

Report of the Real Property Section

1 *To the Council of Delegates:*

2 The Real Property Law Section respectfully requests your favorable consideration of the
3 following proposal to amend R.C. Sections 5302.22 and 5302.23, and add new sections
4 5302.221 and 5302.24 to change the transfer on death designation instrument from a deed
5 to an affidavit.

6 Respectfully submitted,

7 **Robert M. Curry, Dayton**
8 Chair

9 PROPOSED AMENDMENTS

10 § 5302.22 Transfer on death ~~deed~~ designation affidavit form.

11 ~~(A) A deed conveying any interest in real property, and in substance following the~~
12 ~~form set forth in this division, when duly executed in accordance with Chapter 5301. of~~
13 ~~the Revised Code and recorded in the office of the county recorder, creates a present~~
14 ~~interest as sole owner or as a tenant in common in the grantee and creates a transfer on~~
15 ~~death interest in the beneficiary or beneficiaries. Upon the death of the grantee, the deed~~
16 ~~vests the interest of the decedent in the beneficiary or beneficiaries. The deed described~~
17 ~~in this division shall in substance conform to the following form:~~

18 ~~“Transfer on Death Deed~~

19 ~~..... (marital status), of County, (for valuable~~
20 ~~consideration paid, if any), grant(s) (with covenants, if any), to whose~~
21 ~~tax mailing address is, transfer on death to, beneficiary(s),~~
22 ~~the following real property;~~

23 ~~(Description of land or interest in land and encumbrances, reservations, and~~
24 ~~exceptions, if any.)~~

25 ~~Prior Instrument Reference:, wife (husband) of the grantor, releases all~~
26 ~~rights of dower therein.~~

27 ~~Executed this day of~~

28 ~~.....~~

29 ~~(Signature of Grantor)~~

30 ~~(Execution in accordance with Chapter 5301. of the Revised Code)²²~~

31 (BA) Any ~~person~~ individual who, under the Revised Code or the common law of
32 this state, owns real property or any interest in real property as a sole owner, ~~or~~ as a
33 tenant in common, ~~as a tenant in survivorship, or together with his or her spouse owns an~~
34 indivisible interest as tenants by the entireties, may ~~create an~~ designate all of that
35 interest, or any specified part if less than all of that interest in the real property, as
36 transferable on death to a designated beneficiary or beneficiaries by executing, together
37 with the spouse, if any, subordinating the spouse's dower rights to the vesting of title in
38 the named beneficiaries, and recording in the office of the county recorder in the county
39 in which the real property is located, ~~a deed~~ an affidavit as provided in this section. When
40 so recorded such affidavit, or a certified copy, shall be evidence of the beneficiary or
41 beneficiaries so designated, insofar as it affects title to the real property, ~~conveying the~~
42 ~~person's entire, separate interest in the real property to one or more individuals, including~~
43 ~~the grantor, and designating one or more other persons, identified in the deed by name, as~~
44 ~~transfer on death beneficiaries.~~

45 A ~~deed conveying an interest in real property that includes a transfer on death~~
46 ~~beneficiary designation need not be supported by consideration and need not be delivered~~
47 ~~to the transfer on death beneficiary to be effective.~~

48 (CB) Upon the death of any such individual who owns real property as a sole
49 owner or as a tenant in common, title to the ~~or an~~ interest in real property that is subject
50 to a transfer on death beneficiary designation made under a transfer on death deed as
51 provided in this section, the deceased owner's interest shall be transferred only to the
52 transfer on death beneficiaries who are identified in the deed by name and who survive
53 the deceased owner or that are in existence on the date of death of the deceased owner.
54 The transfer of the deceased owner's interest shall be recorded by presenting to the
55 county auditor and filing with the county recorder an affidavit, accompanied by a
56 certified copy of a death certificate for the deceased owner. The affidavit shall recite the
57 name and address of each designated transfer on death beneficiary who survived the
58 deceased owner or that is in existence on the date of the deceased owner's death, the date
59 of the deceased owner's death, a description of the subject real property or interest in real
60 property, and the names of each designated transfer on death beneficiary who has not
61 survived the deceased owner or that is not in existence on the date of the deceased
62 owner's death. The affidavit shall be accompanied by a certified copy of a death
63 certificate for each designated transfer on death beneficiary who has not survived the
64 deceased owner. The county recorder shall make an index reference to any affidavit so
65 filed in the record of deeds.

66 Upon the death of any individual holding real property or an interest in real
67 property that is subject to a transfer on death beneficiary designation made under a
68 transfer on death deed as provided in this section, if the title to the real property is
69 registered pursuant to Chapter 5309. of the Revised Code, the procedure for the transfer
70 of the interest of the deceased owner shall be pursuant to section 5309.081 of the Revised
71 Code. specified in the affidavit will vest in the beneficiary or beneficiaries designated
72 therein. Upon the death of any such individuals who own any interest in real property as
73 tenants in survivorship or as tenants by the entireties, upon the death of one but not all of
74 such survivorship tenants, or upon the death of one but not both of the tenants by the

75 entireties, the real property specified in the affidavit will vest in the surviving tenant or
76 tenants; however, upon the death of the last survivorship tenant or remaining tenant by
77 the entireties, the real property specified in the affidavit will vest in the beneficiary or
78 beneficiaries designated therein, subject to (B)(7) of section 5302.23.

79 (C) The affidavit provided for under this section may be verified before any
80 person authorized to administer oaths and shall include the following:

81 (1) A description of the land, title to which is affected by the affidavit, and
82 a reference to an instrument of record containing such description;

83 (2) If less than the entire interest in the land is to be transferred on death, a
84 statement of the specific interest or part of interest to be so transferred;

85 (3) A statement by the individual that he or she is the person appearing by
86 the record to be the owner of such land at the time of the recording of the
87 affidavit, and the marital status of such owner; if married, a statement by the
88 spouse subordinating the spouse's dower rights to the vesting of title in the named
89 beneficiaries. The recorder shall index the affidavit in the name of such record
90 owner;

91 (4) A statement designating one or more persons, identified in the affidavit
92 by name, as transfer on death beneficiaries.

93 (D) The county recorder for the county where such affidavit is offered for record
94 shall receive and cause the affidavit to be recorded as deeds are recorded, and collect
95 the same fees for recording such affidavit as for recording deeds.

96 (E) An affidavit designating a transfer on death beneficiary designation need not
97 be supported by consideration and need not be delivered to the transfer on death
98 beneficiary, but must be recorded prior to the death of the affiant to be effective.

99 (F) Upon the death of any individual who owns real property or an interest in real
100 property that is subject to a transfer on death beneficiary designation made under a
101 transfer on death affidavit as provided in this section, such deceased owner's interest
102 shall be transferred only to the transfer on death beneficiaries who are identified in the
103 affidavit by name and who survive the deceased owner or that are in existence on the
104 date of death of the deceased owner. For the purposes of this section, a natural or legal
105 person designated by name as a beneficiary or contingent beneficiary solely in that
106 person's capacity as trustee of a trust, which named trustee has died, resigned or
107 otherwise been replaced by a successor trustee of the trust at the time of the death of the
108 owner, shall be deemed to be a beneficiary or contingent beneficiary in existence on the
109 date of death of the deceased owner in full compliance with this section,
110 notwithstanding that the successor trustee is not named in the affidavit.

111 (G) For the purposes of these sections 5302.22 through 5302.23, tenants by the
112 entireties shall mean only those persons who are vested as tenants in an Estate by the
113 Entireties with Survivorship pursuant to deeds recorded between February 9, 1972 and

114 April 3, 1985, under section 5302.17 of the Revised Code as it existed during that time
115 period. Nothing in this statute shall be interpreted as authorizing the creation or
116 recognition of tenancy by the entireties created outside of those dates.

117 (H) Any person who knowingly makes any false statement in any affidavit
118 provided for in this section is guilty of falsification under division (A) (6) of section
119 2921.13 of the Revised Code.

120 **§ 5302.221 Affidavit confirming transfer on death.**

121 (A) The transfer of the deceased owner's interest as designated in the transfer on
122 death designation affidavit provided in section 5302.22 shall be recorded by presenting
123 to the county auditor and filing with the county recorder an affidavit of confirmation,
124 accompanied by a certified copy of a death certificate for the deceased owner. The
125 affidavit shall recite the following:

126 (1) The name and address of each designated transfer on death beneficiary
127 who survived the deceased owner or that is in existence on the date of the deceased
128 owner's death; in the case of a named beneficiary who was designated solely in that
129 person's capacity as trustee of a trust, which trustee has subsequently been replaced by
130 a successor trustee, the name and address of the successor trustee together with a copy
131 of the recorded Successor trustee affidavit pursuant to section 5302.171 of the Revised
132 Code, which copy shall accompany this affidavit;

133 (2) The date of the deceased owner's death;

134 (3) A description of the subject real property or interest in real property; and

135 (4) The names of each designated transfer on death beneficiary who has
136 not survived the deceased owner or that is not in existence on the date of the deceased
137 owner's death.

138 (B) The affidavit shall be accompanied by a certified copy of a death certificate for
139 each designated transfer on death beneficiary who has not survived the deceased owner.

140 (C) The county recorder shall make an index reference to any affidavit so filed in
141 the record of deeds.

142 (D) Upon the death of any individual holding real property or an interest in real
143 property that is subject to a transfer on death beneficiary designation made under a
144 transfer on death designation affidavit as provided in section 5302.22, if the title to the
145 real property is registered pursuant to Chapter 5309 of the Revised Code, the procedure
146 for the transfer of the interest of the deceased owner shall be pursuant to section 5309.081
147 of the Revised Code.

148 (E) Any person who knowingly makes any false statement in any affidavit
149 provided for in this section is guilty of falsification under division (A) (6) of section
150 2921.13 of the Revised Code.

151 **§ 5302.23 Designating Characteristics of transfer on death beneficiary.**

152 (A) Any ~~deed~~ affidavit containing language that shows a clear intent to designate
153 a transfer on death beneficiary shall be liberally construed to do so.

154 (B) Real property or an interest in real property that is subject to a transfer on
155 death beneficiary designation as provided in section 5302.22 of the Revised Code or as
156 described in division (A) of this section has all of the following characteristics and
157 ramifications:

158 (1) An interest of a deceased owner shall be transferred to the transfer on death
159 beneficiaries who are identified in the ~~deed~~ affidavit by name and who survive the
160 deceased owner or that are in existence on the date of the deceased owner's death. If
161 there is a designation of more than one transfer on death beneficiary, the beneficiaries
162 shall take title ~~in~~ to the interest in equal shares as tenants in common, unless the deceased
163 owner has specifically designated other than equal shares or has designated that they take
164 as tenants in survivorship, except as provided in (B)(3) of this section. If a transfer on
165 death beneficiary does not survive the deceased owner or is not in existence on the date
166 of the deceased owner's death, and the deceased owner has designated one or more
167 persons as contingent transfer on death beneficiaries as provided in division (B)(2) of this
168 section, the designated contingent transfer on death beneficiaries shall take the same
169 interest that would have passed to the transfer on death beneficiary had that transfer on
170 death beneficiary survived the deceased owner or been in existence on the date of the
171 deceased owner's death. If none of the designated transfer on death beneficiaries survives
172 the deceased owner or is in existence on the date of the deceased owner's death and no
173 contingent transfer on death beneficiaries have been designated or have survived the
174 deceased owner, the interest of the deceased owner shall be distributed as part of the
175 probate estate of the deceased owner of the interest. If there is more than one transfer on
176 death beneficiary and the deceased owner has designated interests to be taken as tenants
177 in survivorship, then no designated contingent beneficiaries shall take unless no
178 beneficiaries have survived the deceased owner on the date of death of the deceased
179 owner.

180 (2) A transfer on death ~~deed~~ designation affidavit may contain a designation of
181 one or more persons as contingent transfer on death beneficiaries, who shall take the
182 interest of the deceased owner that would otherwise have passed to the designated
183 transfer on death beneficiary if that named designated transfer on death beneficiary does
184 not survive the deceased owner or is not in existence on the date of death of the deceased
185 owner. Persons designated as contingent transfer on death beneficiaries shall be
186 identified in the ~~deed~~ affidavit by name.

187 (3) Any transfer on death beneficiary or contingent beneficiary may be a natural
188 or legal person, including but not limited to a bank as trustee of a trust, except that if
189 more than one beneficiary or more than one contingent beneficiary in a class are
190 designated as tenants in survivorship, all of the beneficiaries or contingent beneficiaries
191 in that respective class must be natural persons. For the purposes of this section, a natural
192 person who has been designated a beneficiary or contingent beneficiary solely in his or

193 her capacity as trustee of a trust shall not be deemed to be a natural person.

194 (34) The designation of a transfer on death beneficiary has no effect on the
195 present ownership of real property, and a person designated as a transfer on death
196 beneficiary has no interest in the real property until the death of the owner of the interest.

197 (45) The designation in an deed affidavit of any transfer on death beneficiary may
198 be revoked or changed at any time, without the consent of that designated transfer on
199 death beneficiary, by the owner of the interest, including the surviving tenants in
200 survivorship or remaining tenant by entireties of the interest, by executing ~~in accordance~~
201 ~~with Chapter 5301. of the Revised Code~~ and recording, prior to the death of the owner, a
202 new deed affidavit under section 5302.22 stating the revocation or change in said
203 designation. The legal effect of such new recorded affidavit shall automatically supersede
204 and revoke all prior recorded transfer on death designation affidavits with respect to the
205 real property identified therein, provided that the prior recorded affidavit was executed
206 before the later recorded affidavit. conveying the grantor's entire, separate interest in the
207 real property to one or more persons, including the grantor, with or without the
208 designation of another transfer on death beneficiary.

209 (56) A fee simple title or any fractional interest in a fee simple title may be
210 subjected to a transfer on death beneficiary designation.

211 (67) A designated transfer on death beneficiary takes only the interest that the
212 deceased owner or owners held on the date of death, subject to all encumbrances,
213 reservations and exceptions. In the case of owners holding title in survivorship tenancy or
214 tenancy by entireties, the death of all but the last survivorship tenant, or the death of the
215 first tenant by entireties, automatically terminates and nullifies any transfer on death
216 beneficiary designations made solely by such deceased co-tenant or co-tenants without
217 joinder by the last surviving co-tenant or remaining tenant by entireties, as of the date of
218 death of that co-tenant, without any affirmative act of revocation required by the last
219 surviving co-tenant in survivorship or remaining tenant by entireties. In the event the last
220 survivorship co-tenant or remaining tenant by entirety dies with no transfer on death
221 beneficiary designation, then the entire interest of such tenant shall be distributed as part
222 of his or her probate estate.

223 (78) No rights of any lienholder, including, but not limited to, any mortgagee,
224 judgment creditor, or mechanic's lien holder, shall be affected by the designation of a
225 transfer on death beneficiary pursuant to this section and sections 5302.22 and 5302.221
226 of the Revised Code. If any lienholder takes action to enforce the lien, by foreclosure or
227 otherwise through a court proceeding, it is not necessary to join the transfer on death
228 beneficiary as a party defendant in the action unless the transfer on death beneficiary has
229 another interest in the real property, that is currently vested.

230 (89) Any transfer on death of real property or an interest in real property that
231 results from an deed affidavit designating a transfer on death beneficiary is not
232 testamentary, and shall supersede any attempted testate or intestate transfer of such
233 property.

234 (10) The execution and recordation of a transfer on death designation affidavit
235 shall be effective to terminate the designation of a transfer on death beneficiary in a
236 previously recorded transfer on death deed.

237 (11) The execution and recordation of a transfer on death designation affidavit
238 shall be effective to bar the vesting of any rights of dower in a subsequent spouse unless
239 such affidavit is revoked or changed.

240 **§ 5302.24 Persons not required to create a transfer on death designation by**
241 **affidavit.**

242 Sections 5302.22 through 5302.23 of the Revised Code do not affect deeds that
243 were executed and recorded prior to the effective date of this section and that designated
244 a transfer on death beneficiary pursuant to section 5302.22 of the Revised Code as it
245 existed prior to the effective date of this section. If such deeds are valid on the day prior
246 to the effective date of this section, such deeds continue to be valid on and after such
247 effective date of this section and, unless they choose to do so, the grantees to such deeds
248 do not have to prepare an affidavit, as described in section 5302.22 of the Revised Code
249 as effective on the effective date of this section, re-designating transfer on death
250 beneficiaries.

251 **Rationale for Proposal:**

252 The statutes creating the transfer on death (TOD) deed, §§ 5302.22 and 5302.23, became
253 effective in August 2000. Essentially, the TOD deed creates a present interest in real
254 property in either a sole owner or a tenant in common as grantee, while also providing for
255 the grantee’s interest to transfer upon the death of the grantee to a specifically named
256 beneficiary or beneficiaries designated in the TOD deed, the TOD transfer to be
257 memorialized of record by an affidavit filed after the grantee’s death.

258 While fulfilling an apparent need that expands beyond the more conventional
259 survivorship tenancy estate, almost immediately questions and controversy arose
260 concerning its attempted use in third party sale transactions and its statutory restriction to
261 grantors and grantees that held title as sole owners or as tenants in common, and not as
262 tenants in survivorship. More specifically, arguments were made by members of the bar
263 on both sides of the question of whether the statutory language inclusively provided that a
264 grantor of a TOD deed could *also* be a grantee, or exclusively required that the grantor
265 *must* be one of the grantees. In other words, whether the TOD deed was a deed for all
266 purposes (as with any other statutory deed form) or intended only as “an estate-planning
267 tool”. In addition, drafters of the TOD deed form chafed under the survivorship tenancy
268 prohibition, often engaging in convoluted beneficiary and contingent beneficiary
269 designations in an attempt to accomplish a survivorship feature, often resulting only in a
270 cloud on the title as to whether the TOD designation had been successfully accomplished.

271 After several years of consultations between a task force of the Real Property Law
272 Section and representatives of the Estate Planning, Trust and Probate Law Section over
273 these and other issues, and with the cooperation, assistance and endorsement of the

274 EPTPL Section, the RPL Section submits this proposal to substitute an affidavit for a
275 deed to create the TOD designation. The effect of these amendments is threefold:

- 276 1. Substituting a non-conveyance instrument for a deed renders the third party
277 transfer debate moot, and preserves the EPTPL Section’s preference for the
278 TOD designation as primarily an estate planning tool while satisfying the RPL
279 Section’s desire that the integrity of the deed form as an instrument of
280 conveyance not be compromised by any perceived limitations in its use.
- 281 2. The amendments broaden the use of the TOD designation to be more user-
282 friendly by including a number of additional features to permit more
283 flexibility in estate planning in a controlled manner, which should eliminate
284 much of the current temptations to stretch the form beyond its intended and
285 designed use, thus avoiding needless title problems.
- 286 3. The amendments clarify a number of issues in the current TOD statutes
287 perceived to be unclear at best and ambiguous at worst, including specifically
288 addressing potential ramifications to dower for the first time.

289 **Substituting the affidavit format.**

290 Precedent for the affidavit form is found in the existing Affidavit on facts relating to title
291 [ORC § 5301.252], in effect for more than thirty years. It is a vehicle for placing of
292 record evidence of facts stated therein as they affect title to real estate, essentially what a
293 designation of TOD beneficiaries needs to be. It provides an existing road map for what
294 type of information should be included in such an affidavit for proper indexing and
295 constructive notice purposes, supported by more than three decades of use experience.
296 Moreover, it complements the existing (and continuing) follow-up affidavit provided by
297 the current TOD statutes to memorialize the death of the owner and vesting of title in the
298 TOD beneficiary.

299 **Additional benefits added by the amendments.**

300 Most prominently, the amendments open the TOD designation to owners holding title in
301 survivorship tenancy, as requested by many in both the real estate and probate bar. In
302 addition, TOD beneficiary interests may also be in survivorship as well as in tenancy in
303 common. Additionally, the amendments allow TOD beneficiary shares to be unequal and
304 permit an owner to designate a specified portion, if less than all, of the owner’s interest to
305 a TOD beneficiary. The current statutes require TOD shares to be equal, and require the
306 owner to designate his or her “entire, separate” interest.

307 **Clarification of previously undefined matters including dower.**

308 The current statutes refer to a designated TOD beneficiary as a “person” and require that
309 the beneficiary survive the grantee/owner or “be in existence”. The terms “person” and
310 “be in existence” have regularly been interpreted as recognizing that the beneficiary may
311 be a legal entity as well as a natural person, however, that is as close as the current
312 statutes come to addressing the issue. The amendments clearly state that a TOD

313 beneficiary or contingent beneficiary may be a natural or legal person.

314 The amendments also address for the first time the status of a trustee of a trust as a TOD
315 beneficiary, expressly clarifying that in the event of the death or resignation of a
316 trustee/TOD beneficiary prior to the death of the owner, a successor trustee of the trust
317 continues the trustee position as remaining “in existence” for the purposes of compliance
318 with the statutes.

319 The amendments expand upon the current brief statutory statement that a TOD transfer is
320 “not testamentary” by proceeding to state that a TOD transfer is deemed a transfer “by
321 operation of law” and supersedes any attempted testate or intestate transfer of the subject
322 real property. Use of the acknowledged term of art “by operation of law” also
323 complements the definition of “Insured” in American Land Title Association (ALTA)
324 title insurance policies, making clear that a TOD beneficiary would succeed to the
325 position of an insured grantee/owner in an existing ALTA policy.

326 While a debate exists between the real estate and probate bar as to whether dower needs
327 to be addressed in the TOD statutes (because a TOD designation itself involves no
328 present conveyance of an interest in property until the death of the grantee/owner), the
329 position of the amendments is to take the safer path in expressly addressing dower,
330 including requiring the spouse of a married grantor to subordinate his or her dower
331 interest in the affidavit in favor of the TOD beneficiaries.

332 Finally, new § 5302.24 provides that all existing TOD designations by deed validly
333 created under the current statutes remain in good standing, requiring no action to re-
334 designate beneficiaries under the amendments.