

TOD DEEDS IN VIRGINIA  
and other Dirt On Deeds

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# TOD DEEDS IN VIRGINIA

*(and other Dirt on Deeds)*

## I. WHAT TRANSFER ON DEATH DEEDS ARE

- A A Transfer on Death “TOD” deed is a ‘non-testamentary instrument’ (Va Code 64.2-626) which is signed and recorded during a grantor’s lifetime, is revocable until the grantor dies, and operates to convey property at the instant of the grantor’s death. As of January, 2014, at least 22 states, including Virginia, authorize TOD deeds by statute.
- B Missouri may be the origin of statutory TOD, enacting the first statute in 1989, although some in Vermont say they developed it first under common law before Missouri’s enactment. Twelve other states enacted their own flavor of legislation authorizing TOD deeds: Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana. The National Conference of Commissioners on Uniform State Laws in 2009 promulgated the “Uniform Real Property Transfer on Death Act”,<sup>1</sup> Since promulgation, 8 states and the District of Columbia have adopted the Uniform TOD Act: District of Columbia, Hawaii, Illinois, Nebraska, Nevada, New Mexico, North Dakota, Oregon, and Virginia effective July 1, 2013.
- C The concept is similar to “Lady Bird” deeds except that the Lady Bird deeds combine a reserved power of appointment with a grant to the grantor and the grantees; if the power of appointment is not exercised then on death of the grantor the property vests in the grantee. This type of conveyance is reportedly named after President Lyndon B. Johnson’s conveyance of property to his wife, “Lady Bird” Johnson. While the mechanism is different, the terms “Lady Bird Deed” and “TOD Deed” are often used interchangeably.

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<sup>1</sup> References to the comments that accompany the Uniform TOD Act from the The National Conference of Commissioners on Uniform State Laws will be in the form of “NCCUSL Comment”

D Virginia adopted the Uniform Act nearly intact; practitioners are directed to the commentary that the NCCUSL included for guidance.

<http://www.uniformlaws.org>.

## II. REQUIREMENTS

A Transferor (i.e. grantor) must be an 'individual' – i.e. a human. Virginia Code §64.2-621.

B Transferor must have testamentary capacity. Virginia Code §64.2-627

C Deed (*see* Virginia Code §64.2-628) must

1. Contain the essential elements and formalities of a properly recordable *inter vivos* deed.
2. State that the transfer to the designated beneficiary is to occur at the Transferor's death
3. Be recorded BEFORE the Transferor's death in jurisdiction where land located
4. Be signed by all joint owners, if any.

D Misc. Aspects:

1. Deed is exempt from recording taxes UNLESS there is actual consideration. Virginia Code §64.2-628(5) and §58.1-811(J).
2. Consideration is not required Virginia Code §64.2-629(2)
3. Notice, delivery and acceptance by the designated transferee is NOT required, a departure from hornbook law on gifts. Virginia Code §64.2-629(1)
4. Is considered a deed for purposes of Virginia Code §17.1-223 (recording requirements for Circuit Court Clerks) Virginia Code §64.2-628(7)
5. NO WARRANTIES attach – even if included in the deed. Virginia Code §64.2-632(D)

6. “The Transferor may select any form of ownership, concurrent or successive, absolute or conditional, contingent or vest, [which is] valid under state law” however “Transferors are encouraged . . . to avoid formulating dispositions that would complicate title” (NCCUSL Comment §5 )

### III. REVOCATION

A Must be by instrument, cannot be by “Act”. Virginia Code §64.2-630(C), and the instrument.

1. Must be acknowledged by the Transferor AFTER the acknowledgment of the TOD deed being revoked AND
2. RECORDED before the Transferor’s death in the Clerk’s Office where TOD deed recorded. Virginia Code §64.2-630(A)(2)

B Is exempt from recording taxes Virginia Code §64.2-621 and Virginia Code §58.1-811(J).

C “Must” be one of the following instruments:

1. A TOD deed which revokes the prior deed in whole or in part Virginia Code §64.2-630(a)(1)(a); [or]
2. A TOD deed that names a designated beneficiary inconsistent with the designated beneficiary of the earlier TOD deed. §64.2-630(a)(1)(b); [or]
3. Is an ‘instrument of revocation’ that expressly revokes the TOD in whole or in part §64.2-630(a)(1)(c); [or]
4. Is an *inter vivos* deed which expressly revokes the TOD deed in whole or in part.
5. WILLS are excluded by omission in this list. The omission is a departure from the Restatement (Third) of Property because the TOD Deed “operates on real property for which certainty of title is essential” (NCCUSL Comment, §11)
6. HOWEVER, an *inter vivos* deed which transfers the property without mention of the TOD deed will still revoke the TOD deed NCCUSL Comment §11.

D Divorce or Annulment after a TOD deed automatically revokes transfer to former spouse UNLESS deed expressly says otherwise. Virginia Code §64.2-632(A)(5)

E If more than one Transferor,

1. Revocation by one does not affect the TOD deed as to the interest of another Transferor Virginia Code §64.2-630(B)(1)
2. If all Transferors were 'joint' owners then all living joint owners must sign Virginia Code §64.2-630(B)(2)<sup>2</sup>

#### IV. EFFECT OF TOD DEEDS

A **While the Transferor is alive** – Per Virginia Code §64.2-631, a TOD deed does NOTHING; specifically, it:

1. Does not Affect an interest or right of the Transferor or any other owner, including the right to transfer or encumber the property;
2. Does not Affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;
3. 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;
4. Does not Affect the Transferor's or designated beneficiary's eligibility for any form of public assistance;
5. Does not Create a legal or equitable interest in favor of the designated beneficiary; or
6. Does not Subject the property to claims or process of a creditor of the designated beneficiary.

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<sup>2</sup> COMMENT: In Virginia, automatic or implied survivorship among joint tenants was abolished years ago (Virginia Code §55-20, Code 1919, § 5159). **Survivorship must be express** in the instrument of conveyance, Virginia Code 55-20.1 says "If, in addition, the expression "with survivorship," or any equivalent language, is employed in such titling, registering or endorsing, it shall be presumed that such persons are intended to own the property as joint tenants with the right of survivorship as at common law." Apparently no one in the General Assembly was familiar with Virginia real estate law when they adopted this.

**B At Death of Transferor** – see Virginia Code §64.2-632

1. TOD deed deemed effective at the Transferor's death Virginia Code §64.2-632(B). Before then it is "Ambulatory" (NCCUSL Comment §12).
  - a. Provisions of Virginia Code §64.2-2200 (Simultaneous Death Act) and §64.2-2500 *et seq* ("Slayer Statute") apply.
  - b. Crops are included; *In re Estate of Roloff*, 143 P.3d 406 (Kan. Ct. App 2006) ("result approved" NCCUSL Comment §13).
2. Designated Beneficiary must survive the Transferor. (64.2-632(A)(2))
3. If Designated Beneficiary survives, property vests on death of Transferor AND Designated Beneficiary becomes, simply, the Beneficiary. Virginia Code §64.2-621 (& NCCUSL Comment §2)
4. Beneficiary may disclaim as provided in 64.2-2600 *et seq.* Virginia Code §64.2-633.
5. "Concurrent interests" are transferred to beneficiaries in equal undivided shares without survivorship; if one of several designated beneficiaries pre-deceases the Transferor, that share is divided proportionately among the surviving beneficiaries. Virginia Code §64.2-632(A)(3) & (A)(4).
6. Beneficiaries take the property subject to all conveyances, liens, mortgages, other rights, etc. 'to which the property is subject at the Transferor's death' Virginia Code §64.2-632(B)
7. If Transferor is a 'joint owner' "Survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship but remains subject to the naming of the designated

beneficiary in the transfer on death deed”, else if Transferor is the last surviving joint owner, the transfer on death deed is effective.<sup>3</sup>

C Continuing liability of property for claims

1. After the death of the Transferor, Virginia Code §64.2-634A (which deviates from the Model Act) provides that property transferred at the Transferor's death by a TOD deed is subject to
  - a. claims of the Transferor's creditors,
  - b. costs of administration of the Transferor's estate,
  - c. the expenses of the Transferor's funeral and disposal of remains, and
  - d. statutory allowances to a surviving spouse and children of the Transferor including the family allowance, the right to exempt property, and the homestead allowance
  - e. AND the Augmented Estate (Virginia Code §64.2-632A)
2. Modifications of above:
  - a. (only) to the extent the Transferor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.
  - b. If more than one property was TOD'd then claims are apportioned 'according to their net values at the Transferor's death'
  - c. subject to the Transferor's right to direct the source from which liabilities will be paid, (COMMENT: Not sure how this 'direction' is to be accomplished)
3. **One Year Statute of Limitation:** A proceeding to enforce the liability under this section shall be commenced not later than one year after the Transferor's death. Virginia Code §64.2-634(C) **NB:** These *inchoate* claims are not the same as the *inter vivos* liens,

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<sup>3</sup> COMMENT: Again, as in previous footnote, this last section appears inconsistent with Virginia Code §55-20 as it seems to assume survivorship among joint owners, the only way to reconcile it is if the instrument creating the joint ownership also had language creating survivorship. A possible litigation area; no one says the General Assembly knows what they're doing!

mortgages which survive the deed and the beneficiaries take the property subject to Virginia Code §64.2-634(A).

4. **Actions At Death Of Transferor** – The TOD deed, like a will, is “ambulatory” (can be revoked or changed) until the Transferor died. Virginia has almost morphed into a “required recording” state in order to change title, so the beneficiary must record something in order to prove in the public records the death of the Transferor and their ownership ‘vesting’. Three things will do that:
  - a. Probate of a will, whether or not there is any administration.
  - b. Qualification of an administrator in an intestate estate
  - c. Real Estate Affidavit pursuant to Virginia Code §64.2-510 (available on line)
5. Disclaimer – A beneficiary may disclaim the property as provided in 64.2-2600 *et seq.* Virginia Code §64.2-633. There is no time limit on the disclaimer PROVIDED that the beneficiary has not taken any act to exert or demonstrate control over the property.

V. A Scenario . . .

There will be revocation issues, but death certificates have date/time of death and court clerks date/time stamp documents either as presented or as recorded. That's easy enough for even a judge to understand! An ancillary problem in some areas of Virginia is that it can be hours between when a document is handed to the clerk and when it is officially 'recorded'. Suppose the death/recording times are IDENTICAL’ – Imagine a likely cellphone conversation (*courtesy NSA*):

JimBob: "Hey, Bubba – is Momma still alive? Just got to the Courthouse"

Bubba: "Barely, Bubba; she wheezin’ a helluva lot. Y’ all better hurry"

JimBob: "OK - handing it to the clerk Now"

Bubba: "Git ‘em to Hurry - all sorts of buzzers and bells going off now"

JimBob: (yelling) "CPR -- HAVE THEM DO CPR"

Bubba: "They won't -- there's a DNR"

JimBob/Bubba: (at same time) "They just shut off the alarms and covered her head with a sheet" *and* "I just got the receipt from the Clerk".

VI. FORMS, TITLE INSURANCE, INTERPRETATION

- A Author's TOD deed attached (the Virginia deed deviates from the NCCUSL form and is, in the author's opinion, horrible).
- B Revocation Language – Author's suggest form attached.
- C Virginia Underwriting Bulletin 2013-16 (September 9, 2013) Fidelity National Title Group™, attached. (used with permission)
- D The Act specifically provides that decisions and interpretations of other states shall be given consideration in order to promote uniformity. Virginia Code §64.2-637.

VI. General comments on deed drafting, especially complex/problem deeds.

- A Tell the history, usually chronologically.
  - 1. Use separate, short, sentences for each event.
  - 2. Begin with the earliest document in which any party to the deed acquired an interest.
  - 3. Refer to previous recorded documents by their date, grantor, location recorded.
  - 4. If deed of partition with multiple generations, trace chronologically by first generation heir. (e.g. Puffuffnick died owning GreenAcres, leaving children A, B, C & D – trace “A's” lineage to present, then “B's”, etc.).
- B You are not limited to Will Book/Deed Book documents
  - 1. Marriage records
  - 2. Court Orders.
  - 3. “Non-Record Room” documents. – Exhibit “A” to the deed.
    - a. Copy of a power of attorney (nowhere does the Code say an original has to be recorded to convey title). Useful when grantor is out of state and agent refuses to send the only original they have.

- b. Once a copy of a ‘lost’ Escheat Grant (certified by the State Librarian) was recorded as “Exhibit A” to a deed from purchaser at escheat auction to his grantee.
  - c. Copy of a list of heirs – or other helpful document – recorded in a different jurisdiction.
- C Draft so that inclusion of the details leads to the conclusion (a) that the grantor actually owns the land/interest being conveyed and (b) has conveyed that to the grantee.
- 1. Remember: Recordation of a document IS NOT required to convey title (except in limited circumstances such as Transfer on Death Deeds).
  - 2. Title is conveyed on delivery and acceptance of a deed (except in limited circumstances such as Transfer on Death Deeds). Recordation is simply “Notice to the World”.
  - 3. Virginia is a Race/Notice state – first to the courthouse wins because the next guy is deemed to have notice.
- D Don’t include ‘warranties’ or ‘English covenants’ unless you have to.
- 1. Virginia’s ‘statutory deed’ set out in Virginia Code §55-48 is all that’s required.<sup>4</sup> It contains no warranties or ‘Modern English Covenants’ that are commonly included in deeds.
  - 2. Warranties (as defined by the author):
    - a. General Warranty: Grantor promises that there’s nothing wrong with the title history since John Smith and Pocahontas were fooling around in the swamps until this conveyance, and will fix the problem at grantor’s own expense – i.e. Grantor promises to fix 400+ years of history if necessary. *See* Virginia Code §55-68

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<sup>4</sup> "This deed, made the . . . . . day of . . . . ., in the year . . . . ., between (here insert names of parties as grantors or grantees), witnesseth: that in consideration of (here state the consideration), the said . . . . . doth (or do) grant unto the said . . . . ., all (here describe the property, including the name of the city or county in which the property is located, and insert covenants or any other provisions). Witness the following signature and seal . . ." Virginia Code §55-48.

- b. Special Warranty: Grantor promises that there's nothing wrong with the title history since Grantor acquired the property until this conveyance, and will fix the problem at grantor's own expense – i.e. Grantor will fix anything Grantor did to the title. *See Virginia Code §55-69.*
3. “Modern English Covenants” – remember first year Property Law in Law School – the ‘right to convey’, ‘quiet possession’, ‘free from encumbrances’, ‘further assurances’ and ‘no act to encumber’. *See Virginia Code §55-71 to 55-74.* Don't put this clause in if a Special Warranty deed as it defeats much of the purpose of limiting the warranty.
4. The author's ‘office’ contract simply says that the grantor will convey the property ‘by warranty deed’ without specifying *which* warranty. It's a matter of who is the client.