; N.J. STAT. § 17:16I-1 et seq.; N.M. STAT. ANN. § 45-6-223; N.Y. E.P.T.L. § 7-5.1 et seq.; N.C. GEN. STAT. §§ 53-146.2, 54-109.57, 54B-130 and 54C-166; N.D. CENT. CODE § 30.1-31-02; OHIO REV. CODE § 2131.10; OKLA. STAT. ANN., Tit. 18, §§ 381.39a and 381.40a; OR. REV. STAT. § 708A.455 et seq.; 20 PA. CONS. STAT. § 6301 et seq.; R.I. GEN. LAW. § 19-9-12; S.C. CODE § 62-6-110; S.D. STAT. § 29A-6-114; TENN. CODE § 45-2-704; TEX. PROBATE CODE § 436 et seq.; VT. STAT. tit. 8, § 14205; VA. STAT. ANN. § 6.1-125.11; WASH. REV. CODE § 30.22.040 et seq.; W.V. CODE § 31A-4-33a; WIS. STAT. § 705.02; WYO. STAT § 2-1-203.

⁴ The name "Totten Trust" is derived from *Matter of Totten*, 179 N.Y. 112 (1904), the case which first authorized its practice.

Standard Maximum Share Insurance Amount.⁵ The Emergency Economic Stabilization Act of 2008, signed by President Bush on October 3, increased the amount of the deposit covered by insurance from \$100,000 to \$250,000 per depositor from October 3, 2008 through December 31, 2009, after which the coverage limit will return to \$100,000. Generally, if a depositor has more than one account in the same financial institution, those accounts are added together and insured in the aggregate. However, account owner may obtain additional separate coverage on multiple accounts, for POD (or Totten Trust) accounts where the recipient on death is a spouse, child, grandchild, parent, brother or sister (whether through blood, adoption or by virtue of remarriage, such as a step-sibling) of the owner, the funds in such accounts are insured for the owner up to a total of \$250,000 (\$100,000) for each such beneficiary separately from any other individual accounts of the owner. Under the federal Defense of Marriage Act, the term "spouse" is limited to a person of the opposite sex who is a husband or wife as defined in the act.⁶

II. TOD Registration of Securities

TOD registration is available with regard to property such as certain investment securities, stocks, bonds, mutual fund shares, security accounts, membership interests in limited liability companies and limited partnership interests in partnerships in lieu of transferring of those assets during lifetime. The exact definition of "property," however, varies somewhat from state to state so an estate planner should review the applicable state law to ensure that the asset in question may be registered to TOD in that jurisdiction.

TOD registration of securities is available in the District of Columbia and all states other than Louisiana and Texas.⁷ It is not certain how the probate courts in Louisiana and Texas would treat assets held by a resident in TOD form under the laws of another state; accordingly, residents of these states may want to transfer assets directly to their revocable trusts rather than relying on TOD registration.

The following is a brief overview of how to effect TOD registration of some common types of property:

⁵ 12. U.S.C. 1829, §11

⁶ 1 U.S.C. § 7.

⁷ See generally ALA. CODE § 8-6-140 *et seq.*; ALASKA STAT. § 13.33.301 *et seq.*; ARIZ. REV. STAT. § 14-6301 *et seq.*; ARK. CODE § 28-14-101 *et seq.*; CAL. PROBATE CODE § 5500 *et seq.*; COLO. REV. STAT. § 15-15-301 *et seq.*; CONN. GEN. STAT. § 45a-468 *et seq.*; DEL. CODE § 12-801 *et seq.*; D.C. CODE § 19-603.01 *et seq.*; FLA. STAT. § 711.101 *et seq.*; GA. CODE § 53-5-60 *et seq.*; HAW. REV. STAT. § 539-1 *et seq.*; IDAHO CODE § 15-6-310 *et seq.*; 815 ILL. COMP. STAT. § 10/0.01 *et seq.*; IND. CODE § 32-17-9-1 *et seq.*; IOWA CODE § 633.800 *et seq.*; KAN. STAT. ANN. § 17-49a01 *et seq.*; KY. REV. STAT. § 292.6501 *et seq.*; ME. REV. STAT. tit. 18-A, § 6-301 *et seq.*; MD. CODE, EST. & TR. art., § 16-101 *et seq.*; MASS. GEN. L. ch. 201E, § 101 *et seq.*; MICH. COMP. L. § 700-6301 *et seq.*; Minn. Stat. § 524.6-301 *et seq.*; MISS. CODE § 91-21-1 *et seq.*; MO. REV. STAT. § 461.003 *et seq.*; MONT. CODE § 72-6-301 *et seq.*; NEB. REV. STAT. § 30-2734 *et seq.*; NEV. REV. STAT. § 111.480 *et seq.*; N.H. REV. STAT. § 563-C:1 *et seq.*; N.J. STAT. § 3B:30-1 *et seq.*; N.M. STAT. ANN. § 45-6-301 *et seq.*; N.Y. E.P.T.L. § 13-4.1 *et seq.*; N.C. Gen. Stat. § 41-40 *et seq.*; N.D. CENT. CODE § 30.1-31-21 *et seq.*; OHIO REV. CODE § 1709.01 *et seq.*; OKLA. STAT. ANN., Tit.71, § 1-101 *et seq.*; OR. REV. STAT. § 59.535 *et seq.*; 20 PA. CONS. STAT. § 6401 *et seq.*; R.I. GEN. LAW § 7-11.1 *et seq.*; S.C. CODE § 35-6-10 *et seq.*; S.D. STAT. § 29A-6-301 *et seq.*; TENN. CODE § 35-12-101 *et seq.*; UTAH CODE § 75-6-301 *et seq.*; VT. STAT. tit. 9, § 4360 *et seq.*; VA. STAT. ANN. § 64.1-206.1 *et seq.*; WASH. REV. CODE § 21.35.005 *et seq.*; W.V. CODE § 36-10-1 *et seq.*; WIS. STAT. § 705.21 *et seq.*; WYO. STAT § 2-16-101 *et seq.*

- *Publicly-Traded Stocks and Bonds and Investment Accounts.* With respect to publicly-traded stocks and bonds and investment accounts, the stockbroker or the institution holding the account will generally have a specific form for TOD registration. Although executor or administrator of the owner's estate will not have to take any action to ensure that the securities transfer to the TOD beneficiary, the TOD beneficiary must take steps to re-register the securities in his or her name. This may generally be affected by sending a copy of the death certificate and an application for re-registration to the transfer agent.
- *Limited Partnership and Membership Interests.* With respect to limited partnership interests and membership interests, TOD registration may generally be affected by making a request in writing to the general partner or manager, as the case may be, that the schedule for the written agreement, if any, and K-1s be changed to reflect ownership in TOD format. If the asset is being registered to TOD to a revocable trust, any written agreement should be reviewed to determine whether the trust would be a permissible limited partner or member, as the case may be, upon the owner's death.

TOD registration of securities held in a client's sole name may generally be affected by changing the ownership records to reflect the client's ownership interest as follows:

- With respect to a single beneficiary: "*John Doe TOD Jane Doe.*"
- With respect to multiple beneficiaries: "*John Doe TOD Jack Doe and Jill Doe.*"
- With respect to a single beneficiary with named successor beneficiary: "*John Doe TOD Jane Doe SUB BENE Jack Doe.*"
- With respect to single beneficiary with lineal descendants per stirpes as successor beneficiaries: "*John Doe TOD Jane Doe LDPS.*"
- With respect to single beneficiary with lineal descendants by right of representation as successor beneficiaries: "*John Doe TOD Jane Doe LDPR.*"
- With respect to a revocable trust agreement as beneficiary: "*John Doe TOD The John Doe Revocable Trust w/a/d _____, 20__.*"

Under the Uniform Act, TOD registration is expressly not permitted with respect to securities held by tenants in common.⁸ The comment to this provision of the Uniform Act provides that this provision is "designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of all co-owners."⁹ The comment further provides that "persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holding into

⁸ UNIF. TOD SEC. REGISTRATION ACT §2, *available at* <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utodsr89amend.htm> ("Uniform TOD Act").

⁹ *Id* at §2, *comment*.

separate registrations of the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary."¹⁰

Assets held as joint tenants with rights of survivorship or tenants by the entirety may generally be registered as follows:

- With respect to joint tenancies with rights of survivorship: "*John Doe and Jane Doe JTROS TOD Jack Doe.*"
- With respect to tenancies by the entirety: "*John Doe and Jane Doe T by E TOD Jack Doe.*"

Where there is a desire for the asset held as joint tenants with rights of survivorship or tenants by the entirety to TOD to a revocable trust, such asset should be registered to TOD to the revocable trust of the spouse who will be deemed to survive in the event of a common accident as follows:

- With respect to joint tenancies with rights of survivorship: "*John Doe and Jane Doe JTROS TOD Jane Doe Revocable Trust w/a/d _____, 20__.*"
- With respect to tenancies by the entirety: "*John Doe and Jane Doe T by E TOD Jane Doe Revocable Trust w/a/d _____, 20__.*"

Upon the death of the first spouse to die, the ownership records for such asset should be updated in the format for TOD registration of assets held in the sole name of the surviving spouse.

III. TOD Registration of Real Property

Currently, twelve states — Arizona, Arkansas, Colorado, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, Ohio, Oklahoma and Wisconsin — have enacted statutes which expressly permit TOD registration of real property.¹¹ Of these jurisdictions, six use the term "beneficiary deed" — Arizona, Arkansas, Colorado, Missouri, Montana and Nevada — instead of referring to it as a "transfer on death deed." Ten of these jurisdictions — Arizona, Arkansas, Colorado, Kansas, Minnesota, Montana, Nevada, New Mexico, Ohio and Oklahoma— provide forms of deed.¹²

The National Conference of Commissioners on Uniform State Laws released its most recent draft discussion of a uniform "Real Property Transfer on Death Act" in December 2008.¹³

¹⁰ *Id* at §2, comment.

¹¹ See generally ARIZ. REV. STAT. § 33-405; ARK. CODE § 18-12-608; COLO. REV. STAT. § 15-15-401 *et seq.*; KAN. STAT. ANN. § 59-3501 *et seq.*; MINN. STAT. § 507.071; MO. REV. STAT. § 461.025; MONT. CODE ANN § 72-6-121; NEV. REV. STAT. § 111.109; N.M. STAT. ANN. § 45-6-401; OHIO REV. CODE § 5302.22; OKLA. STAT. ANN., Tit. 58, § 1251 *et seq.*; WIS. STAT. § 705.15.

¹² ARIZ. REV. STAT. § 33-405(K); ARK. CODE § 18-12-608(g); COLO. REV. STAT. § 15-15-404; KAN. STAT. ANN. § 59-3502; MINN. STAT. § 507.071(24); MONT. CODE ANN § 72-6-121(13); NEV. REV. STAT. § 111.109.6; N.M. STAT. ANN. § 45-6-401(C); OHIO REV. CODE § 5302.22(A); OKLA. STAT. ANN., Tit. 58, § 1253.

¹³ Available at <http://www.law.upenn.edu/bll/archives/ulc/tod/2008dec%20clean%20draft.pdf>.

It is anticipated that the act will be presented for final approval in the summer of 2009.¹⁴ In addition, bills authorizing TOD registration of real property have been introduced in other states, including California¹⁵ and Indiana.¹⁶

Since a uniform act has not yet been adopted, the rules governing TOD deeds vary somewhat from jurisdiction to jurisdiction.¹⁷ For example:

- *Revocability.* All twelve jurisdictions expressly permit the sole grantor to change or revoke the TOD deed at any time during the grantor's lifetime; however, the grantor may not revoke by Will.¹⁸ In addition, Missouri and Wisconsin expressly provides that upon divorce a TOD deed benefiting a former spouse is revoked automatically.¹⁹ Arizona, Arkansas, Colorado and Nevada each provide that any co-owner may revoke the TOD deed joined in by all co-owners, unless the co-owners hold the property as joint tenants or community property with right of survivorship (or tenancy by the entireties in Arkansas), in which case the revocation is effective only if joined in by all co-owners or by the last to die of the co-owners.²⁰ Missouri provides that a revocation or change of a TOD deed involving property held jointly may only be made with the agreement of all owners then living.
- *Mortgages.* Each of the jurisdictions (except Missouri) expressly requires that any outstanding mortgage on the property runs with the land and, accordingly, will pass to the beneficiary.²¹
- *Fractional Interests.* Missouri, New Mexico and Ohio²² each expressly permit TOD deeds of fractional interests. The statutes in the other jurisdictions are silent on fractional interests.

¹⁴ See Susan N. Gary, *Uniform Law Commission Develops Transfer-on-Death Deeds*, available at www.dcpvidersonline.com/pres_file.php?id=2910&file=126_128_toddeedsarticle308.pdf.

¹⁵ A.B. 250, 2007-2008 Sess. (Cal. 2008). For a discussion of the debate over adoption of this legislation in California, see David Major, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California's Trusts & Estate Attorneys Heading for the Hills*, 49 Santa Clara L. Rev. 285.

¹⁶ H.R. 1254, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006).

¹⁷ For a more detailed discussion of these issues and other issues effecting TOD deeds, see Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 Real Prop., Prob. and Trust J. 529 (Fall 2006).

¹⁸ ARIZ. REV. STAT. § 33-405.F; ARK. CODE § 18-12-608(d); COLO. REV. STAT. § 15-15-405; KAN. STAT. ANN. § 59-3503; MINN. STAT. § 507.071(10), (19); MONT. CODE ANN § 72-6-121(6), (11); NEV. REV. STAT. § 111.109.7; N.M. STAT. ANN. § 45-6-401.D, F; OHIO REV. CODE § 5302.23(4); OKLA. STAT. ANN., Tit. 58, § 1254; WIS. STAT. § 705.15(3).

¹⁹ MO. REV. STAT. § 461.051; WIS. STAT. § 854.15.

²⁰ ARIZ. REV. STAT. § 33-405(d); ARK. CODE § 18-12-608(b); COLO. REV. STAT. § 15-15-408(1); NEV. REV. STAT. § 111.109.3

²¹ ARIZ. REV. STAT. § 33-405.A; ARK. CODE § 18-12-608(a)(1)(B)(i)(a); COLO. REV. STAT. § 15-15-407; KAN. STAT. ANN. § 59-3504(b); MINN. STAT. § 507.071(3); MONT. CODE ANN § 72-6-121(1); NEV. REV. STAT. § 111.109.1; N.M. STAT. ANN. § 45-6-401.I; OHIO REV. CODE § 5302.23(7); OKLA. STAT. ANN., Tit. 58, § 1255.B; WIS. STAT. § 705.15(4).

- *Multiple Beneficiaries.* A transferor may name more than one beneficiary of property to take under a TOD deed. Unless the TOD deed otherwise provides, the beneficiaries take the property as tenants in common. Missouri law explicitly permits a class gift, and provides that a TOD deed "designating the children of the owner or any other person as a class and not by name shall include all children of the person, whether born or adopted before or after the beneficiary designation is made."²³

Where a TOD deed is used, the beneficiary generally takes title to the property by recording a death certificate, sometimes accompanied by an affidavit.²⁴ While using a TOD deed may significantly speed up the transfer to the designated beneficiary, it may not be appropriate where the beneficiary will need to sell the property immediately because title insurance companies may delay in issuing title insurance or charge a higher premium.²⁵ Prior to recommending that a client register any real property to TOD, an estate planner may want to consult with a local title company to determine their policies regarding TOD deeds.

IV. TOD Registration of Automobiles

Currently, only five states — California, Connecticut, Kansas, Missouri and Ohio — have enacted statutes that expressly permit TOD registration of automobiles.²⁶ However, many states that do not permit TOD registration of automobiles have simplified procedures that facilitate easy transfer of automobiles upon death.

V. Potential Issues

The following are some of the issues that should be considered when advising clients to take advantage of POD designation and/or TOD registration. As with all estate planning matters, there is no one-size fits all POD and/or TOD format; accordingly, estate planners should be careful to look at the issues raised by each individual client's situations:

- *Capacity.* Article VI of the Uniform Probate Code, the model for many state's POD designation provisions, is silent on the capacity issue.²⁷ The Uniform TOD Security Registration Act is similarly silent on whether testamentary or contractual capacity (i.e., the capacity to manage one's financial affairs) is required to make a TOD registration.²⁸ Section

²² MO. REV. STAT. §§ 461.005(12), 461.025(1) (providing that a beneficiary deed may transfer "an interest in real property," and defines "property" as "any present or future interest in property"); N.M. STAT. ANN. § 45-6-401.I (providing that the beneficiary takes the owner's interest in the property subject to any conveyance by the owner that is "less than all of the record owner's interest" in the real property); OHIO REV. CODE ANN. § 5302.23(B)(5) (providing that "a fee simple title or any fractional interest in a fee simple title" may be transferred by TOD deed).

²³ MO. REV. STAT. § 461.059(2).

²⁴ See, e.g., COLO. REV. STAT. § 38-31-102; MINN. STAT. § 507.071(20); MONT. CODE ANN § 72-6-121(12); NEV. REV. STAT. § 111.109.8; OHIO REV. CODE § 5302.22(C); OKLA. STAT. ANN., Tit. 58, § 1255.A.

²⁵ See *Id* at 4.

²⁶ See CAL. PROBATE CODE § 4150.7; CONN. GEN. STAT. § 14-16(b); KAN. STAT. ANN. § 59-3508 *et seq.*; MO. REV. STAT. § 301.681; OHIO REV. CODE § 2131.13

²⁷ See generally UNIF. PROBATE CODE, available at <http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm>.

²⁸ See generally Uniform TOD Act.

203 of the discussion draft of a uniform "Real Property Transfer on Death Act"²⁹ and Section 5620 of the proposed California TOD deed act³⁰ each provide that the capacity necessary for a TOD deed is the same standard as used for testamentary capacity. Additionally, the Missouri courts have applied the testamentary capacity standard in reviewing a decedent's capacity when TOD deed was executed.³¹ When advising clients in jurisdictions where there is no clear rule regarding capacity with respect to the type of property being transferred, estate planners may want to employ the higher contractual capacity standard in determining whether the client has the capacity to act. Alternatively, a client's power of attorney may expressly provide that the client's attorney-in-fact under a durable financial power of attorney has the power to register assets in POD or TOD format. To avoid any potential diversion of assets, the potential class of beneficiaries should be limited to one or more of the following: the client's spouse, the client's descendants and/or any revocable or irrevocable trust established by the client.

- *Creditor Protection.* Registering assets to TOD or designating accounts POD provides no creditor protections during the owner's lifetime because no transfer of the asset is made until the death of the owner(s). Additionally, creditors have shown a willingness to pursue creditor claims after death against non-probate assets in addition to probate assets, even without the orderly process for creditors provided by probate.³² Moreover, if the designated beneficiary receives his or her interest outright, there will be protections from the creditors of the designated beneficiary; accordingly, clients may want to consider naming a spendthrift trust as the designated beneficiary.
- *Effect on Medicaid.* In some states, Medicaid estate recovery is limited to those assets that pass as part of the probate estate; however, in other states the state Medicaid program may recover funds from assets held in POD or TOD format. Additionally, in some states owning property in POD or TOD format itself may disqualify the owner from Medicaid in the first place. Accordingly, an estate planner should ascertain whether his or her client has or is

²⁹ Section 204 of the December 2008 discussion draft of a uniform "Real Property Transfer on Death Act" provides that "The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will." Available at <http://www.law.upenn.edu/bll/archives/ulc/tod/2008dec%20clean%20draft.pdf>. The comments to this section note that this provision is consistent with Restatement (Third) of Property (Wills and Other Donative Transfers) §8.1(b), which applies the standard of testamentary capacity to revocable will substitutes. The comments further note that it is also consistent with Uniform Trust Code Section 601 which provides that "[t]he capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will." However, in its issues memorandum for the December 2008 meeting, one of the issues identified for discussion by committee members was whether this standard for capacity should be higher. See Memorandum from Thomas P. Gallanis to Drafting Committee for the Uniform Real Property Transfer on Death Act (November 3, 2008), available at <http://www.law.upenn.edu/bll/archives/ulc/tod/2008dec%20issues%20memo.pdf>.

³⁰ Proposed California Probate Code § 5620 provides that "An owner of real property who has testamentary capacity may make a revocable transfer on death deed of the property." Available at <http://clrc.ca.gov/pub/Printed-Reports/Pub226.pdf>.

³¹ See generally *Allee v. Ruby Scott Sigeards Estate*, 182 S.W.3d 772, 780 (Mo. Ct. App. 2006).

³² See Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. Miami L. Rev. 757, 762-3 (Apr. 2008)

likely to receive any Medicaid payments and review the provisions of applicable law prior to advising the client on TOD registration or POD designations.

- *Right of Election.* Under the Uniform Probate Code, assets held in POD or TOD format are expressly included in the decedent's "augmented estate" and may be elected against.³³ Many states have adopted the Uniform Probate Code rule or a similar statutory rule which augments the decedent's estate for purposes of the right of election to include non-probate assets, such as assets held in POD or TOD format. In other states, a decedent's spouse may only elect against the decedent's "net estate," which generally only includes assets which pass by testate succession.³⁴ Where the client's estate might be the subject of a right of election, the estate planner should review applicable law to determine whether assets held in POD or TOD format might be included in the decedent's estate for purposes of the right of election.
- *Lapse of Bequest.* Generally, if the designated beneficiary does not survive the owner then the state anti-lapse statute would apply, and the property would pass to the named beneficiary's heirs. However, in other jurisdictions, laws regarding TOD deeds do not expressly apply the anti-lapse statutes, so the designation may lapse and the property would then pass as part of the owner's estate. Since the majority of jurisdictions permit the designation of successor beneficiaries, clients should be advised to do so.

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³³ UNIF. PROB. CODE §2-205, available at <http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm>.

³⁴ In 2008, the Court of Appeals of Maryland declined to find that placing the assets outside of the decedent's net estate was a *per se* fraud on the decedent's marriage. See *Schoukroun v. Karsenty*, 404 Md. 152, 945 A.2d 1270 (2008). The court therein stated that, in the absence of a finding of actual fraud upon remand, the decedent's revocable trust and TOD accounts passed to his daughter by operation of law at his death and were not includible in his net estate for purposes of his wife's right of election.