

ALLOWING FARMERS TO “TAKE BACK” WHAT’S THEIRS: ADOPTION OF THE REVOCABLE LIFE ESTATE DEED

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I. Introduction	409
II. The Life Estate Deed	410
III. Today’s Revocable Life Estate Deed	412
IV. Advantages of the Revocable Life Estate Deed	416
V. Disadvantages of the Revocable Life Estate Deed	418
VI. Why is it so Important For Farm States to Adopt the Revocable Life Estate Deed?	422
VII. Where Is Iowa?	425
VIII. Conclusion	427

I. INTRODUCTION

Deeds come in many different shapes and sizes. They are generally used to transfer one’s interest in real property but may also be a useful tool to transfer interest in personal property. This Note singles out one type of deed, the life estate deed, and proposes that Iowa, along with similar farm states, joins in adopting the revocable life estate deed.

Superficially, carrying out a successful deed seems relatively simple, but in order for a deed to go into effect, there are certain prerequisites that must be met to satisfy the deeds validity. Typically, a valid deed must include: (1) a detailed description of the property being transferred, (2) the name of the party who receives the property, and (3) the signature of the transferring party signed in the presence of the notary.¹ A deed is used as an instrument to convey ownership of real property² and has been defined as “[a] written instrument, which has been signed and delivered, by which one individual, the

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1. *Real Estate & Property Law*, JUSTIA, <https://www.justia.com/real-estate/docs/deeds.html> (last visited Jan. 17, 2017).

2. *Deed*, FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/deed> (last visited Jan. 17, 2017).

grantor, conveys title to real property to another individual, the grantee; a conveyance of land, tenements, or hereditaments, from one individual to another.”³ In Iowa, a grantor “includes but is not limited to, a seller, mortgagor, borrower, assignor, lessor, or affiant,” and a grantee “includes but is not limited to a buyer, mortgagee, lender, assignee, lessee, or party to an affidavit who is not the affiant.”⁴ To understand the necessity for adopting the revocable life estate deed, this Note will provide a thorough explanation of the present life estate deed, the problems regarding the transfer of property, and the advantages and disadvantages of adopting the deed.

II. THE LIFE ESTATE DEED

A life estate deed is used to transfer property automatically upon another party’s death.⁵ In the legal aspect,

[a] life estate deed is an instrument used to transfer ownership of the real property that is the subject of the deed to one or more persons (the ‘remainderman’), while retaining ownership of a life estate in the property by the person(s) transferring the property (the ‘life tenant’). A life estate is the right to occupy and use the property, or the benefits of the property, during one’s life time.⁶

To establish ownership of the property being transferred, the party receiving the remainder can simply file the initial life tenant’s death certificate in the proper record;⁷ therefore, avoiding probate. This is, primarily, why most individuals are more than willing to use a life estate deed.⁸

Indeed, the life estate deed has many positives, but it does not come without its negatives. The main downfalls of the life estate deed include: (1) a person is disqualified from Medicaid for five years starting from the date of the transfer of property—however, if there was a medical emergency, the disqualification could be cured by transferring the real estate out of the life estate ownership form and back to the individual; (2) if the property is sold during the lifetime of the life tenant, he or she would not get the income tax exception available upon the sale of a personal residence that would otherwise have been available to them if they were sole owners at the sale date; (3) all owners (i.e., the

3. *Id.*

4. IOWA CODE ANN. § 558.1B (West 2016).

5. *What is a Life Estate? Explanations of Life Estate Deeds*, DEEDCLAIM [Hereinafter *What is a Life Estate*], <http://www.deedclaim.com/life-estate/> (last visited Jan. 17, 2017).

6. Randy Coleman, *The Problem with Life Estate Deeds*, LINKEDIN (July 28, 2014), <https://www.linkedin.com/pulse/20140728165911-7718716-the-problem-with-life-estate-deeds>.

7. *What is a Life Estate?*, *supra* note 5.

8. *See id.*

life tenant and remaindermen) must sign to sell the property or to mortgage the property during the life tenant’s lifetime; (4) and once the deed is delivered, it cannot be revoked.⁹

Inability to revoke the deed is a legitimate concern for farmers. In an interview with Kenny Swanson, who farms nearly 3,000 acres in and around Clarinda, Iowa, Swanson expressed that keeping specific land in the family was more than just a concern of his—it was everything.¹⁰ When asked about deeding land away while still living, without being able to revoke it, Swanson was hesitant and not comfortable with losing the control of something he worked for and dedicated his whole life to.¹¹ He was also concerned about fairly dividing his land among his heirs while ensuring the proper treatment of his farm land.¹² Ultimately, Swanson was open to the idea of an instrument that would allow him to transfer property to his [heirs], retain control over his property during his life, and avoid the aggravations of probate.¹³

One of the benefits of the life estate deed is it avoids the probate process.¹⁴ “[P]robate is . . . the process a legal court takes to conclude all [of a person’s] legal and financial matters after [his or her] death. Essentially, probate is the process by which a court distributes [an] estate.”¹⁵ “[Probate] can be expensive. Legal fees, executor fees and other costs must be paid before your assets can be fully distributed to your heirs. If you own property in other states, your family could face multiple probates, each one according to the laws in that state.”¹⁶ Multiple probates can cause multiple years of litigation. Additionally, “[y]our family has no privacy. Probate is a public process, so any ‘interested party’ can see what you owned . . . who will receive your assets and when they will receive them. The process ‘invites’ disgruntled heirs to contest your will and can expose your family to unscrupulous solicitors.”¹⁷ Lastly, “[y]our family has no control. The probate process determines how much it will cost, how long it will take, and what information is made public.”¹⁸

9. Susan M. Mooney, *Life Estate Ownership of Real Estate (Advantages & Disadvantages)*, LAW OFFICES OF SUSAN M. MOONEY: A PROF’L CORP., http://www.susanmooney.com/wp-content/uploads/2011/06/life_estate_ownership.pdf (last visited Jan. 17, 2017).

10. Interview with Kenny Swanson, Farm Operator, in Clarinda, Iowa (Oct. 17, 2015).

11. *Id.*

12. *Id.*

13. *Id.*

14. *What is a Life Estate?*, *supra* note 5.

15. Kiara Ashanti, *What is Probate – Definition, Process & How to Avoid It*, MONEY CRASHERS, <http://www.moneycrashers.com/avoid-probate-definition-process/> (last visited Jan. 17, 2017).

16. *Professional Resource: Understanding Living Trusts: What’s so Bad About Probate?*, FARMERS & MERCHANTS TR. CO., [hereinafter *Professional Resource*] <http://www.fmtrust.com/resources> (last visited Jan. 17, 2017).

17. *Id.*

18. *Id.*

Although the downfalls of the life estate deed may seem unattractive, in many instances, these downfalls will be outweighed by the benefits. Yet, what if some of the downfalls were eliminated? What if a property owner could avoid probate and still retain power over his or her property after deeding the property to a grantee? In the last twenty to twenty-five years, a new type of property deed has begun to emerge.¹⁹ The deed has been used as an instrument to convey property at death.²⁰ Essentially, this instrument is a revocable life estate deed, but it has adopted multiple names, including: the Beneficiary Deed, the Transfer on Death Deed,²¹ the Enhanced Life Estate Deed, and the Lady Bird Deed.²² For the remainder of this writing, the deed will be referred to as the “revocable life estate deed.” “[The revocable life estate] deeds are . . . non-probate device[s] from which ‘an owner of real property may deed the property to a named beneficiary, the transfer to become operative on the owner’s death and to remain revocable until then.’”²³ This deed has very similarly required elements and formalities as the inter vivos deed, with the addition of a few requirements including: (1) the deed must contain the name of the grantor; (2) names of the beneficiaries; (3) a legal description of the property being transferred . . . ; (4) an acknowledgement of the deed; (5) a statement that the transfer to the designated beneficiary is to take place upon the grantor’s death; (6) and “the deed must be recorded before the grantor’s death in the public records of the county or town where the property being transferred is located.”²⁴ The additional recording requirement, compared to the traditional delivery requirement for the inter vivos deed, protects against the “deed in the drawer” problem of testamentary deeds.²⁵

III. TODAY’S REVOCABLE LIFE ESTATE DEED

The District of Columbia, along with twenty-six other states, recognize the revocable life estate deed and allow a person to use the deed to leave his or her estate to another

19. See generally David Major, Comment, *Revocable Transfer on Death Deeds: Cheap, Simple, and has California’s Trusts & Estates Attorneys Heading for the Hills*, 49 SANTA CLARA L. REV. 285, 286 (2009).

20. See *id.* at 288.

21. *Id.* at 291.

22. “Lady Bird Deed” (Aka: *Enhanced Life Estate Deed or Transfer on Death Deed*), RAYMOND C. BARRY & ASSOCS., PLLC, <http://www.rcbarrylaw.com/library/lady-bird.cfm> (last visited Jan. 17, 2017); see also *Transfer on Death Deeds*, REAL EST. NEWS (Montpelier Title & Closing, Montpelier, VT), June 2008, at 1, <http://www.montpelierlaw.com/pdf/Deeds.pdf>.

23. Major, *supra* note 19, at 288.

24. Tyler H. Gablenz, Note, *Simplify the Process: Why Connecticut Should Adopt the Use of Transfer on Death Deeds*, 28 QUINN. PROB. L. J. 165, 169-70 (2015).

25. See Michael Kelly, *Keeping the Family Home Out of Probate – The Deed in a Drawer Dilemma*, FAM. CTR., <http://www.familycenterweb.org/index.php/ask-the-experts/42-all/517-keeping-the-family-home-out-of-probate-the-deed-in-a-drawer-dilemma> (last visited Jan. 17, 2017).

individual, even if the grantor is not a resident of the state in which the estate resides.²⁶ In 2009, “[t]he Uniform Real Property Transfer on Death Act (URPTODA) was first approved by the Uniform Law Commission.”²⁷ URPTODA allows an owner to transfer property to a beneficiary at death “simply, directly, and without probate by executing and recording [the] deed.”²⁸

So far, thirteen states and the District of Columbia have enacted URPTODA,²⁹ but there are at least seven other states that have adopted something similar, and it is likely that more states will join in the following years.³⁰ The commission gives three reasons why all states should adopt URPTODA. First, “URPTODA is an alternative to expensive estate planning for simple estates.”³¹ URPTODA provides an easier and cheaper alternative for lower income families to transfer property by allowing them to add an heir’s name to a bank account as “payable on death,” which avoids probate.³² Second,

26. See Mary Randolph, *States that Allow Transfer-On-Death Deeds for Real Estate*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/avoid-probate-book/chapter5-1.html> (last visited Jan. 17, 2017) (reporting states that have adopted the deed include: Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

27. *The Uniform Real Property Transfer on Death Act: A Summary*, UNIF. L. COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act> (last visited Jan. 17, 2017).

28. *Id.* (the key advantages for this uniform act include: (1) probate evasion; (2) the inclusion of all the essential elements of a recordable inter vivos deed; (3) it must be signed by the transferor and recorded during the transferor’s lifetime; (4) the capacity to make a will; (5) revocability; (6) until the transferor’s death, the deed has no effect; (7) at the time of the transferor’s death, title automatically transfers to the beneficiary, including the interests owned by the transferor at the time of his or her death; (8) only when the estate is insolvent can the beneficiary be held liable for claims against the transferor’s estate; (9) the beneficiary may disclaim the transferred interest; and (10) the act includes options forms that each state may choose whether to enact).

29. See *Legislative Fact Sheet – Real Property Transfer on Death Act*, UNIF. L. COMM’N [Hereinafter *Legislative Fact Sheet*], <http://www.uniformlaws.org/legislativfactsheet.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act> (last visited Jan. 17, 2017) (Alaska, District of Columbia, Hawaii, Illinois, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Virginia, Washington, and West Virginia have all enacted URPTODA).

30. See *Legislative Tracking*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act> (last visited Jan. 17, 2017) (Tennessee, Connecticut, and Utah have all introduced URPTODA in 2016).

31. *Why Your State Should Adopt URPTODA*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20Your%20State%20Should%20Adopt%20URPTODA> (last visited Jan. 17, 2017).

32. *Id.*

URPTODA allows the owner of the estate to have sole ownership and decision making power until his/her death.³³ This is a much better alternative than adding a family member to the title as a joint owner to get the property passed at death because “joint titling” requires dual decision making power and can open the door for creditors.³⁴ Lastly, the act has been very effective and successful in other states, and it has been well received by recording officers, real estate attorneys, and the title insurance industry.³⁵

Due to the fact that non-probate transfers of personal property to beneficiaries have become common, it should not be a surprise that states are now wanting to use this straightforward, inexpensive, and reliable method of transferring property in real estate.³⁶ But how important is it for states to adopt a deed that makes it easier for people to transfer their property at death? In 2014, over 50 percent of Americans between fifty-five and sixty-four years of age did not have a will.³⁷ When these individuals die without a will it is called “intestacy,”³⁸ and their estate will be distributed to their heirs according to probate.³⁹ When asked why they did not have a will, a number of reasons were given, such as: they had not gotten around to making a will; they felt like it was not urgent; they did not need one; or they just did not want to think about death.⁴⁰ The revocable life estate deed is easy to create and allows the grantor to retain complete control over the estate until death, all while avoiding probate; thus, avoiding most concerns of millions of older Americans and their families.⁴¹

Some states, including Iowa, have refrained from adopting URPTODA.⁴² Although Iowa does recognize the concept of transferring property upon death for securities, “Iowa does not allow real estate to be transferred with [revocable life estate] deeds,”⁴³ therefore, Iowa has generally refrained from adopting the uniform act⁴⁴ and has not recognized the

33. *Id.*

34. *Id.*

35. *Id.* (“URPTODA fills the gap by providing a way for families . . . to easily transfer property outside of probate”).

36. See Letter from Jeffrey J. Snell, Am. Bar Ass’n Comm’n on Law & Aging, to Robert A. Stein, President, Unif. L. Comm’n (Jan. 14, 2010).

37. Richard Eisenberg, *Americans’ Ostrich Approach to Estate Planning*, FORBES (Apr. 9, 2014, 11:04 AM), <http://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/#698d211ef07b>.

38. *Intestacy*, FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/intestacy> (last visited Jan. 17, 2017).

39. See *id.*

40. Eisenberg, *supra* note 37.

41. See *Professional Resource*, *supra* note 16.

42. See *Legislative Fact Sheet*, *supra* note 29.

43. *Avoiding Probate in Iowa: How to Save Your Family Time, Money, and Hassle*, NOLO, <http://www.nolo.com/legal-encyclopedia/iowa-avoiding-probate-31971.html> (last visited Jan. 17, 2017).

44. See *Enactment Status Map*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Real%20Property%20Transfer%20on%20Death>

deed at the common law. Nonetheless, 2016 has been a much different year for Iowa. On February 8, 2016, Iowa introduced Senate File 2117 to the Judiciary, S.J. 171.⁴⁵ Through this bill, it was proposed that Iowa adopts the “*Uniform Real Property Transfer On Death Act*,” which relates to “creation of transfer on death deeds and to disclaimers of an interest in real property, and including applicability provisions.”⁴⁶

This bill provides that an individual may execute a transfer on death deed which transfers real property outside of probate to one or more beneficiaries effective at the transferor’s death. To be valid, a transfer on death deed must contain the essential elements and formalities of a properly recordable inter vivos deed, state that the transfer to the designated beneficiary is to occur at the transferor’s death, and be recorded before the transferor’s death in the office of the county recorder.⁴⁷

If enacted, this bill would “not affect any deed executed and recorded prior to the effective date of the bill and applies to a transfer on death deed made before, on, or after the effective date of the bill by a transferor dying on or after the effective date of the bill.”⁴⁸

Unfortunately, introductory bills like the one mentioned above are very difficult to analyze, nevertheless pass, because the

[Revocable life estate] deed statutes are relatively new in all the states that have adopted such deeds. Thus there is little, if any, case law concerning resolution of conflicts regarding ownership and beneficiary-grantee designation rights among joint owners after the death of one or more joint owners, or of resolution of conflicts between multiple grantee-beneficiaries or contingent grantee-beneficiaries.⁴⁹

The dearth of case law makes it difficult when analyzing the revocable life estate deed, because there is a lack of precedent to look to guide us.

⁴⁵ S.F. 2117, 86th Gen. Assemb., Reg. Sess. (Iowa 2016) (introduced).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Catherine A. Seal & Michael A. Kirtland, *The Transfer-on-Death Deed in the Elder Law*, 4 NAT’L ACAD. ELDER L. ATT’Y J. 71, 72 (2008); see Seth Williams, Note, *Property Law-Homestead Exemption-A Beneficiary Interest Can Support a Homestead Exemption in Arkansas and a Look at Other Interests Sufficient to Support a Homestead Exemption*, *Fitton v. Bank of Little Rock*, 2010 Ark. 280, S.W.3d, 34 U. ARK. LITTLE ROCK L. REV. 173, 189 (2011) (explaining the difficulty of examining the relatively new revocable life estate deed, due to the lack of case law).

IV. ADVANTAGES OF THE REVOCABLE LIFE ESTATE DEED

As discussed in Part I, it is clear that the revocable life estate deed at the federal level is quickly progressing in to a national instrument used to help transfer property at death. Also, noted previously, the Commission for URPTODA believes it is necessary for all state legislatures to adopt the deed, and, as will be demonstrated next, when one analyzes the progression, including the advantages and disadvantages, of this deed at the state level, it is quite clear that states, specifically farm states, should consider implementing the revocable life estate deed, which was first codified at the state level in 1989.⁵⁰ Since then many states have recognized the vast amount of advantages of the deed and embraced the idea of having their own revocable life estate deed.⁵¹

First and foremost, the main advantage of the revocable life estate deed is that the grantor retains full control and ownership of the estate until his or her death.⁵² The owner is capable of revoking the deed any time he or she wants, can decide to transfer property at any time, and can alter the property any way he or she wants until death.⁵³ As an example, imagine a father who granted his child land through a revocable life estate deed. Three years later, they no longer have a relationship. This could be caused by tension, death, change of career, change of location, or any other circumstance that may cause a relationship to deteriorate. Without any delay, the father could instantly transfer the deed to another child. Another plausible example could be that the father may still maintain a relationship with his first child but suddenly gets into financial troubles. The father can revoke the deed and sell his property for financial necessity. Transferring property and ownership is an enormous commitment, and things like those mentioned above can happen in an instant. It is imperative that grantors are provided with an instrument that can readily take care of these unpreventable or unpredictable problems.

A revocable life estate deed is also useful because it can help avoid probate.⁵⁴ As discussed earlier when analyzing the life estate deed, probate can be an extremely difficult process.⁵⁵ Probate laws can be complicated and, depending on the property, families may be subject to years of litigation in different states in order to declare ownership of

50. See Major, *supra* note 19, at 291; see also ANDREA JACKSON & CHRISTINE A. GILSINAN, *Deeds Effective on Death of Owner § 13.38*, in 2 MO. TRUSTS, POWERS OF ATT'Y, CUSTODIANSHIPS, AND NONPROBATE MATTERS (Mo. Bar 2d ed. 2013) [hereinafter *Deeds Effective on Death of Owner § 13.38*] (Missouri has defined this deed as “[an] instrument used to transfer property at death.”).

51. See Randolph, *supra* note 26.

52. See, e.g., *Deeds Effective on Death of Owner § 13.38*, *supra* note 50 (the advantages in Missouri include: the deed is fully revocable, there is no doubt that the owner has the power to transfer property, and if the owner sells the property during his or her life, the grantee has no basis for claiming that the proceeds are held in constructive trust for their benefit).

53. See, e.g., *id.*

54. See *id.*; see also W. THOMAS COFFMAN & C. ROBERT JONES, OKLA. ESTATE PLANNING: WILL DRAFTING & ESTATE ADMIN. FORMS § 19.2 (2015).

55. *Professional Resource*, *supra* note 16.

one, single piece of property in the estate.⁵⁶ In fact, during probate, the property is, in a way, taken from the family and is given to the state.⁵⁷ The family that is disputing the estate makes no decision about the property during this time, and they have no right to privacy regarding the estate—the probate process is public.⁵⁸

Next, the revocable life estate deed is attractive to younger married couples.⁵⁹ Due to its relatively simple drafting requirements and because this deed is not subject to will challenges or the entanglements and delays of ordinary title disputes, these couples, with few heirs, can be confident that the title to their home will transfer as they wish, with minimum intra-family disputes.⁶⁰ For example, it is more common than not, that a younger married couple does not have kids, grandkids, or a lot of assets; therefore, it will not take a lot to transfer their property. They are not looking for a long exhaustive process, which can turn out to be expensive, just to transfer a few items.⁶¹ A revocable life estate deed provides a solution for such a situation by its simplicity, efficiency, and durability.⁶²

Another advantage of the revocable life estate deed is the additional requirement from the inter vivos deed: the recording requirement.⁶³ Most states require that in order for the revocable life estate deed to be valid, it must be recorded in the proper county recorder’s office.⁶⁴ In the past, many attorneys would instruct their clients to execute a quit claim deed to their spouse without recording it.⁶⁵ As noted in Part I, this is commonly known as a “dresser drawer deed,” and they were used to fund a living trust while both spouses were alive.⁶⁶ The problem with this, besides the confusion it causes in the ad-

56. *Id.*

57. *Id.*

58. *Id.*

59. See Gretchen Szydowski, *Home Sweet Home: Estate Planning and the Primary Residence*, 61 J. MO. B. 208, 210 (2005); see also Thomas J. Murphy, *Drafting the New Beneficiary Deed*, 38 ARIZ. ATT’Y 30, 31 (2002).

60. See Szydowski, *supra* note 59, at 210. *But see Beneficiary Deeds are not always the Best Choice in Missouri Estate Plans*, RJH (Feb. 16, 2012) [hereinafter RJH], <http://www.kctrustlaw.com/beneficiary-deeds-are-not-always-the-best-choice-in-missouri-estate-plans/> (“Beneficiary Deeds are inexpensive, and they do avoid probate, but that’s about it. They have their place, but it is limited. They don’t provide when families fight or just can’t agree.”).

61. See Szydowski, *supra* note 59, at 210.

62. See *id.*

63. ARIZ. REV. STAT. ANN. § 33-405(E) (2016) (the state of Arizona made it a requirement that revocable life estate deeds be executed and recorded in the office of the county recorder of the county in which the property is located before the death of the owner or the last surviving owner).

64. Murphy, *supra* note 59, at 31.

65. Matthew A. Ferrara, *Eliminating Unrecorded Deeds*, PLAINLY LEGAL (Apr. 23, 2013, 7:00 AM), <http://blog.fwslaw.com/2013/04/eliminating-unrecorded-deeds.html>.

66. *Id.*

ministration process, is that creditors would argue the deeds were completed; therefore, there was no creditor protection for jointly owned real estate.⁶⁷ Lastly, the recording requirement is also an advantage because it makes it easier to track the ownership of land than trusts do.⁶⁸

The last advantage, which is a relatively simple concept but can sometimes be overlooked, is the automatic transfer of property at death.⁶⁹ This can also be intertwined with the advantage of avoiding probate. Once the grantor dies, the grantee automatically becomes owner of the estate because it is already recorded.

V. DISADVANTAGES OF THE REVOCABLE LIFE ESTATE DEED

Although the revocable life estate deed has a great number of advantages, it does not come without some possible disadvantages. The first disadvantage of this deed is that it cannot be reformed to correct a unilateral mistake after the owner's death,⁷⁰ therefore, if an owner wants the beneficiary to receive any payments that are accrued and unpaid upon the owner's death, it should be specified within the property description at transfer.⁷¹ This property

is taken subject to all conveyances, assignments, contracts, mortgages, liens, and security pledges made during the lifetime of the record owner. This can include an executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust or lien, and to any interest conveyed by the record owner that is less than all of the record owner's interest in the property.⁷²

After death it is nearly impossible to undo or change the provisions of the deed.⁷³

Recognizing this possibility of a unilateral mishap, states have put great emphasis on a party's mental state when determining if a revocable deed is valid or void.⁷⁴ The Missouri Supreme Court has categorized these types of non-probate transfers as "matters of agreement;" therefore, they are governed under the state's contract laws.⁷⁵ Under Mis-

67. *Id.* ("[The revocable life estate deed] allows a married couple to retain the creditor protection of jointly owning property while ensuring that their living trust ultimately controls the disposition of all their property without the necessity of probate.").

68. *See Williams*, *supra* note 49, at 188.

69. *See id.* at 189.

70. *Deeds Effective on Death of Owner* § 13.38, *supra* note 50; *Groh v. Ballard*, 965 S.W.2d 872, 874 (Mo. Ct. App. 1998).

71. *Deeds Effective on Death of Owner* § 13.38, *supra* note 50.

72. *COFFMAN & JONES*, *supra* note 54.

73. *See Deeds Effective on Death of Owner* § 13.38, *supra* note 50; *Groh*, 965 S.W.2d at 874.

74. *See Ivie v. Smith*, 439 S.W.3d 189, 204 (Mo. 2014).

75. *Id.* at 203-04.

souri common law, “a contract is deemed void if a party lacks the requisite mental capacity at the time of contracting—meaning mental capacity must be present for a contract to exist at all.”⁷⁶ It is important to note that the Missouri Supreme Court held that it would use the standard for capacity to make a contract, rather than “testamentary” capacity, which is a lower capacity requirement.⁷⁷

A state considering the adoption of Missouri’s revocable life estate deed must be aware of the possible frustrations that can arise when one does not take the necessary steps to review the essential requisites and intentions of the grantor before death.⁷⁸ Other states have also attempted to resolve the issue of who can execute these sorts of deeds⁷⁹ by using language that limits the transfer of property by a natural person and not an entity.⁸⁰ Both of these solutions will help ensure that there will be less chances of a mistake in the intended transfer of the estate.⁸¹

The fact that this deed must be recorded before being valid is an advantage. This can be somewhat misleading because it can also be categorized as a disadvantage. This extra step of recording to validate the deed can often be disregarded or forgotten.⁸² Both parties may reach an agreement on everything regarding the estate, but if the grantor does not get it recorded, the deed is declared invalid. In this case, the estate would be subject to a partition or another form of dividing property. This can also stem from the disadvantage that the revocable life estate deed is just too simple to set up.⁸³ With such an emphasis on an easily structured deed, people can be tempted to create the deed without consulting an attorney.⁸⁴ By having to go to an attorney, the lawyer can spot tax issues, counsel the client on the advantages and disadvantages of other methods, and make sure there is an overall coherent estate plan (for example, if you put the land into a trust, you can have other assets in there as well and divide them evenly, whereas a deed may not accomplish that).⁸⁵

Another disadvantage of the revocable life estate deed involves ownership entitlement, specifically involving surviving spouses and tenants in common.⁸⁶ The deed can

76. *Id.* at 204; *McElroy v. Mathews*, 263 S.W.2d 1, 10-12 (Mo. 1953).

77. *Ivie*, 439 S.W.3d at 204.

78. *See Deeds Effective on Death of Owner* § 13.38, *supra* note 50; *Groh*, 965 S.W.2d at 874.

79. *See Sorrell v. Gaarde-Morton*, 357 P.3d 828, 829 (Ariz. Ct. App. 2015).

80. *See id.* at 830 (“[The Court] will not expand A.R.S. § 33-405 to include trustees and trust property when, by its express terms, does not do so.”); *Price v. City of Mesa*, 339 P.3d 650, 652 (Ariz. Ct. App. 2014).

81. *Ivie*, 439 S.W.3d at 203-04.

82. *Murphy*, *supra* note 59, at 31.

83. Interview with Jerry Anderson, Professor, Drake Univ. Law Sch., in Des Moines, Iowa (Jan. 8, 2016).

84. *Id.*

85. *Id.*

86. *See Murphy*, *supra* note 59, at 32; *see also Williams*, *supra* note 49, at 189.

cause problems for those with previous marriages because “the surviving spouse can revoke or change the beneficiary deed after the death of the first spouse. Simply naming the children from the first spouse’s prior marriage leaves them vulnerable to the vicissitudes of the second spouse if the first spouse dies first.”⁸⁷ This example is yet another reason why consulting with an attorney before one records a deed is important. Another problem may be found in regards to tenants-in-common.⁸⁸ For example, an Arizona statute states that “a beneficiary deed can be revoked ‘by any of the owners who executed the beneficiary deed’ and that a revocation is not effective ‘unless executed by the last surviving owner.’ It is not clear if the term ‘owner’ refers to the ownership of a particular undivided interest or the entire property.”⁸⁹

The next disadvantage arises when title companies are involved. Title companies have not been eager to allow these types of deeds because “[t]he owner will have to revoke any existing . . . deed prior to selling or refinancing the property.”⁹⁰ Title insurance companies still need to develop guidelines on how to handle beneficiary deeds in a chain of title.⁹¹

Last but not least, a disadvantage of adopting the revocable life estate deed is that there is sparse case law to look at for resolving issues.⁹² Some states have attempted to resolve this problem by implementing certain guidelines to examine these deeds. As follows, Arkansas proposed guidelines to examine a [revocable life estate deed]:

If a Beneficiary Deed is the final entry of record, the examiner should not presume that the conditions to its effectiveness as a conveyance have been met without further proof, such as a certificate of the death of the grantor.

If a Beneficiary Deed contains conditions to its effectiveness as a conveyance, other than the death of the grantor, the examiner should require proof that those conditions have been met or except them.

The examiner should require adequate proof of the release or disclaimer of the lien claim provided for in Ark. Code Ann. § 20-76-436, or except the liens.

If a Beneficiary Deed provides for successor grantees or names as grantees tenants by the entirety or joint tenants, the examiner should require proof of the grantees’ death or survivorship, as appropriate, and the sequence thereof to determine which grantee received title.

87. Murphy, *supra* note 59, at 32.

88. *See id.*

89. *Id.*; ARIZ. REV. STAT. ANN. § 33-405 (2016).

90. Murphy, *supra* note 59, at 31.

91. Williams, *supra* note 48, at 189.

92. *See id.*

The examiner should determine whether the Beneficiary Deed under examination “expressly states” the grantor’s intentions and “substantially” conforms to the required forms, all as provided in Ark. Code Ann. § 18-12-608.⁹³

North Carolina also drafted requirements for the revocable life estate deed to avoid complications such as: (1) the revocable life estate deed statute should be used to create an optional form, which will serve as a “channeling function;” thus, it will ensure that legislation will pass the proposed bill; (2) to protect against legal mistakes, including helping the owner avoid any requirements necessary to validate the deed, i.e., recording, the form should provide notice of any legal consequences of the deed; (3) the legislation should include a provision that addresses owner agency to authorize an agent to perform an action that an owner is authorized to do; (4) the owner of the revocable life estate deed “should be required to verify his or her competency and legal capacity in writing;” (5) legislation should require the state to provide additional witnesses on the form to prevent fraud; (6) the owner should be required to record his or her deed to not only prevent fraud, but also to show that the owner is serious about their intentions to follow through with the deed; legislation should apply an anti-lapse statute just in case the owner outlives the beneficiary, “thus the interest of the designated beneficiary lapses;” (7) legislation should protect industry lawyers by using the form to promote legal consultation.⁹⁴

It is important to note that some states have recognized the revocable life estate deed as a transfer on death deed, but then chose to replace it.⁹⁵ “Ohio eliminated [the traditional revocable life estate deed] and replaced that deed with a *TRANSFER ON DEATH DESIGNATION AFFIDAVIT*.”⁹⁶ This affidavit has five requirements: (1) it must be notarized and filed before the death of the property owner; (2) it must describe the property and instrument number; (3) it must describe the portion of the property being transferred; (4) it must state whether or not you are married, and if you are, the spouse must sign the affidavit; (5) and it must name the beneficiary.⁹⁷ One can see that this affidavit addressed the spousal problem and the right to survivorship issue that was discussed earlier as a disadvantage.⁹⁸

93. STANDARDS FOR EXAMINATION OF REAL ESTATE TITLES IN ARK. § 4.13 (Ark. Bar Ass’n 2013).

94. Jennifer W. Jiang, *Transfer on Death Deeds: Benefit or Burden? A Proposal for Transfer on Death Deed Legislation in North Carolina*, 90 N.C. L. REV. ADDENDUM 106, 127-31 (2012).

95. See Laurie Steiner, *Ohio Eliminates Transfer on Death Deeds*, LAURIE’S LINES (Jan. 2, 2010), <http://lauries-lines.blogspot.com/2010/01/ohio-eliminates-transfer-on-death-deeds.html>.

96. *Id.*

97. OHIO REV. CODE ANN. §§ 5302.22(D)-(E) (West 2016).

98. *See id.*

VI. WHY IS IT SO IMPORTANT FOR FARM STATES TO ADOPT THE REVOCABLE LIFE ESTATE DEED?

In regards to farming, this deed can be extremely useful to transfer personal property, in addition to land, cattle, growing crops, and farm machinery.⁹⁹ Farming, more than most professions, involves the ownership of a lot of real and personal property. Millions of dollars can flow through a single farming operation, and, after death, distributing the assets used in these operations to their new owners can be very complex.

Many farm owners struggle with transferring property to their family and are searching for a satisfactory method of making the transfer easier.¹⁰⁰ The lack of planning of transfers within the family can result in multiple problems including:

[c]hildren remaining on the home farm may make extensive improvements which are shared with [siblings] at the parents' death; children may not improve or even remain on the home farm because of uncertainties; the remaining parent may not receive enough property to provide a satisfactory income for his or her remaining years; the process of buying out other heirs, the son or daughter remaining on the home farm may be forced into debt beyond the ability to pay; expensive and drawn-out estate settlements may result; excessive taxes may fall upon the heirs; the farm may be divided into uneconomic units¹⁰¹

Faced with all of these problems, farm parents often become pressured, irritated, or confused, and as a result, they do nothing about transferring their property or preparing to transfer their property.¹⁰² Timmons and O'Byrne, in the *Agriculture Research Bulletin*, determined nine objectives one should consider when planning a transfer of an estate:

These objectives may include one or more of the following: (1) provide sufficient income for the parents during the rest of their lives, (2) treat all children fairly, (3) help one or more of the children start farming, (4) keep the farm within the family, (5) maintain continuity in farming operations between generations without dispersing the herds, flocks, land and improvements build up over a lifetime, (6) reward certain children for special favors or contributions to parents' welfare or to improvement of the farm, (7) indicate to prospective heirs what to expect early in life so they can plan their lives accordingly, (8) minimize estate settlement costs, and (9) minimize all

99. ANDREA JACKSON & CHRISTINE A. GILSINAN, *Beneficiary Deed of Gift or Bill of Sale* § 13.39, in 2 MO. TRUSTS, POWERS OF ATT'Y, CUSTODIANSHIPS, AND NONPROBATE MATTERS (Mo. Bar 2d ed. 2013) [hereinafter *Beneficiary Deed of Gift or Bill of Sale* § 13.39].

100. See JOHN F. TIMMONS & JOHN C. O'BYRNE, AGRIC. EXPERIMENT STATION, IOWA STATE COLL., TRANSFERRING FARM PROPERTY WITHIN FAMILIES IN IOWA 150 (1953).

101. *Id.* at 156.

102. *Id.* at 150.

taxes to the family, including gift, inheritance, estate capital gains and income taxes.¹⁰³

In considering these nine objectives from Timmons and O’Byrne in the context of the advantages and disadvantages, the revocable life estate deed can sufficiently address each objective.¹⁰⁴

First, the revocable life estate deed guarantees that the owner of land is provided with sufficient income for the rest of their lives.¹⁰⁵ The owner stays in complete control of the land until death, and if he or she does get into financial distress, the deed can be revoked at any time.¹⁰⁶ The owner of the land can either work the land to collect the proceeds, or he or she can immediately sell the land for income.

The revocable life estate deed also allows the parent on the farm to treat all their children fairly. Previously, it was recognized that one of the downfalls of the lack of transfer preparation for farm property is that some of the children may be treated unfairly—one child may work the farm for his or her whole life, make substantial improvements, etc., but if there is no transfer plan, the other siblings will most likely get an equal share of the land even though they did nothing to contribute to the farm production.¹⁰⁷ The revocable life estate deed allows a parent to deed away specific assets of the estate the way he or she wants. For example, imagine there were three children, but one of them helped their father for years working on an old tractor. This tractor has no worth at all, but the sentimental value is priceless to the child and the father. If there was no plan to transfer this property at death, it is highly likely that the other siblings will end up with the tractor; most likely resulting in liquidation. With the revocable life estate deed, the father can easily ensure that his child with a sentimental connection gets the tractor instead of the other two children.

The next objective ties in with the previous one: helping a child get started in farming. This is a very important objective because “96.4 [percent] of the crop-producing farms in the U.S. are owned by families, and they represent 87 [percent] of all the agricultural value generated”¹⁰⁸ Because of the high percentage of family-run farms, it is very important that parent farmers have an efficient method of helping their children get started in the farming business. Once again, the revocable life estate deed will allow the parent to transfer the essential farm equipment, land, etc. that the child needs to get started farming.¹⁰⁹ The fourth objective that Timmons and O’Byrne felt necessary is to

103. *Id.* at 156.

104. *See id.*

105. *See id.*

106. Michael A. Kirtland & Catherine A. Seal, *The Significance of the Transfer-on-Death Deed*, 21 PROB. & PROP. 42, 45 (2007).

107. TIMMONS & O’BYRNE, *supra* note 100, at 156.

108. Lydia DePillis, *Farms are Gigantic Now. Even the “Family-Owned” Ones*, WASH. POST (Aug. 11, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/08/11/farms-are-gigantic-now-even-the-family-owned-ones/>.

109. *See Beneficiary Deed of Gift or Bill of Sale* § 13.39, *supra* note 99.

keep the family farm within the family.¹¹⁰ The revocable life estate deed accomplishes this the same way it accomplished the second and third objectives. The deed enables the parent farmer to easily transfer any farm property that is necessary to their children.

The fifth objective involves maintaining “continuity in farming operations between generations without dispersing the herds, flocks, land and improvements built up over a lifetime.”¹¹¹ This may seem similar to the previous objectives, but the fifth objective is actually more distinct and important than most realize. Family farms are not created overnight. Farmers and their children spend their whole lives contributing to a farm’s durability and output, in hopes that one day they will be able to own it themselves. Millions of dollars are contributed to this lifetime of work, and if a family does not have a transfer method to take place at death, this wealth and lifetime of work could vanish in an instant.¹¹²

The sixth and seventh elements (“reward certain children for special favors or contributions to parents’ welfare or to improvement of the farm” and put them on notice of what to expect) will not be analyzed because of its similarity to the second element, treating children fairly.¹¹³ The revocable life estate deed puts the power in the grantors hands and allows them to distribute land, machinery, etc. without having to reveal to everyone else that the child has been disproportionately benefited.¹¹⁴

The eighth objective, minimizing the costs of estate planning, will always be a concern for people trying to transfer property, especially, those of the lower socioeconomic classes.¹¹⁵ As discussed earlier, one of the advantages of the revocable life estate deed is that it avoids probate—“the process a legal court takes to conclude all [a person’s] legal and financial matters after [their] death. Essentially, probate is the process by which a court distributes [an] estate.”¹¹⁶ “Even in probate-friendly states . . . the transfer-on-death-deed permits the completion of the non-probate transfer of assets such as estates.”¹¹⁷ Although many states have implemented a small estate transfer procedure to avoid the headaches of probate, the costs are still a problem.¹¹⁸ For example, in Alabama a small-estate proceeding is limited to estates worth \$3,000 or less, but on the other side

110. TIMMONS & O’BYRNE, *supra* note 100, at 156.

111. *Id.*

112. See Stephen Follett, *Good/Bad News For Farming Families*, ARIZ. EST. PLAN. & PROB. (Feb. 29, 2008), <http://www.arizonaestateplans.com/2008/02/articles/wills/goodbad-news-for-farming-families/>; see also Lisa Schumaker, *Grain Rally Complicates U.S. Farmer Estate Planning*, REUTERS (Feb. 28, 2008, 1:22 PM), <http://www.reuters.com/article/farming-conference-estates-idUSN2857133420080228> (one reason farmers lose the wealth in their farmland is that people are not comfortable talking about the topic; they put it off until it is too late, resulting in the loss of land and future income).

113. See TIMMONS & O’BYRNE, *supra* note 100, at 145.

114. Kirtland & Seal, *supra* note 106, at 47.

115. See TIMMONS & O’BYRNE, *supra* note 100, at 145.

116. Ashanti, *supra* note 15.

117. Kirtland & Seal, *supra* note 106, at 46.

118. See *id.*

of the spectrum, California’s small-estate procedure has a \$100,000 limit.¹¹⁹ By its simplicity, the revocable life estate deed allows farmers, even in probate-friendly states, to avoid the unnecessary costs of probate.

Lastly, the ninth objective, minimizing “all taxes to the family, including gift, inheritance, estate, capital gains and income taxes.”¹²⁰ Executing a deed in most states creates a completed gift, which can impose a federal gift tax “to the extent that the gift exceeds the annual gift tax exclusion amount, currently \$12,000 per year per grantee.”¹²¹ When a revocable life estate deed is deemed to occur at the grantor’s death, “the grantee receives a step-up in basis.”¹²² Unfortunately, it is unlikely that the grantee will be able to avoid any estate taxes.¹²³

Many writers in different states have recognized the benefits of the revocable life estate deed towards farming.¹²⁴ These writers recognized that many times farmers work their whole lives building a financially sound farm system, but all the wealth that is wrapped up in the land can get lost at death.¹²⁵ A revocable life estate deed could help solve this problem because people can take care of their land behind closed doors, in the security and privacy of their own home, and they do not have to go out and initiate the topic with an attorney they may or may not know.¹²⁶ Of course, as stated previously, this may be misleading because it is always a good idea to consult with an attorney first to ensure there are no encumbrances on the deed.

VII. WHERE IS IOWA?

Iowa recognizes a deed as being a “legal document that proves our ownership to a specific piece of real estate. A new deed must be prepared and signed in order to transfer a property interest to a new owner. Property rights and deed requirements are governed by [Iowa’s specific rules conveying real estate].”¹²⁷ Iowa requires a deed to identify the names of all the parties included in the transfer; the deed must be dated; the property owner must sign (in dark, legible ink) it in the presence of a notary public; and the deed

119. *Id.*; see ALA. CODE § 43-2-692 (2016); CAL. PROB. CODE § 13100 (West 2016).

120. TIMMONS & O’BYRNE, *supra* note 100, at 156.

121. Kirtland & Seal, *supra* note 106, at 43; 26 U.S.C. § 2503 (2012).

122. Kirtland & Seal, *supra* note 106, at 43; 26 U.S.C. § 1016 (2012).

123. *Transfer on Death Instrument: Advantages and Disadvantages*, ATT’Y TITLE GUARANTY FUND, INC. (Sept. 21, 2011, 9:23 AM), <https://www.atgf.com/underwriting/news/transfer-death-instrument-advantages-and-disadvantages>.

124. See Follett, *supra* note 112.

125. See *id.*

126. See *id.*

127. Maggie Lourdes, *Transferring a Property Title in Iowa*, GLOBALPOST, <http://oueverydaylife.com/transferring-property-title-iowa-32981.html> (last visited Jan. 17, 2017).

must be stamped and filed in the county recorder's office where the property is located.¹²⁸

Subsequently, Iowa's life estate deed "is a document that grants ownership of a parcel of real property to two separate parties: (1) the Life Tenant, and (2) the Remainderman."¹²⁹ Like most states regarding life estate deeds, Iowa gives the life tenant all the property rights during his or her lifetime,¹³⁰ in return, the grantee does hold ownership or entitlement to the land but does not have the right of possession until the life tenant dies. There is also an adverse effect on the life tenant. When the property owner/life tenant holding a life estate delivers the deed to the remainderman/grantee, he or she "is no longer able to transfer, sell or mortgage the property without the joinder of the remainderman."¹³¹ As demonstrated throughout this Note, the revocable life estate deed specifically addresses this problem by putting ownership and the decision-making authority in the hands of the grantor.

Lawyers opposing the revocable life estate would recommend using a revocable trust because it, ideally, accomplishes the exact same goals as the revocable life estate deed.¹³² "Living trusts are a flexible, private way to manage a person's assets during his life and provides for orderly distribution of the assets after death, while avoiding probate. . . . Flexibility of the living trust instrument gives the owner great control over the distribution of his property."¹³³ Although this may seem like a reasonable solution, the revocable trust does have its downfalls.

[T]he main disadvantages . . . are its complexity and high costs. Because the living trust can be structured to meet the specific needs of a property owner, there are a myriad of ways to prepare the living trust instrument, which could lead to a greater likelihood for ambiguities or mistakes . . . The process requires careful consideration and analysis, hence the high costs.¹³⁴

Compared to the revocable life estate deed, the main difference is that the trust is more cumbersome to set up, and the deed is much simpler.¹³⁵

128. IOWA CODE ANN. §§ 558.11, 558.41 (West 2016).

129. *Iowa Life Estate Deed*, CORPUS JURIS, <http://theonlinelawyer.blogspot.com/2011/10/iowa-life-estate-deed.html> (last visited Dec. 13, 2016).

130. *Id.*

131. Coleman, *supra* note 6.

132. Interview with Jerry Anderson, *supra* note 83 (the revocable trust allows the grantor to avoid probate and retain revocability, assuming the life tenant is the trustee).

133. *Transfer on Death Instrument: Advantages and Disadvantages*, *supra* note 123.

134. *Id.*

135. Interview with Jerry Anderson, *supra* note 83.

VIII. CONCLUSION

Although the revocable life estate deed is a relatively new concept, it is very important to look at the few states that have adopted the deed for advice. Jennifer Jiang, in a position paper for North Carolina, summarized her opinion perfectly, which could be applied to all states considering adopting the revocable life estate deed.¹³⁶ Jiang concludes that

[revocable life estate deeds] provide a cost-effective alternative . . . without going through the lengthy and expensive probate process. Implementing [this type of deed] . . . would not only serve important state interests . . . by increasing court efficiency and lowering state costs, but the option would also provide . . . increased financial autonomy . . . [I]t is important to provide a flexible option to property owners who would choose to use [the revocable life estate deed].¹³⁷

Accordingly, farm states are singled out because the farm profession is not like any other profession. Most are family-run operations that involve a lifetime of hard work and commitment, which in return, means that the transfer of assets and property within families are more prevalent than most professions. Farmers should not be forced to go through the stress and troubles of probate, wills, or trusts just to pass along estates or assets to their children that not only have a monetary value, but also have a sentimental value. The revocable life estate deed provides an easier alternative for these families to protect these values that could otherwise be lost. For all these reasons, farm states like Iowa should enact a revocable life estate deed statute similar to those discussed in this note.

136. See Jiang, *supra* note 94, at 131.

137. *Id.*