

2015

TODDs: A Transfer on Death Dilemma? A Comprehensive Analysis of Minnesota's Transfer on Death Deed Statute—MINN. STAT. § 507.071

Keriann L. Riehle

Follow this and additional works at: <http://open.mitchellhamline.edu/lawandpractice>

 Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Riehle, Keriann L. (2015) "TODDs: A Transfer on Death Dilemma? A Comprehensive Analysis of Minnesota's Transfer on Death Deed Statute—MINN. STAT. § 507.071," *Journal of Law and Practice*: Vol. 9, Article 1.

Available at: <http://open.mitchellhamline.edu/lawandpractice/vol9/iss1/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Journal of Law and Practice by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

TODDs: A Transfer on Death Dilemma? A Comprehensive Analysis of Minnesota's Transfer on Death Deed Statute—MINN. STAT. § 507.071

Keywords

Deeds, Estate planning, Inheritance and succession, Conveyancing

**TODDs: A TRANSFER ON DEATH DILEMMA?
A COMPREHENSIVE ANALYSIS OF MINNESOTA’S TRANSFER ON
DEATH DEED STATUTE—MINN. STAT. § 507.071**

Keriann L. Riehle*

“Death and taxes may be unavoidable, but for many people probate is no longer necessary.”¹

I. Introduction	2
II. What is a Transfer on Death Deed?	2
III. How are TODDs Utilized in Other States?	5
A. Indiana’s TODD Statute: 32-17-14-11	5
B. Colorado’s TODD Statute: 15-15-401 through 15-15-415.....	6
IV. Minnesota’s Transfer on Death Deed Statute	7
A. 2008: Minnesota Introduces TODDs.....	7
B. 2014: Current Language of § 507.071	8
1. The 2014 Amendments.....	8
2. Current Application of the Statute.....	9
C. How Do TODDs in Minnesota Compare to Other States?	10
V. TODDs: Use with Caution.....	11
A. Practical Effects of a TODD.....	11
1. Probate Avoidance.....	11
2. Avoidance of Unintended Circumstances	11
3. Potential to Avoid Certain Creditors	11
B. Potential Pitfalls Present in TODDs	13
1. Violation of Statute of Wills.....	13
2. Violation of Intent of the Grantor Owner	14
VI. Legislative Proposal Language.....	15
A. TODDs Should Mirror Formalities Found in Wills.....	15
B. TODDs Should Give Effect to the Intent of the Grantor Owner	16
C. Extension of State of Minnesota Medical Assistance Liens and Claims	16
VII. Conclusion.....	18

* Keriann Riehle: JD Candidate, William Mitchell College of Law, 2016; BA magna cum laude, Psychology, Bemidji State University, 2012. The author worked as a law clerk in the Benefit Recovery Division of the Minnesota Department of Human Services. Any opinions expressed in the article belong solely to the author and do not represent any position of the office. The author wishes to thank the members of the William Mitchell Journal of Law & Practice for their assistance and to Andrew Riehle for his unwavering patience and support.

¹ Susan N. Gary, *Transfer on Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 531 (2006).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

I. INTRODUCTION

Imagine an eighty-year old woman whose spouse has recently passed away. That woman is now the only owner listed on the deed to her home. Her only asset is her home. She has children, but they are living the typical American lifestyle of “spend first, save later” and have mortgages, auto loans, and credit card debt—with little money saved. The woman would like to give her homestead to one of her children when she passes away, the one who has assisted her the most in her old age, but she also wants to make sure she can continue living in her home until that time comes.

Until 2008 in Minnesota, the woman had several options to achieve this transfer, but none of them allowed her to retain full interest in the property until her death, at little or no cost to the woman or her family. Some of her options would cost money up front, but she would be able to retain full interest in her property until death. Other options would cost the woman little to no money, but would transfer an interest in the property to her child immediately. The woman’s final option, transferring the property in her will, would likely only cost the amount her attorney charges for such a document, but her property would have to be sent into the probate process to effectuate the transfer. In 2008, Minnesota gave this woman a new option, the TODD.

II. WHAT IS A TRANSFER ON DEATH DEED?

A Transfer on Death Deed (“TODD”), or also commonly referred to as a beneficiary deed,² is a device used in the world of estate planning to avoid the need to enter into probate when an individual has minimal assets.³ TODDs are similar to pay-on-death and transfer-on-death accounts,⁴ and TODDs are a relatively recent addition to the system of American jurisprudence.⁵ In fact, fewer than half of the states in the United States have enacted a TODD or beneficiary deed statute as a non-probate device. The TODD or beneficiary deed statutes of each state vary, some being rather complex while others are likely too simplistic to address many legal issues that may arise.⁶ Because TODDs are such a recent innovation, there is little case law to

² Gary, *supra* note 1, at 532; *see also* *Death Deed Conveyance of Interests in Real Property by Transfer Provision Provided: Hearing Before the Committee on Finance*, 85th Sess. (Mar. 28, 2008) (statement of Rep. Emmer Thissen, Author), available at ww2.house.leg.state.mn.us/audio/mp3ls85/fin032808.mp3 (stating that the name “beneficiary deed” was considered for the device, but transfer on death deed was chosen for clarity purposes).

³ *E.g.*, Catherine Anne Seal & Michael A. Kirtland, *The Transfer-On-Death Deed in the Elder Law Setting*, 4 NAT’L ACAD. ELDER L. ATTNY’S J. 71, 72, 80 (2008) [hereinafter Seal, *TODDs in Elder Law Setting*].

⁴ Michael A. Kirtland & Catherine Anne Seal, *Features, The Significance of the Transfer-on-Death Deed*, 21 PROB. & PROP. 42, 42–43 (2007) [hereinafter Kirtland, *Significance of TODDs*]. Pay-on-death accounts were created for use with bank accounts. Gary, *supra* note 1, at 531.

⁵ The Uniform Law Commission (ULC) formerly known as the National Conference of Commissioners on Uniform States Laws (NCCUSL) developed the Uniform Transfer on Death Security Registration Act in 1989, and in 2009 the ULC approved the Uniform Real Property Transfer on Death Act. Many states base their transfer-on-death deed statutes on these acts. *See* Seal, *TODDs in Elder Law Setting*, *supra* note 3, at 72 (2008); Ronald R. Volkmer, *Future on Nebraska Estate Planning: Article: Nebraska’s Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 CREIGHTON L. REV. 499, 501 (2013).

⁶ *See infra* Part III.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

determine how conflicts regarding a TODD should be resolved.⁷

In general terms, a TODD is a deed that is executed by a grantor owner that only becomes effective upon that owner's death.⁸ Although the TODD does not become effective until the death of the grantor owner, the TODD must be recorded prior to death.⁹ This requirement eliminates the possibility of a family member or other interested party persuading—or coercing—a grantor owner to execute a TODD in anticipation of imminent death.¹⁰

Because a TODD is only effective upon the death of the grantor owner an interest in the property is not created in the beneficiary until the grantor owner's death.¹¹ This may be the primary reason a grantor owner chooses to execute a TODD to convey property to a beneficiary over other more traditional forms of conveyance. Another benefit is a TODD is much less expensive than other forms of real property transfers.¹² Further, because the beneficiary does not hold a present interest in the property, they have no ability to alienate it against the grantor owner's wishes,¹³ the property is not subject to encumbrances by creditors of the beneficiary,¹⁴ and the beneficiary cannot be divested of a share of his or her interest as a result of divorce.¹⁵ Thus, the grantor owner truly is the owner of the property until his or her death.

⁷ Seal, *TODDs in the Elder Law Setting*, *supra* note 3, at 72 (stating that there is little case law regarding a conflict between joint owners after the death of one of the owners or conflicts between multiple grantee beneficiaries). The author researched the case law of Minnesota and was not able to locate a single case resolving a dispute caused by a TODD in Minnesota.

⁸ See Gary, *supra* note 1, at 532; Kirtland, *Significance of TODDs*, *supra* note 4, at 45; Volkmer, *supra* note 5, at 502.

⁹ See generally Gary, *supra* note 1, at 532 (“[I]f the [grantor] owner records [a TODD] and does not revoke it, the beneficiary will be able to obtain title to the property at the [grantor] owner's death without going through probate.”).

¹⁰ See Kirtland, *Significance of TODDs*, *supra* note 4, at 45 (2007) (stating that a TODD that is not recorded prior to the death of the grantor owner is void). *But see* Seal, *TODDs in the Elder Law Setting*, *supra* note 3, at 78 (“[S]ubject to undue influence, the elderly individual may execute [TODDs] to multiple individuals, often in a relatively short period of time, to gain the favor of each adult child.”).

¹¹ See, e.g., Kirtland, *Significance of TODDs*, *supra* note 4, at 45 (“[T]he grantee- beneficiary has no ownership in the property before the death of the grantor [owner] . . .”).

¹² Gary, *supra* note 1, at 542 (“[I]n any state a probate proceeding will cost more than the fees associated with a [TODD] deed.”).

¹³ See, e.g., *id.* at 543 (“[O]lder people ‘often are persuaded to transfer their homes to their children, who then threaten to evict them so they can sell the property.’”) (citing Tim Willert, *Bill Would Simplify Transfer of Real Property*, S.F. DAILY J., May 26, 2005, at 3).

¹⁴ See, e.g., Kirtland, *Significance of TODDs*, *supra* note 4, at 45 (stating that as no present interest is created as the result of a TODD, the beneficiary cannot borrow against the property, nor can creditors of the beneficiary attach any liens or encumbrances against the property); *see also* Gary, *supra* note 1, at 542.

¹⁵ See Seal, *TODDs in Elder Law Setting*, *supra* note 3, at 75.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

Another benefit of a TODD is that prior to death, the grantor owner can revoke the TODD at will.¹⁶ Such revocation is favorable in many instances. It may be that the grantor owner no longer desires to grant his or her property using a TODD. In this case, generally all that is required is the filing of a revocation of the TODD prior to the grantor owner's death.¹⁷ The situation may also come to pass where the grantor owner and the intended beneficiary were in a non-marital relationship and that relationship terminates prior to the death of the grantor owner. In this situation, a TODD is clearly favorable to another method of conveyance, a joint tenancy with a right of survivorship, as the grantor owner does not need to negotiate the severance of the joint tenancy with the other individual.¹⁸

In addition to the ability of a grantor owner to revoke a TODD at will, a TODD can also be nullified if the grantor owner alienates the property to be conveyed by the TODD prior to death.¹⁹ Such nullification allows the grantor owner the freedom to change his or her mind about retention of the property after the TODD has been created—there is no requirement that the grantor owner retain ownership in the property to convey it to the intended beneficiary at death.

A third and final option the grantor owner has in addition to revocation and nullification is the ability to create multiple TODDs. In the event that a grantor owner decides the original intended beneficiary of the TODD is no longer the appropriate person to receive the real property upon death, the grantor owner may execute and record a new TODD, conveying the property to a new beneficiary not named in the original TODD.²⁰

The TODD statutes in many states provide that in the event of multiple TODDs, the one that shall be effective upon the death of the grantor owner is the most recently *executed* TODD.²¹ Such distinction on the word “executed” is important. Should the statute read: “the most recently recorded TODD” or “the most recent TODD” there remains the possibility for deceit in filing of the TODD.²² For example, if a beneficiary is to be the individual recording the TODD on behalf of the grantor owner, they could wait to record the

¹⁶ See Kirtland, *Significance of TODDs*, *supra* note 4, at 45 (discussing that because the grantor owner retains full interest in the property until death, this includes the right to revoke the TODD).

¹⁷ See, e.g., 2014 Minn. Sess. Law Serv., ch. 266 (West) (codified at MINN. STAT. § 507.071, subdiv. 10 (2014)).

¹⁸ See Kirtland, *Significance of TODDs*, *supra* note 4, at 47 (“[T]he [TODD] eliminates what is often the most contentious aspect of the breakup of a nonmarital relationship.”); see also Seal, *TODDs in Elder Law Setting*, *supra* note 3, at 78 (stating that all states which have TODDs permit the grantor to revise or revoke the TODD without notifying the beneficiary).

¹⁹ Gary, *supra* note 1, at 547 (“A sale or other disposition of the property . . . revokes the TOD[D] designation.”).

²⁰ See *id.* at 547–48; Seal, *TODDs in Elder Law Setting*, *supra* note 3, at 78–79 (“[S]hould the grantee-beneficiary cease to assist the elderly parent, the elderly parent is free to . . . gift the property outside the will to a different grantee-beneficiary through the use of a new [TODD].”).

²¹ See, e.g., MINN. STAT. § 507.071, subdiv. 13 (2012). Minnesota’s Transfer on Death Deed statute provides protection to grantor owners in the event that the grantor owner executes multiple TODDs. The statute states that “the [TODD] that has the latest *acknowledgment* date and that is recorded before the death of the grantor owner . . . is the effective [TODD] and all other [TODDs], if any . . . are ineffective to transfer any interest and are void.” *Id.* (emphasis added). *But see* KAN. STAT. ANN. § 59-3501 (West, Westlaw through 2014 Reg. Sess.) (providing no guidelines to determine validity in the event multiple TODDs are executed).

²² See Gary, *supra* note 1, at 548 (stating that the execution date is most likely to give effect to the grantor’s wishes because “an owner would not likely execute a second deed unless the owner wanted to change a prior designation”).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

TODD until death of the grantor owner is certain, such as the grantor owner being placed in hospice care. This would all but guarantee that the beneficiary would have the most recently recorded TODD. This may not be the intent of the grantor owner if the TODD had been executed years prior and the grantor owner has since executed and recorded a new TODD. Thus, a provision in the statute that the most recently executed TODD is the device that controls protects the intent of the grantor owner.²³

There are few formalities required when creating a TODD. Most states only require that the grantor owner sign the TODD, that there be a legal description of the property to be transferred at death, that the beneficiary of the TODD be named on the instrument, and that the TODD be acknowledged.²⁴ Although these limited formalities allow a grantor owner the ability to create a TODD with ease, the lack of formalities may prove problematic if the TODD is contested and the matter has to be drawn into probate proceedings.²⁵

Many states have provisions within their TODD statutes that prevent the use of a TODD to avoid creditors of the grantor owner.²⁶ These provisions generally provide that any effective claim, lien, encumbrance, etc. against the property of the grantor owner may attach to the property when the interest in property is created in the beneficiary at the owner's death.²⁷

III. HOW ARE TODDs UTILIZED IN OTHER STATES?

A. INDIANA'S TODD STATUTE: § 32-17-14-11

Some TODD statutes are incredibly minimalistic. Indiana is one such state with an incredibly general TODD statute.²⁸ Although at first glance the statute appears to contain many provisions, most are to clarify the effect of the transfer depending on the type of interest the grantor owner holds.²⁹ Otherwise, the statute only provides that the TODD will transfer the grantor owner's interest if it is executed and recorded prior to the grantor owner's death,³⁰ the TODD need not be supported by consideration,³¹ and the wording

²³ *Id.*

²⁴ *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-405(K) (2014); KAN. STAT. ANN. §§ 59-3501, 59-3502 (2014); MINN. STAT. § 507.071, subdiv. 24 (2014).

²⁵ *See generally* Gary, *supra* note 1, at 548-49 (providing that as of the time of publication, no TODD statutes “indicate the level of capacity required to execute a [TODD]”). Lack of capacity could provide an individual contesting a TODD the adequate proof to allow a court to find the TODD invalid. *Id.*

²⁶ Kirtland, *Significance of TODDs*, *supra* note 4, at 42-43.

²⁷ *Id.* (“[T]imely filed creditor claims against the estate of the grantor may attached to the [TODD] property.”).

²⁸ *See, e.g.*, IND. CODE ANN. § 32-17-14-11 (West, Westlaw through 2014 2d Reg. Sess. and 2d Reg. Tech. Sess.).

²⁹ *Id.* § 32-17-14-11(e)(1-6) (Westlaw).

³⁰ *Id.* § 32-17-14-11(a-b) (Westlaw).

³¹ *Id.* § 32-17-14-11(c) (Westlaw).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

required for the TODD.³²

Indiana's TODD statute is a relatively recent addition by the Indiana Legislature,³³ and given its minimal nature, it will likely be amended by the legislature or given additional interpretation by the courts of Indiana in the future.

B. COLORADO'S TODD STATUTE: §§ 15-15-401 THROUGH 15-15-415

Colorado has one of the more extensive TODD statutes in the country.³⁴ In addition to the provisions generally found in TODD statutes³⁵ the statute also provides a Medicaid³⁶ eligibility exclusion,³⁷ a subsequent bona-fide purchaser provision,³⁸ a non-testamentary disposition provision,³⁹ and a limitation on actions and proceedings against a grantee beneficiary.⁴⁰

The medical eligibility exclusion relates to Colorado's estate recovery program. Colorado has codified its reasons behind the aggressive estate recovery program it maintains.⁴¹ As is likely true with many states across the country, Colorado acknowledges that the cost of providing a state Medicaid program to its citizens has increased over the years, "creating an increased burden on the state."⁴² To keep the Medicaid program functioning, Colorado determined that an estate recovery program was necessary to require

³² *Id.* § 32-17-14-11(f-g) (Westlaw).

³³ 2009 Ind. Acts 1493-94.

³⁴ The author researched the TODD or beneficiary deeds across the country and found Colorado's to be one of the most extensive.

³⁵ *See* IND. CODE ANN. § 32-17-14-11 (West, Westlaw through 2014 2d Reg. Sess. and 2d Reg. Tech. Sess.); *see also* KAN. STAT. ANN. § 59-3501(a) (West, Westlaw through 2014 Reg. Sess.). Some general provisions found in most TODD statutes include provisions of how the property transfers at death, the beneficiary has no interest during the life of the grantor, the TODD must be executed and recorded prior to the grantor owner's death, the TODD is revocable, and the grantor owner may execute multiple TODDs with the last one executed to be the effective TODD at death. *Id.*

³⁶ There is often confusion regarding terms such as Medicaid and Medical Assistance. Medicaid is the general term for "a government program that provides [assistance] to people who are unable to pay for regular medical care." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 771 (11th ed. 2003). Medical Assistance is a term used by some states to describe the Medicaid program offered by the state. *See, e.g.,* MINN. STAT. § 256B.02, subdiv. 8 (2014). Thus, in many instances, the terms can be used interchangeably.

³⁷ COLO. REV. STAT. ANN. § 15-15-403 (West, Westlaw through 2014 2d Reg. Sess.).

³⁸ *Id.* § 15-15-410 (Westlaw).

³⁹ *Id.* § 15-15-412 (Westlaw). *But see infra* Part V.B.1. (stating that such language is likely only persuasive, not authoritative as TODDs are clearly testamentary documents).

⁴⁰ COLO. REV. STAT. ANN. § 15-15-411 (West, Westlaw through 2014 2d Reg. Sess.).

⁴¹ COLO. REV. STAT. ANN. § 25.5-4-302 (West, Westlaw through 2014 2d Reg. Sess.).

⁴² *Id.* § 25.5-4-302(1) (Westlaw).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

recipients of the program to “share in the cost” of the services they receive through the program.⁴³ Colorado also found this to be a “cost-effective method of offsetting medical assistance costs in an equitable manner.”⁴⁴

Colorado’s General Assembly determined that the laws of the state should restrict the “ability of persons to become eligible for Medicaid by means of making transfers of property without fair and valuable consideration.”⁴⁵ Colorado’s Medicaid eligibility exclusion relating to TODDs reflects this determination of the General Assembly.⁴⁶

This section of the TODD statute in Colorado effectively takes the eligibility for and receipt of medical assistance “off the table” so to speak for those who have executed a TODD.⁴⁷ While this may seem unfair, as referenced by the Colorado General Assembly, the cost for medical assistance care is rising.⁴⁸ This can be seen even further in the present, likely due to increased enrollments countrywide after the enactment of the Affordable Care Act, and increases in fees for services charged by providers. States, in a creditor function, may suffer as a result of many TODDs,⁴⁹ which helps to justify Colorado’s “Medicaid Eligibility Exclusion” provision in its TODD statute.

IV. MINNESOTA’S TRANSFER ON DEATH DEED STATUTE

A. 2008: MINNESOTA INTRODUCES TODDs

In 2008, the Minnesota Legislature introduced its TODD statute, which remained largely unchanged in its first six years of existence.⁵⁰ The purpose of the TODD statute was to create a new mechanism to transfer property among family members.⁵¹ The newly introduced statute contained twenty-five subdivisions and sample forms,⁵² all of which currently remain in effect—some with slight modifications.⁵³

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* § 15-15-403 (Westlaw).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See infra* Part V.A.3.

⁵⁰ *See* 2009 Minn. Sess. Law Serv. 74 (West); 2008 Minn. Sess. Law Serv. 1401–06 (West). The amendments passed unanimously in the Senate under H.F. 2188. *See* S. Journal, 2014 Reg. Sess. No. 103 (Minn. 2014).

⁵¹ *Death Deed Conveyance of Interests in Real Property by Transfer Provision Provided: Hearing Before the Committee on Finance*, 85th Sess. (Mar. 28, 2008) (statement of Rep. Emmer Thissen, Author), ww2.house.leg.state.mn.us/audio/mp3ls85/fin032808.mp3.

⁵² MINN. STAT. § 507.071 (2008) (amended 2014).

⁵³ *See infra*, Part IV.B.–C.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

B. 2014: CURRENT LANGUAGE OF § 507.071

1. The 2014 Amendments

In 2014, the Minnesota Legislature amended the TODD statute, but this time several subdivisions were affected.⁵⁴ The first three amendments came in the definition section,⁵⁵ in what can be seen as an attempt to provide clarity to ambiguous terms. First, the legislature refined what “grantor owner” means in the context of the statute, adding language that said owner can be either the sole owner, a joint tenant, or a tenant in common.⁵⁶ Such clarification is important, as generally once a joint tenant dies the remaining joint tenant(s) has the right of survivorship and the now deceased joint tenant’s interest in the property would not transfer.⁵⁷

The second part amended under the first subdivision was in regard to who an “owner” is under the statute.⁵⁸ The amendment again adds clarity to who can be an owner for purposes of the statute. The prior language of subdivision 1(d) did not provide that an owner is an individual who has ownership or another interest in all or part of the property conveyed with the TODD either at the time the deed is executed or at the time the deed becomes effective.⁵⁹ Such clarification was necessary to eliminate obvious confusion, because as discussed above, such deeds are not effective at the time of filing.⁶⁰

The third and final part of subdivision 1 that was amended in 2014 is the addition of a definition for “property.”⁶¹ This definition is clearly necessary to provide instructions to those creating TODDs in the types of property that are transferrable through the use of the instrument.

The legislature also amended the effect a TODD has on a spouse who is neither a grantor owner nor joint owner with regard to a conveyance of an interest in property.⁶² This amendment provides that such a spouse who joins in the execution of a TODD no longer has any claimed interest, either statutory or marital, in the property.⁶³

⁵⁴ MINN. STAT. § 507.071, subdiv. 1–3, 6, 8, 10 (2014).

⁵⁵ *Id.*

⁵⁶ *Id.* at subdiv. 1(c).

⁵⁷ The right of survivorship is defined as “[a] joint tenant’s right to succeed to the *whole* estate upon the death of the other joint tenant.” BLACK’S LAW DICTIONARY 1440 (9th ed. 2009) (emphasis added).

⁵⁸ MINN. STAT. §507.071, subdiv. 1(d) (2014).

⁵⁹ MINN. STAT. § 507.071, subdiv. 1(d) (2010).

⁶⁰ *See supra* Part II.

⁶¹ MINN. STAT. § 507.071, subdiv. 1(e) (2014).

⁶² *Id.* subdiv. 2.

⁶³ *Id.*

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

A third substantial amendment to the statute regards revocation of the TODD. The amendment provides that a “revocation revokes the transfer on death deed in its entirety.”⁶⁴ This addition to subdivision 10 was necessary to show that TODDs cannot be partially revoked. Although there were other amendments to the statute in 2014,⁶⁵ such amendments were not material in determining how to apply the statute.

2. *Current Application of the Statute*

If an individual wants to transfer property through the use of a TODD in Minnesota, the process is relatively straightforward.⁶⁶ Subdivision 24 provides a sample TODD form that individuals can use.⁶⁷ This form requires the grantor owner or owners, the grantee beneficiary, and a legal description of the property be specified.⁶⁸ However, the only signature required on a TODD in Minnesota is one of the grantor.⁶⁹

As a default rule, because the property to be transferred must be described in the TODD, the TODD does not convey any property acquired by the grantor owner or owners after the execution and recording of the TODD.⁷⁰ However, the grantor owner may provide with specific language in the TODD that it “will apply to any interest in the described property acquired by the grantor owner after the signing or recording of the deed.”⁷¹ For example, a grantor owner may have a joint tenancy interest in property at the time the TODD is executed. If the joint tenancy is severed and after severance the grantor owner has a fee simple absolute interest in the described property, the fee simple absolute interest is transferred by the TODD.

A grantor owner may designate multiple grantee beneficiaries⁷² and successor grantee beneficiaries.⁷³ A TODD can also be used to transfer the interest of multiple joint tenant owners; however, all owners must execute the TODD in order for the deed to be effective upon the death of the last surviving grantor owner.⁷⁴ The grantor owner or owners may execute a TODD or it may be executed by an attorney-in-fact.⁷⁵ To be valid in Minnesota, a TODD must be recorded in the county where at least part of the property described

⁶⁴ *Id.* subdiv. 10.

⁶⁵ *Id.* subdiv. 3, 6, 8.

⁶⁶ *See generally* MINN. STAT. § 507.071 (2012) (providing the requirements an individual must fulfill to execute and file a TODD).

⁶⁷ MINN. STAT. § 507.071, subdiv. 24 (2012).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* § 507.071, subdiv. 21.

⁷¹ *Id.*

⁷² *Id.* § 507.071, subdiv. 4.

⁷³ *Id.* § 507.071, subdiv. 5.

⁷⁴ *Id.* § 507.071, subdiv. 6.

⁷⁵ *Id.* § 507.071, subdiv. 7.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

within it is located *before* the death of the grantor owner.⁷⁶ Because the interest created in the grantee beneficiary of the TODD is not effective until the death of the grantor owner, the TODD statute in Minnesota follows the general rule that the grantee beneficiary cannot alienate or assign the real property and the real property is not subject to any kind of encumbrance of the grantee beneficiary until the effective date of the TODD.⁷⁷

According to section 507.071, a TODD may be revoked at any time by the grantor owner or owners and such revocation is effective when the revocation is recorded in a county where at least part of the real property described within the original TODD is located.⁷⁸ Another way to revoke a TODD is by the grantor owner conveying all or part of his or her interest in the real property described in the TODD to a third party prior to death.⁷⁹ However, such a revocation only applies to the interest transferred to a third party; the TODD remains valid for any other interest it conveys.⁸⁰ One important aspect regarding revocation is once a TODD is executed and recorded, the TODD is not revoked by the provisions of a will, if at the time of the grantor owner's death the grantor owner had a will.⁸¹

In Minnesota, section 507.071 provides that creditors, including states and counties, continue to have valid "conveyances, assignments, contracts, mortgages, deeds of trust, liens, security pledges, judgments, tax liens, and any other matters or encumbrances" which were effective and the property was subject to on the death of the grantor owner.⁸² The TODD statute also provides specific provisions that a beneficiary must comply with if the state or county held an encumbrance against the property at the time of the grantor owner's death.⁸³ These provisions involve obtaining a clearance certificate for the real property⁸⁴ and recording said certificate with an affidavit of identity and survivorship and a certified copy of the death record of the grantor owner.⁸⁵

C. HOW DO TODDS IN MINNESOTA COMPARE TO OTHER STATES?

As discussed *supra*,⁸⁶ it should be clear that Minnesota falls in the middle of the pack—but leaning towards the side of greater regulation—regarding extensiveness of its TODD statute. That being said, there remains

⁷⁶ *Id.* § 507.071, subdiv. 8.

⁷⁷ *Id.* § 507.071, subdiv. 22; *see supra* Part V.

⁷⁸ *Id.* § 507.071, subdiv. 10(a).

⁷⁹ *Id.* § 507.071, subdiv. 10(b).

⁸⁰ *Id.* § 507.071, subdiv. 10(b).

⁸¹ *Id.* § 507.071, subdiv. 19.

⁸² 2014 Minn. Sess. Law Serv. Ch. 266 (West, Westlaw through 2014 Reg. Sess.).

⁸³ MINN. STAT. §§ 507.071, subdiv. 3, 23 (2012).

⁸⁴ *Id.* § 507.071, subdiv. 23.

⁸⁵ *Id.* § 507.071, subdiv. 20.

⁸⁶ *See supra* Part IV.–V.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

more that could be done by the legislature to better protect those individuals who choose to utilize a TODD to transfer an interest in property outside of probate, beneficiaries of a TODD, and also creditors of a grantor owner who chooses to utilize a TODD to take property out of probate proceedings.

V. TODDs: USE WITH CAUTION

A. PRACTICAL EFFECTS OF A TODD

1. Probate Avoidance

TODDs are an ideal instrument for individuals with minimal assets to utilize if they want to avoid sending those assets to probate—assuming that the asset is a type that would be subject to probate. This mechanism saves the family of the deceased grantor owner money, and it also saves both the family and the court the time needed to complete the probate process for that asset. Further, in an instance where an individual has minimal assets, using a TODD to take the property transfer out of a probate proceeding protects the already minimal assets from depletion as a result of paying for the proceeding.

In a society that is becoming excessively legal in nature, with disputes entering the court systems that may have once been decided through the parties negotiating on their own, taking the simple transfer of property out of that court system gives the grantor owner the peace of mind in knowing that their final wishes will be granted—namely, that the property will pass to the person that it was intended to pass to.

2. Avoidance of Unintended Circumstances

Another benefit in the use of TODDs as a non-probate transfer is in the protection of the grantor owner from unseen negative circumstances. Such circumstances generally arise in the use of a joint-tenancy deed⁸⁷ where the generosity of the grantor owner may be taken advantage of, the grantee-joint tenant has existing debts that end up defaulting, or where the relationship status between the grantor owner and the joint tenant changes. In any of these potential situations, the grantor owner likely will lose to some extent—as even if the grantor owner retains ownership in the property, that ownership will likely have to be bought by the grantor owner from another party.

Some examples to provide clarity to the above analysis include: The joint tenant may take a loan out on the property, making it difficult or even impossible for the grantor owner to do the same if needed; the joint tenant could also default on said loan, leaving the property subject to satisfy any judgment or encumbrance of the creditor; or the joint tenant and grantor owner's relationship may become one where the grantor owner no longer wishes the joint tenant to have an interest in the property, but removal of the joint tenant from the joint tenancy would likely require that individual to be bought out.

In any event, as stated above, the grantor owner loses something. More than likely, such a loss would not have been within the contemplation or intent of the grantor owner at the time the joint tenancy was created.

3. Potential to Avoid Certain Creditors

⁸⁷ *Id.*

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

Although most TODD statutes include a provision that any encumbrance, lien, or judgment against a TODD property transfers with the property to the grantee beneficiary, there are certain forms of creditors that may lose an interest in a property as a result of a TODD. Such an avoidance may be hard to imagine, as clearly one of the most common forms of encumbrances, a mortgage, would have to be satisfied by a grantee beneficiary to avoid the property going into foreclosure. However, there are claims of certain creditors that may be avoided as a result of the passage of a certain period of time.

This type of creditor is an unexpected one—it is a State. Many states have recovery programs in place to allow the State to recoup certain payments made on behalf of an individual with medical assistance.⁸⁸ In Minnesota, this practice assists in replenishing the general fund, which is then used to pay for individuals receiving medical assistance in the future.⁸⁹ States, in a creditor function, may suffer as a result of many TODDs as many state statutes only provide a limited period of time in which the state is permitted to collect from estates of individuals who received medical assistance.⁹⁰ With the imposition of such time limits, the use of a TODD to transfer real property subject to such a claim or lien may result in the State losing its right to enforce said claim or lien if the statutory time limit has passed.

One may wonder, how can a TODD create such a result? Under traditional probate proceedings, the property subject to the encumbrance of the State would be utilized to satisfy the encumbrance before distribution to any heirs or devisees of the estate. With a TODD, most state statutes provide that the grantee beneficiary receives the property, subject to the encumbrance.⁹¹ What is lacking from the Minnesota statute is the requirement that the grantee beneficiary actually satisfy the encumbrance of the State.⁹² This is a problem in Minnesota, because Minnesota's statutes impose time limitations for when the State may recover on medical assistance benefits paid on behalf of an individual. In Minnesota, if a grantee beneficiary chooses to not sell the property,⁹³ or if the grantee beneficiary dies and transfers the property to another through the use of a non-probate transfer,⁹⁴ there is no mechanism to force the encumbrance of the State to be paid.

⁸⁸ Minnesota and Colorado are two such states. MINN. STAT. §§ 256B.15, 514.981 (2012); COLO. REV. STAT. § 15-15-403 (West, Westlaw through 2014 2d Reg. Sess.).

⁸⁹ See MINNESOTA DEP'T OF HUMAN SERVICES, FEBRUARY 2014 FORECAST, 2 (Feb. 28, 2014), <http://mn.gov/dhs/general-public/publications-forms-resources/reports/financial-reports-and-forecasts.jsp>.

⁹⁰ See, e.g., MINN. STAT. §§ 256B.15, 514.981 (2012). Minnesota's state statutes provide that a Notice of Potential claim against a Medical Assistance recipient's estate survives for twenty years after the death of the Medical Assistance recipient or the date of filing, whichever is later. § 256B.15 subdiv. 1f(a). Minnesota's state statutes also provide that a Medical Assistance lien is effective for ten years after the date it attaches to the property, with the possibility of renewal for another ten years. *Id.* § 514.981 subdiv. 6(a).

⁹¹ See, e.g., KAN. STAT. ANN. § 59-3504(b) (West, Westlaw through 2014 Reg. Sess.); MINN. STAT. § 507.071, subdiv. 3 (2012).

⁹² See MINN. STAT. § 507.071, subdiv. 3.

⁹³ See generally MINNESOTA DEP'T OF HUMAN SERVICES, HEALTH CARE PROGRAMS MANUAL - CHAPTER 19.50.05: METHODS OF ESTATE RECOVERY, <http://hcopub.dhs.state.mn.us/hcopmsrc/> (last visited Nov. 11, 2015) (providing the methods in which the State can recover its claims and liens).

⁹⁴ Failure to transfer the property utilizing a non-probate transfer would subject the property to probate proceedings, where the encumbrance of the State would have to be satisfied prior to distributing any remaining assets to heirs or devisees.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

While such an oversight by the Minnesota legislature may prove beneficial to grantee-beneficiaries, the State has a whole suffers because recoveries completed by the State are used in part to fund the Medical Assistance program for future individuals in need.⁹⁵

B. POTENTIAL PITFALLS PRESENT IN TODDS

1. Violation of Statute of Wills

The statute of wills was “[a]n English statute (enacted in 1540) that established the right of a person to devise real property by will.”⁹⁶ There are also state statutes that recognize the old English statute of wills that “provid[e] for testamentary disposition and if certain requirements for valid execution in that jurisdiction are met.”⁹⁷ In most jurisdictions, including Minnesota, the state’s statute provides the formalities required for execution of a valid will are, at minimum, the signature of the testator, and the signatures of at least two witnesses.⁹⁸

Such formalities serve many purposes, as discussed *supra*, including protecting the intent of the grantor, reducing or eliminating fraud or undue influence, a guarantee to the testator’s capacity, a reminder to the testator of the importance and finality of the document, providing witnesses to testify—if necessary—to the testator’s capacity and intent, and also a document for the courts.

TODDs are a major departure from the common law—and statutory requirement—that testamentary documents be executed in the same formality as a will. Although the TODD statutes of most states, Minnesota included, require that the grantor sign the document and that the document be acknowledged⁹⁹ and recorded, there is no provision requiring witnesses to the creation of the TODD. Although the acknowledgment does provide for several of the purposes behind testamentary document formality, such as a document for courts to assess and a reminder of importance and formality, it does not address all.

The Uniform Transfer on Death Act and statutes of some states include provisions expressly stating that a TODD is a non-testamentary instrument.¹⁰⁰ While this may seem to solve the problem of the testamentary execution requirement for a TODD, a court interpreting the statute may view such a provision as just smoke

⁹⁵ See MINNESOTA DEP’T OF HUMAN SERVICES, FEBRUARY 2014 FORECAST, 2 (Feb. 28, 2014), <http://mn.gov/dhs/general-public/publications-forms-resources/reports/financial-reports-and-forecasts.jsp>.

⁹⁶ BLACK’S LAW DICTIONARY 1546 (9th ed. 2009).

⁹⁷ *Id.*

⁹⁸ MINN. STAT. § 524.2-502 (2012).

⁹⁹ Acknowledgment involves an individual signing a document “in the presence of an authorized officer, such as a notary public” to confirm authenticity of signature. BLACK’S LAW DICTIONARY 25 (9th ed. 2009).

¹⁰⁰ See, e.g., COLO. REV. STAT. § 15-15-412 (West, Westlaw through 2014 2d Reg. Sess.); UNIF. REAL PROPERTY TRANSFER ON DEATH ACT §§ 1–21 (2013).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

and mirrors,¹⁰¹ because a TODD is entirely a testamentary disposition.¹⁰² It is a transfer of property that does not take effect until the death of the grantor owner, and the grantor owner retains his or her full interest in the property until death. Every state legislature could enact a provision into statute that TODDs are non-testamentary, but that does not necessarily make it so. Neither does the authority of the legislature itself in calling a TODD non-testamentary turn this falsehood into truth.

As a major departure from common law, it would be wise for individuals interested in utilizing a TODD as a method of non-probate transfer to execute the document with the same formality required for other testamentary documents. This formality would include a requirement of having individuals witness the grantor owner's execution of the TODD. Failure to do so could result in invalidation of the TODD if Minnesota courts find such instruments to be testamentary. Such a finding may lead the court to not uphold the statute and interpret TODDs as invalid for lack of formality. If such a ruling were made, the court would have the option to apply such a ruling retroactively—having an effect on all TODDs created in Minnesota since the enactment of the statute in 2008.

2. Violation of Intent of the Grantor Owner

Another problem that may arise as a result of Minnesota's TODD statute is the intent of the grantor owner may not be honored in the event the grantor owner executes a will after the TODD has been recorded. As discussed *supra*, in Minnesota once a TODD is “executed, acknowledged, and recorded . . . [it] is not revoked by provisions of a will.”¹⁰³ This statutory acknowledgement makes a TODD superior to any will of the grantor owner; even one that is created after the TODD was recorded.

In many circumstances this likely would not be an issue, as the grantor owner would be advised by a competent attorney in drafting the will who would research the law involving TODDs. This attorney would be able to relay to the owner that even if a provision in the will directly contradicts the TODD, giving property at death to another individual, the TODD would supersede the will.

However, there is the possibility for a grantor owner to create a will without the assistance of an attorney, or the possibility that the assistance the grantor owner is receiving from the attorney is not competent. If the owner attempts to transfer property to another via a will—believing such a subsequent transfer would rule in probate—without revoking a prior recorded TODD that transfers the same property; the TODD will supersede the will.

Many would say that this provision helps to guide a court in deciding which document should be given greater effect. While this is true, it is also true that this provision may not take into account the intent of the grantor, which is of utmost importance in the law of estates and trusts and probate practices.

¹⁰¹ See generally Volkmer, *supra* note 5, at 503 (providing that although the legislature has the power to create exceptions from “fundamental legal distinctions”). That being said, a TODD “might be characterized as an oxymoron, or perhaps, more accurately, a legal fiction. Traditionalists may cringe in reading that the transfer on death ‘deed’ is non-testamentary and that, under this particular type of ‘deed,’ no interest passes until the death of the transferor.” *Id.*

¹⁰² A disposition is “the relinquishing of property.” BLACK’S LAW DICTIONARY 539 (9th ed. 2009). A testamentary disposition is “[a] disposition to take effect upon the death of the person making it, who retains substantially entire control of the property until death.” BLACK’S LAW DICTIONARY 539 (9th ed. 2009).

¹⁰³ MINN. STAT. § 507.071, subdiv. 19 (2012).

VI. LEGISLATIVE PROPOSAL LANGUAGE

A. *TODDs SHOULD MIRROR FORMALITIES FOUND IN WILLS*

In order to provide the most protection to grantor owners, the formalities of the execution of a TODD should mirror those in existence for testamentary documents such as a will. The Minnesota legislature should amend subdivision 2 of section 507.071 to include the following language:

Subd. 2. Effect of transfer on death deed. A deed that conveys or assigns an interest in real property, to a grantee beneficiary and that expressly states that the deed is only effective on the death of one or more of the grantor owners, transfers the interest to the grantee beneficiary upon the death of the grantor owner upon whose death the conveyance or transfer is stated to be effective, but subject to the survivorship provisions and requirements of section 524.2-702. A transfer on death deed must comply with all provisions of Minnesota law applicable to deeds of real property including, but not limited to, the provisions of sections 507.02, 507.24, 507.34, 508.48, and 508A.48. *A transfer on death deed must be executed in the presence of at least two witnesses, who attest by their signature to the competency of the grantor owner in its execution and to the absence of fraud, undue influence, or duress in its execution.* If a spouse who is neither a grantor owner nor an owner joins in the execution of, or consents in writing to, the transfer on death deed, such joinder or consent shall be conclusive proof that upon the transfer becoming effective, the spouse no longer has or can claim any statutory interest or other marital interest in the interest in real property transferred by the transfer on death deed. However, such transfer shall remain an interest as identified in section 256B.15 for purposes of complying with and satisfying any claim or lien as authorized by subdivision 3 of this section.¹⁰⁴

This amendment provides additional formalities for the execution of a TODD, which would aid in reducing any potential fraud, undue influence, or duress and would also provide witnesses should a court need to rule on the validity of a TODD in the event it is contested.

Should the Minnesota legislature choose not to follow the amendment suggested above, it could follow the lead of Colorado¹⁰⁵ and amend the statute to include a new subdivision. This new subdivision would be:

Subd. 2. Nontestamentary disposition.

“A transfer on death deed is nontestamentary.”

The author recommends inserting this new subdivision after the definition section found in subdivision 1 of the statute¹⁰⁶ so it is not lost in the other twenty-six subdivisions of the statute.¹⁰⁷ However, as discussed *supra*, such a provision would at best be only persuasive to a court interpreting the validity of the statute,

¹⁰⁴ The language of the amended subdivision mirrors the current version of Minnesota Statute section 507.071, subdivision 2 with the exception of the language in italics. This is the amendment suggested by the author.

¹⁰⁵ COLO. REV. STAT. § 15-15-412 (West, Westlaw through 2014 2d Reg. Sess.).

¹⁰⁶ MINN. STAT. § 507.071, subd. 1 (2012).

¹⁰⁷ *Id.* § 507.071.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

as a TODD is clearly a testamentary instrument.¹⁰⁸

B. TODDS SHOULD GIVE EFFECT TO THE INTENT OF THE GRANTOR OWNER

The Minnesota legislature should amend subdivision 19 of section 507.071, currently titled “Nonrevocation by will.”¹⁰⁹ This provision should be amended to:

Subd. 19. Revocability by will.

- (a) A transfer on death deed that is executed, acknowledged, and recorded in accordance with this section is not revoked by the provisions of a will *with an execution date prior to the recording date of the transfer on death deed.*
- (b) A will shall revoke a recorded TODD if:
 - (i) *The will transfers property with a legal description identical to that listed in the TODD;*
 - (ii) *The will transfers the property to an individual other than the individual listed in the TODD; and*
 - (iii) *The will has an execution date subsequent to the recording date of the TODD.*¹¹⁰

Under this suggested amendment, if the grantor owner executes a will after the recording of a TODD, includes in the will the precise property that the TODD is to transfer at the death of the grantor owner, and transfers that precise property to another in the will, it can be clearly presumed that the intent of the grantor owner is to utilize the will as a method of transferring the property, not the TODD. If this assumption were not true, the grantor owner would not have included the property the TODD was supposed to convey within the will, transferring it to a beneficiary not listed on the TODD.

C. EXTENSION OF STATE OF MINNESOTA MEDICAL ASSISTANCE LIENS AND CLAIMS

Under the law of Minnesota for medical assistance claims and liens as it is currently written, such an encumbrance on property by the State has a time limit for enforceability.¹¹¹ In the event that property subject to such an encumbrance is transferred to another utilizing a TODD, there is a high probability that this time period could lapse long before the State’s interest would ever be satisfied. Generally speaking, when a property is subject to a claim or lien of the State, that claim or lien is satisfied when the estate of the owner of said property moves through probate.¹¹² When a TODD is involved, the property does not transfer through probate. Thus, although the property remains subject to the encumbrance of the State, there is no mechanism to force repayment unless the grantee beneficiary decides to sell the property or dies without

¹⁰⁸ See *supra* text accompanying note 101.

¹⁰⁹ MINN. STAT. § 507.071, subdiv. 19 (2014).

¹¹⁰ This suggested language is identical to the current language of subdivision nineteen, with the exception of the language in italics. The language in italics constitutes the amendment to the subdivision. MINN. STAT. § 507.071, subdiv. 19 (2012).

¹¹¹ See *supra* Part V.A.3.

¹¹² See *supra* Part V.A.3.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

utilizing a non-probate transfer mechanism to transfer the property.¹¹³

There are two legislative options to minimize such a negative result for the State as a creditor. The first would involve an amendment to the TODD statute with language similar to that used in Colorado.¹¹⁴ To affect such a change, the Minnesota legislature would need to amend subdivision 3¹¹⁵ and subdivision 23¹¹⁶ of section 507.071 as it is currently written. These subdivisions both relate to the right of the State as a creditor, so all language contained within them regarding the State as a creditor would need to be removed.

In addition to removal of the language from subdivision 3 and subdivision 23 regarding the State as a creditor, the following subdivision would need to be inserted in the statute:

Subd. 4. Medical Assistance Eligibility Exclusion.

(a) No person who is an applicant for or recipient of medical assistance for which it would be permissible for the Department of Human Services to assert a claim or lien pursuant to 256B.15 or 514.981 shall be entitled to such medical assistance if the person has in effect a transfer on death deed.¹¹⁷

Should the Minnesota legislature consider this amendment, there would likely be a large debate regarding the public policy of such a provision. Individuals, families, advocates, and elder law attorneys would likely cry foul, as a TODD is a legal method to transfer property and the prohibition in receipt of medical assistance for utilizing such an instrument would negatively impact many already disadvantaged individuals.¹¹⁸

In addition to the public policy argument, there is also a high probability that the statute would not achieve its desired result by the state. Going back to the hypothetical from the Introduction, what if a claim or lien of the State were placed on the property for medical assistance benefits received by the woman's husband prior to his death? Imagine further that the husband did not use a TODD to transfer the property to his wife. In this instance, the statute would not have prevented the receipt of medical assistance benefits by the husband, and there is nothing to stop the now widowed woman from transferring the property prior to her death utilizing a TODD. Here, the State would be in the same predicament—having its claim or lien expire—as it is with the statute as it is currently written.

A second option that avoids the issue of time lapse would be remove the time limitations on property that is transferred utilizing a TODD that is also subject to a medical assistance claim or lien. This amendment

¹¹³ See generally MINNESOTA DEP'T OF HUMAN SERVICES HEALTH CARE PROGRAMS MANUAL, METHODS OF ESTATE RECOVERY CHAPTER 19.50.05, <http://hcopub.dhs.state.mn.us/hcpmsrc/> (last visited Nov. 11, 2015) (providing the methods in which the State can recover its claims and liens).

¹¹⁴ COLO. REV. STAT. ANN. § 15-15-403 (West, Westlaw through 2014 2d Reg. Sess.).

¹¹⁵ 2014 Minn. Sess. Law Serv. Ch. 266 (West, Westlaw through 2014 Reg. Sess.).

¹¹⁶ MINN. STAT. § 507.071, subd. 23 (2012).

¹¹⁷ The author used substantially similar language to the Colorado statute in developing the language for this suggested amendment. COLO. REV. STAT. ANN. § 15-15-403 (West, Westlaw through 2014 2d Reg. Sess.). The author recommends that this language be inserted immediately following subdivision 3, which addresses the rights of creditors.

¹¹⁸ Those individuals to whom this amendment would impact are those whose income falls at or below 75% of the Federal Poverty Guidelines. MINNESOTA DEP'T OF HUMAN SERVICES, *Insurance Affordability Programs*, MN.GOV, <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-3461A-ENG> (last visited Nov. 11, 2015).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

would also require the removal of language from subdivision three and subdivision twenty-three as previously discussed in this section. This amendment is:

Subd. 4. Rights of state and county as a creditor under sections 256B.15 and 514.981.

The time limitations under sections 256B.15 and 514.981 shall be extinguished should property that is subject a claim or lien of the state or county for medical assistance benefits paid under sections 256B.15 and 514.981 be subsequently transferred utilizing a transfer on death deed.

This amendment is superior to the amendment suggested prior as it does not deny medical assistance benefits to those who need them, but it does protect the right of the State as a creditor.

VII. CONCLUSION

I would like to bring the reader back to the scenario discussed in the Introduction of this article—the eighty-year-old woman facing a dilemma on how to effectuate a transfer of property to one of her children, while retaining full interest in the property until her death, and of course at a minimal cost. As I hope this article has made clear, this woman does have the option of utilizing a TODD to achieve her desired result.

The woman decides to execute and record a TODD transferring her homestead at her death to the child discussed in the Introduction and then the child stops assisting her. The woman then decides she no longer wants to transfer the property to this child. She has a few other legal issues she would like to address and decides to update her will to take care of everything. She does not think to mention the TODD to her attorney, and she has the attorney draft language in the will that will transfer her homestead to another child. The woman then dies without ever revoking the TODD, believing that her will would transfer her homestead to the other child. In Minnesota, this would not be the case. Because the woman died without ever revoking the TODD, her child whom she no longer wanted to transfer the property to would receive it regardless. Clearly her intent is not being honored by Minnesota's TODD statute in this instance.

This, along with several other negative scenarios, is possible as a result of the TODD statute in Minnesota the way it is currently worded. The TODD statute in Minnesota needs to be amended and these suggested amendments will protect the statute and those individuals relying upon it should a court in Minnesota be required to rule on its validity. The key areas that a court would likely find invalid include the lack of formality for the testamentary instrument, the failure of the statute to give full effect to the intent of the grantor owner, and the possibility of the State as a creditor losing its ability to collect on a lien placed on the property. Should the court find invalidity in the statute, it is possible that the court would choose to apply its ruling retroactively. Should this occur, all TODDS created in the state of Minnesota since the 2008 enactment of the statute could be impacted. Thus, it is clear to the author—and hopefully now to the reader—that amendments to Minnesota's TODD statute are necessary to protect the State and all Minnesotans living in it from potential pitfalls associated with TODDs. Without such change, Minnesota truly could be facing a *Transfer on Death Dilemma*.