In Virginia, personal property routinely passes to a named beneficiary outside of a decedent’s estate. For example, on death, personal property may pass automatically by way of ownership, such as when property is held as joint tenants with right of survivorship or as tenants by the entireties. Other permitted non-testamentary transfers are contractually based and include beneficiary designations on life insurance policies or pension plans, registration of securities in beneficiary form, and payable on death bank accounts.1

Until recently, however, the options for passing real estate directly to a beneficiary at death, such as a personal residence (which is often a person’s only substantial asset), were limited. Unless the real estate was held before death by more than one person and with survivorship rights or subject to a legal remainder interest, a decedent’s interest in the real estate would become part of his or her estate. For real estate owners who wanted to pass their property outside of their estate but not transfer rights to the property before death, there was no commonly used, straightforward, inexpensive, and reliable means of passing such property directly to a beneficiary at death.2

A new option is available to real estate holders in Virginia and estate planners must be aware of it in order to adequately advise their clients. This new tool is the transfer on death deed (TOD deed).3 TOD deeds became effective July 1, 2013.4 Although TOD deeds are new to Virginia, they are not a new concept. Including Virginia, twenty jurisdictions have legislation authorizing TOD deeds in some form.5 Like Virginia, a number of these jurisdictions modeled their statute after the Uniform Law Commissions’ “Uniform Real Property Transfer on Death Act” (UPTODA). UPTODA and its Virginia counterpart6 are important because they enable an individual owner or joint owners of real estate to pass their property directly to a designated beneficiary on the owner’s or joint owners’ death without estate administration.

Creating a Transfer on Death Deed

Under the new law, individuals who are owners or joint owners of Virginia real property may make a non-testamentary transfer to a beneficiary of any interest in real property – not just residential real estate – that may be transferred at death by means of a TOD deed.9 Making a TOD deed is relatively simple. The capacity to make a TOD deed is the same as is required to make a will.10 Further, a TOD deed must contain the essential elements and formalities of a properly recorded inter vivos deed, must indicate that the transfer of real property is to occur upon the transferor’s death, and must be recorded before the transferor’s death in the clerk’s office having jurisdiction where the real property is located.11 Concurrent and alternate beneficiaries may also be designated as the transferor so chooses.12 Additionally, the transferor may select any form of ownership, concurrent or successive, absolute or conditional, contingent or vested, that is valid under state law.13 No consideration and no notice or delivery to, or acceptance by, the designated beneficiary is necessary.14 An optional form TOD deed is provided in the Virginia Code.15

Why Use a Transfer on Death Deed?

The TOD deed offers several advantages over using joint tenancy or a legal remainder interest as a means of avoiding estate administration. Unlike a joint tenancy, the TOD deed does not convey any legal or equitable interest to the beneficiary during the owner’s lifetime.16 Therefore, with a TOD deed, the property is not subject to a partition action or to the claims of the beneficiary’s creditors.17 Because there is no transfer of interest there is also no gift for gift tax purposes and it does not trigger an acceleration clause in a mortgage or a property tax reassessment during the transferor’s life. Finally, the TOD deed does not create adverse Medicaid or other public assistance consequences for either the owner or the beneficiary.19

During the owner’s lifetime, the owner retains full
power to transfer or encumber the property or to revoke the deed.\textsuperscript{20} A TOD deed does not affect the rights of the owner’s creditors.\textsuperscript{21} They can obtain a lien or levy against the property to satisfy judgments. At any time, the owner may terminate the beneficiary’s interest by disposing of the property, revoking the TOD deed, or changing the beneficiary designation in a subsequent TOD deed. A TOD deed may only be revoked by recording a revocation or recording a different deed.\textsuperscript{22} If the TOD deed remains in place, the property passes on the owner’s death to the beneficiary, much like the survivorship feature of joint tenancy.\textsuperscript{23} This bypasses the estate administration and probate process, saving both time and money.

For example, having real property pass outside of a testate estate can avoid the Virginia probate tax.\textsuperscript{24} Probate tax is assessed at the rate of 10 cents per $100 on estates valued at more than $15,000.\textsuperscript{25} Localities may impose a local tax equal to 1/3 of the state probate tax.\textsuperscript{26} Further savings can be achieved by lessening attorney’s fees, fiduciary or probate fees, and any surety if it is required as those fees and costs are calculated based on the value of the estate. Finally, if the estate is small enough, formal administration may be avoided completely.\textsuperscript{27} Currently, it remains to be seen how title insurance companies will react, but it is possible that the sale of real estate by a beneficiary following the death of a transferor is likely to be easier and less involved – much like real estate passing through a trust – than a sale of real estate passing through an estate.

**Transfer on Death Deed Not For Everyone**

While a TOD deed is an easy and effective way to transfer real property at death, the revocable trust offers many of the same advantages as the TOD deed and is a more comprehensive and customizable estate planning tool.

With the revocable trust, an individual can make arrangements for the transfer on death of all of his or her assets in one document. This is done while preserving the right to control the assets and amend the revocable trust during his or her life. The revocable trust, like a will, is also a useful tool for tax planning and asset apportionment. Unlike a will, but like a TOD deed, the revocable trust does not require a probate proceeding on death.

For those individuals with larger estates, privacy concerns, or complex planning needs, a TOD deed fails to accomplish many of their post-death goals. But, for individuals who have small estates, simple plans, or whose major asset is a family home, a TOD deed can be an excellent option versus the more expensive revocable trust.

Additionally, although TOD deeds are relatively simple, it remains wise for people to consult with a lawyer before making a TOD deed to prevent making legal mistakes. TOD deeds have their own specific requirements. Moreover, if an owner attempts to create his or her own TOD deed, he or she might name one beneficiary but fail to provide for the possibility that the beneficiary may predecease the owner. A person who makes their own TOD deed may also be confused about whether a will or other testamentary document can revoke a TOD deed. On this point the law is clear: the TOD deed, if validly recorded and unrevoked by a later deed, controls, and the owner’s will or trust has no effect on the deed.\textsuperscript{28}

If a TOD deed is used, it should be coordinated with the client’s overall estate plan. Moreover, in advising your clients, you should also remain cognizant of potential problems that may occur post-death if a TOD deed designates a minor, incapacitated, or otherwise untrustworthy person as a beneficiary or when a TOD deed designates multiple beneficiaries who would be unable to act as co-owners of real property. These concerns, where they may arise, should be addressed with the client and may be ameliorated by designating a custodian, guardian, or trustee of a trust to hold the property for such individuals if possible.

**Parting Thoughts**

Because my law practice is in Northern Virginia, I am aware that the District of Columbia’s transfer on death deed act, which became effective March 19, 2013 and was also modeled after the uniform law, has stirred controversy among real estate professionals and title insurers. Much of this controversy surrounds the intricacies of D.C. law regarding recording and taxing deeds. Some concerns, however, have also been raised about the perceived difficulty of obtaining title insurance for TOD deeds.

While it may be too early to tell whether those
concerns are well-founded or whether they apply here in Virginia, my experience with TOD deeds here has been uneventful. I have prepared a couple of TOD deeds and have thus far found the clerk’s office to be properly equipped to record such deeds and the process no different than when recording any other deed. While uncertainties still remain with TOD deeds, as time passes all parties involved will gain more experience and familiarity with TOD deeds and the TOD deed will likely become one of an ever growing list of tools in the estate planner’s toolkit.

David Majors is an associate with The Majors Law Firm in Tysons Corner, Virginia. He received his B.A. from Dickinson College and his J.D. from the University of Virginia School of Law. Mr. Majors advises individuals and families on all aspects of trusts and estates, including estate planning, transfer tax, business succession, charitable giving, fiduciary responsibilities, and trust and estate administration. He is a member of the Virginia State Bar as well as numerous other professional and estate planning associations.

(Endnotes)
1. Effective July 1, 2013, motor vehicles registered with the Virginia Department of Motor Vehicles may also be registered in transfer on death form. Va. Code § 46.2-633.2. For an excellent overview of the new law and on how to register motor vehicles as transfer on death, see state Senator Richard H. Black’s article on the topic in this October’s edition of the Virginia Lawyer.
2. As far back as 2001, a form of transfer on death deed was likely already authorized in Virginia under now Virginia Code Section 64.2-620. Va. Code § 64.2-620(A) (allowing for provisions in deeds of gift for nonprobate transfers on death to be nontestamentary). How well-known and widespread nonprobate transfers were used in deeds of gifts is unknown, but I suspect that it was seldom used.
5. These jurisdictions are: Missouri, Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, Indiana, the District of Columbia, Hawaii, Illinois, Nebraska, North Dakota, Oregon, and Virginia.
7. All joint owners, that is, individuals who own real property with right of survivorship must execute a TOD deed for it to be effective. Va. Code § 64.2-628(6). At the death of one joint owner, the property belongs to the remaining joint owner or owners with right of survivorship and remains subject to future TOD deeds. Va. Code § 64.2-632(C). At the death of the last surviving joint owner, the TOD deed is effective. Id.
8. A beneficiary can be any person, including the trustee of a revocable trust, governmental, or business entity. See Va. Code § 64.2-621.
9. Id. §§ 64.2-621, -624, and -626.
11. Va. Code § 64.2-628(1)-(4).
12. Except as otherwise provided for in the TOD deed, Code Section 64.2-302 (elective share); Code Sections 64.2-2200 through -2208 (Uniform Simultaneous Death Act); and Code Sections 64.2-2500 through -2511 (Acts barring property rights), concurrent beneficiaries who survive the transferor receive equal and undivided concurrent shares with no right of survivorship. Va. Code § 64.2-632(A).
13. The transferor may reserve property interests for his or her estate, specify or limit the extent of the beneficiary’s interest, or provide for alternate and contingent takers. Also note, Virginia’s anti-lapse statute, Code Section 64.2-418, does not apply to TOD deeds.
14. Va. Code § 64.2-629. If there is no consideration, the transfer is exempt from recordation tax as provided in Virginia Code Section 58.1-811(J).
15. Va. Code § 64.2-635. Because TOD deeds are new in Virginia, it may be prudent for planners who wish to draft a TOD deed to base their deed on the sample form, adapting only where necessary to comply with the state recording statute and the individual client’s needs.
18. The TOD deed is an incomplete gift since the owner retains full use of the property with a power to revoke and therefore for gift tax purposes a gift does not occur upon execution of the beneficiary deed. Tres. Reg. §25.2511-2. Since the property will be subject to estate tax in the owner’s estate there will be a step-up in basis under I.R.C. §1014(a)(1).
22. Va. Code § 64.2-630. An optional form of revocation is provided in Code Section 64.2-636. Unlike a will, a TOD deed cannot be revoked by act.
23. A beneficiary who takes title under a TOD deed takes the property subject to all existing encumbrances, liens, and restrictions. Va. Code § 64.2-632(B).
27. See Va. Code §§ 64.2-600 through -605.