

# **Beneficiary Deeds in Colorado**

by

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## **Authors**

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The initial draft of this outline was prepared by R. Sterling Ambler. Sterling died May 26, 2004 at the age of 72. Throughout his long legal career, Sterling was an exemplary professional who in addition to serving his clients was active in many Colorado Bar Association Sections and Committees, including Elder Law, Real Estate Law, Taxation Law, and the Trust & Estate Sections. Sterling initiated and chaired the beneficiary deeds subcommittee of the Statutory Revisions Committee of the Trust and Estate Section.

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## **Beneficiary Deeds Background**

On May 12, 2004, the governor signed House Bill 04-1048 relating to beneficiary deeds (sometimes called “transfer on death deeds”) into law. The act took effect on August 4, 2004. This was the result of many hours of consideration and discussion among members of the Bar, together with a great deal of input from the Department of Health Care Policy and Financing (“DHCPF”). The law is designed to provide a means of transferring title to real property on death of the owner without the need for probate, providing for the owner to be able to maintain control of the property during his lifetime, and at the same time providing some protection for creditors of the decedent. The owner has the power to revoke the beneficiary deed or change the beneficiary without the joinder, consent or knowledge of the beneficiary.

### ***Subcommittee members:***

The original subcommittee was comprised of three members of the Trust and Estate Section Statutory Revisions Committee, a member of the Real Estate Section Council, an officer of a title insurance company, and an attorney who had extensive experience in Medicaid planning. After 16 meetings the original draft of the statute was approved by the Trust and Estate Section Statutory Revisions Committee and the Trust and Estate Section Council. It was then forwarded to the Real Estate Section Council for comment, and two additional members of the Legislative Committee of the Real Estate Section were then added. Further revisions were then incorporated at their suggestion. The statute was first introduced in the 2003 legislative session, but was not adopted, primarily because of certain objections by DHCPF. Since that time a number of other meetings were held in an effort to iron out some additional issues which, upon review, needed some clarification.

The subcommittee was initially formed in the fall of 2000, and met more than 25 times since then. The procedure was to review some suggested language and draft revision at one meeting, then review, comment on and approve that work at the following meeting. All language remained open to discussion and revision during the entire process.

### ***History:***

The Beneficiary deeds is not a new concept. The prior wording of section 15-15-101(1) in the **Colorado Probate Code** contains general language to the effect that a “conveyance” or “deed of gift” may contain provisions for a nonprobate transfer on death. However, the statute is not clear on how that is to be accomplished and what the effect of such a deed would be. The purpose of the statute is to now make it clear how the documentation is to be handled, the effect of such a deed, and the limitations of such a transfer. Accordingly, the subcommittee felt it appropriate for the clarification to appear as an additional Part of Title 15 in the Colorado Probate Code.

The subcommittee noted that the existing statute, 15-15-101(1), has already been used by some Colorado attorneys to create various forms of beneficiary deeds, containing different conditions and limitations. The subcommittee felt that consistency would be appropriate and wanted to provide some uniformity in defining the rights and obligations of the parties and creditors of the deceased owner who may have executed such a deed.

While this is a relatively new concept for most practitioners in Colorado real estate law, several other states have enacted statutes permitting such transfers of real property, including Kansas, Missouri, Ohio and Arizona. The subcommittee attempted to draw from those statutes and added some language in areas where we felt the statutes of the other states were deficient.

In general the committee believed that the beneficiary deed would primarily be used for very small estates as a probate avoidance device and as a means of funding revocable living trusts in those situations where clients might want to engage in periodic refinancing of the home. Many mortgage companies refuse to finance homes held in trust

and the use of the beneficiary deed should eliminate the need to transfer homes in and out of trusts solely for refinancing.

### ***Subcommittee's Approach:***

This subcommittee approached the drafting of the statute with the following objectives and philosophies in mind:

1. The statute is to be creditor neutral – that is, creditors of the decedent were not to be deprived of any rights they might have had if the property had been in a probate estate. This provision is similar to the provisions with respect to payable on death and jointly held bank accounts now in Parts 2 and 3 of Title 15 in the Probate Code.
2. Likewise, *bona fide* purchasers from and secured lenders to the grantee-beneficiary after the death of the owner are to be protected.
3. The beneficiary designation is to be revocable and may be changed by the owner at any time during his lifetime without the consent or joinder of the named grantee-beneficiary.
4. The owner is to have the freedom to deal with the property as he/she sees fit during his/her lifetime without the need for the grantee-beneficiary to join in any transaction which may affect the title to the property.
5. The statute is intended to be available for use in cases of smaller estates for probate avoidance where the only reason for a probate would be a residence or other piece of real property in the owner's name. Although it may certainly be used to add a piece of real property to an existing trust or other vehicle used to title real estate such as a family limited partnership or corporation.
6. Time limits are to be placed on the ability of persons to object to the transfer in order to preserve the merchantability of title.

### ***Comparison with other "non-probate" transfers***

- A. Under the statute, the owner can deal with the property in any way he sees fit during his lifetime without the consent [or even the knowledge] of the grantee-beneficiary. Joint tenancies or transfers reserving a life estate are common non-probate means used to effect a transfer of real property on the death of the owner. However, both require the joinder of the other "owners" in order to effect a sale or secure a loan using the property as collateral during the owner's lifetime.
- B. In terms of asset protection for the donee or grantee-beneficiary, any creditors of a grantee-beneficiary would not be able to assert any claims or effectively attach the interest of a grantee-beneficiary during the grantor's life. In contrast if a gift is made of a joint tenancy interest during life it may be possible for that gifted interest to be attached and although the life tenant will be protected from the creditors of the remainderman, it is likely that a creditor could attach that remainder interest upon conclusion of the life estate.

- C. In terms of asset protection for the owner, all of the interest of an owner who issues a beneficiary deed remains subject to the owner's creditors. A remainderman's interest is not subject to the claims of the creditors of the life tenant and on death of the life tenant the property passes without probate and free of all debts of the life tenant. Similarly in Colorado as to real property the interest of one joint tenant is subject to creditor claims of that joint tenant during life but will pass free of that tenant's creditors at death and cannot be drawn back into the probate process.
- D. Under the statute, after the death of the owner who has issued a beneficiary deed, creditors are given the right to bring the property into the probate estate of the deceased owner if the assets subject to probate are inadequate to satisfy claims. This right is currently present in the Probate Code with respect to joint bank accounts and payable-on-death accounts only. On the other hand, if a creditor of one joint tenant or a life estate owner has a lien on the joint owner's interest in the property or that of the life tenant, upon the owner's death the lien against the deceased owner's interest in the property is no longer effective against the property.
- E. Under the statute, title to the property passes to the surviving grantee-beneficiary immediately upon death subject to the rights of creditors. Proof of death is the same as that required for a joint tenancy
- F. Under the statute, good faith purchasers from and lenders to the grantee-beneficiary are protected.

### ***Tax Consequences***

The beneficiary deed is an incomplete gift since the owner retains full use of the property with a power to revoke and therefore for gift tax purposes a gift does not occur upon execution of the beneficiary deed. Reg. §25.2511-2. Since the property will be subject to estate tax in the owner's estate there will be a step-up in basis under I.R.C. §1014(a)(1) except for 2010 when carry-over basis rules under I.R.C. §1022 may be in effect.

### ***Conservators and Powers of Attorney***

The committee opted not to amend the durable power of attorney statute under C.R.S. §15-1-1305 or §15-14-501 or the conservatorship statute under C.R.S. §§15-14-401 et seq, in regard to real property transactions and the power to create or revoke a beneficiary deed by an agent or conservator.

It was presumed that the agent if granted powers of sale over real estate would have the power to revoke, however, this power would need to be exercised in a manner consistent with fiduciary powers and would arguably be subject to challenge if the power was utilized in bad faith or in a manner inconsistent with the owner's estate plan. In addition

the owner could restrict the power to revoke in the power of attorney, however, this might create a conflict if the power to sell was not also restricted since the sale of the property obviously effects a revocation. Similarly if an agent had power to make gifts the agent could presumably execute a beneficiary deed. §15-14-408 requires an agent to take into consideration the principal's estate plan and to attempt to preserve it if possible.

§15-14-411 sets forth court approvals required before a conservator can engage in certain acts. Presumably under subsection 1(a) which allows for gifts a conservator could be authorized by court order to execute a beneficiary deed. Subsection (1)(g) allows the conservator with court approval to make, amend or revoke the protected person's will. The beneficiary deed would presumably not be covered by that section, however, since the statute specifically sets forth that a beneficiary deed is not a testamentary disposition. See, §15-15-411, below.

Conservators are however granted broad powers in regard to property and unless restricted by the court could sell the real estate subject to a beneficiary deed and presumably revoke a beneficiary designation if needed. 3 Colorado Practice §100.9. It is a requirement of the law however that the conservator give effect to the protected persons estate plan §15-15-425(5) in making distributions.

Issues such as these are confronted by conservators in situations involving financial transfer on death accounts, see [\*Estate Planning Considerations When Distributing Assets from a Conservatorship Estate\*, 32 Colo.Law. 55 \(Aug. 2003\)](#).

### ***Planning Caveat:***

The beneficiary deed is intended as a limited probate avoidance device, however, it should not be regarded as a substitute for a good estate plan. A beneficiary deed will not take effect unless it is recorded in the county real estate records prior to death and the anti-lapse provisions of the probate code are not applicable to beneficiary deeds, although successor or alternate beneficiaries may be named in the Beneficiary Deed. It is therefore recommended that consideration be given to coordinating the estate plan with the beneficiary deed either prior to or at the time of execution of a beneficiary deed. In other words make sure the same grantee-beneficiary is designated in the will or trust to receive the property that is the subject of the beneficiary deed. This will guard against the inadvertent death of an owner prior to recording or the accidental recording of the deed in the wrong county.

### **The Statute by Section with Comments:**

#### ***Section 1 of HB04-1048:***

#### ***15-15-401. Definitions.***

**As used in this part 4, unless the context otherwise requires:**

(1) "Beneficiary deed" means a deed, subject to revocation by the owner, which conveys an interest in real property and which contains language that the conveyance is to be effective upon the death of the owner and which may be in substantially the form described in section 15-15-404.

(2) "Deed" means any instrument of conveyance of real property.

(3) "Grantee-beneficiary" means one or more persons or entities capable of holding title to real property designated in a beneficiary deed to receive an interest in real property upon the death of the owner. "Grantee-beneficiary" includes, but is not limited to, a successor grantee-beneficiary.

(4) "Owner" means the grantor of a beneficiary deed.

(5) "Successor grantee-beneficiary" means the person or entity designated in a beneficiary deed to receive an interest in the property if the primary grantee-beneficiary does not survive the owner.

(6)(a) "Transfer", when used as a verb, means to convey.

(b) "Transfer", when used as a noun, means a conveyance.

Comments: The term beneficiary deed was chosen by the committee after considering synonymous terms such as gift deed and TOD or transfer on death deed. The generic term owner was coined since this deed allows conveyances of any interests in real property.

#### ***15-15-402. Real property--beneficiary deed.***

(1) In addition to any method allowed by law to effect a transfer at death, title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner's death, a beneficiary deed signed by the owner of such interest, as grantor, designating a grantee-beneficiary of the interest. The transfer by a beneficiary deed shall be effective only upon the death of the owner. A beneficiary deed need not be supported by consideration.

(2) The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required. Subject to the right of the grantee-beneficiary to disclaim or refuse to accept the property, the conveyance shall be effective upon the death of the owner.

(3) During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power

**and authority with respect to the property without the joinder, signature, consent, or agreement of, or notice to, the grantee-beneficiary for any purpose.**

Comments:

Prior Deeds: The committee did not want to invalidate any prior deeds of gift and provided that any other method to effect a transfer at death would be considered effective. This statute is applicable, however, to prior beneficiary deeds executed by owners who die on or after the effective date of the House Bill 04-1048. See §15-15-415 below.

Grantee Beneficiary rights: The essence of the beneficiary deed is that the grantee-beneficiary has absolutely no enforceable rights during the life of the owner and no joinder or other action by a grantee-beneficiary is required.

Disclaimers or Refusals: A grantee-beneficiary has the right to disclaim or refuse to accept title. The subcommittee had initially included only disclaimer language, however, it is the practice of some attorney's to advise their clients to refuse the property and not to execute a disclaimer apparently on the basis that the act of disclaiming might create some liability. A subcommittee of the Statutory Revisions Committee of the Trusts and Estates Section of the Colorado Bar Association is considering revisions to the state's disclaimer statute and the chair of that subcommittee has expressed concern about the wording in the beneficiary deed statute regarding refusal and its potential impact on disclaimers. There was no intent on the part of the committee to change the existing law as to disclaimers and a technical amendment may need to be considered.

### ***15-15-403. Medicaid eligibility exclusion.***

**No person who is an applicant for or recipient of medical assistance for which it would be permissible for the department of health care policy and financing to assert a claim pursuant to section 26-4-403 or 26-4-403.3, C.R.S., shall be entitled to such medical assistance if the person has in effect a beneficiary deed. Notwithstanding the provisions of section 15-15-402(1), the execution of a beneficiary deed by an applicant for or recipient of medical assistance as described in this section shall cause the property to be considered a countable resource in accordance with section 26-4-403.3(6), C.R.S., and applicable rules and regulations.**

Comments:

The beneficiary deed was not designed as a technique for Medicaid planning. Dealing with Medicaid eligibility and estate recovery by DHCPF was one of the major issues which resulted in the failure of the bill during the 2003 legislative session. DHCPF was unwilling to accept the creditor protections which had been placed in the bill in §15-15-409 (see below) since its estate recovery methods are in part dependent upon monitoring probate filings.

Various other methods of dealing with Medicaid issues such as requiring releases from DHCPF were considered and were deemed cumbersome, expensive or in conflict with

federal law. It was decided to provide statutorily that a Medicaid recipient would not be entitled to Medicaid assistance if a beneficiary deed was in effect. This provision was the result of last minute negotiations between the subcommittee and DHCPF and may prove problematic. Its technical compliance with federal Medicaid regulations may be arguable.

The first sentence of §403 essentially prohibits anyone who has a beneficiary deed in effective from qualifying for Medicaid. §§26-4-403 and 26-4-403.3 referenced in §403 are the estate recovery and lien statutes used by DHCPF to recover from the estate of an individual who has received Medicaid assistance. If an individual has a beneficiary deed in effect the individual clearly has property as to which DHCPF could assert a claim after death. In the opinion of the authors, absent some conflict with federal regulation, anyone with a beneficiary deed in effect is disqualified from receipt of Medicaid benefits.

Even if there is an unknown loophole in the first sentence of §403, the second sentence renders any property subject to a beneficiary deed as a countable asset for Medicaid purposes and given the value of most homes would disqualify any applicant for Medicaid absent a spend-down.

Any applicant for Medicaid who has a beneficiary deed in effect can remedy the situation by revoking. Although this is only implied by the statute, DHCPF has promulgated a specific regulation on this point.

MEDICAL ASSISTANCE ELIGIBILITY REGULATION

8.110.51 A. 1. f. The principal place of residence, which is subject to estate recovery, becomes a countable resource upon the execution and recording of a beneficiary deed. The exemption can be regained if a revocation of the beneficiary deed is executed and recorded.

***15-15-404. Form of beneficiary deed--recording.***

**(1) An owner may transfer an interest in real property effective on the death of the owner by executing a beneficiary deed that contains the words "conveys on death" or "transfers on death" or otherwise indicates the transfer is to be effective on the death of the owner and recording the beneficiary deed prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. A beneficiary deed may be in substantially the following form:**

**BENEFICIARY DEED**

**(§§ 15-15-401, ET SEQ., Colorado Revised Statutes)**

**CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.**

\_\_\_\_\_, as grantor,  
(Name of grantor)

designates \_\_\_\_\_ as  
(Name of grantee-beneficiary)

grantee-beneficiary whose address is \_\_\_\_\_ (Note to Assessor and  
Treasurer: This address is for identification purposes only, all notices and tax  
statements should continue to be sent to grantor.)

(Optional)[or if grantee-beneficiary fails to survive grantor, grantor designates  
\_\_\_\_\_, as

(Name of successor grantee-beneficiary)

successor grantee-beneficiary whose address is \_\_\_\_\_]and grantor  
transfers, sells, and conveys on grantor's death to the grantee-beneficiary, the  
following described real property located in the County of \_\_\_\_\_, State of  
Colorado:

(insert legal description here)

Known and numbered as \_\_\_\_\_

**THIS BENEFICIARY DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY  
OWNERSHIP UNTIL THE DEATH OF THE GRANTOR. IT REVOKES ALL PRIOR  
BENEFICIARY DEEDS BY THIS GRANTOR FOR THIS REAL PROPERTY EVEN IF  
THIS BENEFICIARY DEED FAILS TO CONVEY ALL OF THE GRANTOR'S INTEREST  
IN THIS REAL PROPERTY.**

**WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY DISQUALIFY THE  
GRANTOR FROM BEING DETERMINED ELIGIBLE FOR, OR FROM RECEIVING  
MEDICAID UNDER TITLE 26, COLORADO REVISED STATUTES.**

**WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY NOT AVOID PROBATE.**

Executed this \_\_\_\_\_.  
(Date)

\_\_\_\_\_

(Grantor)

**(2) Unless the owner designates otherwise in a beneficiary deed, a beneficiary  
deed shall not be deemed to contain any warranties of title and shall have the  
same force and effect as a conveyance made using a bargain and sale deed.**

**Comments:**

This section deals with the form of beneficiary deed to create a transfer on death designation. The form of deed illustrates that the grant is revocable by the grantor-owner, and must be recorded prior to the death of the grantor-owner in order to be effective. The subcommittee elected to include the form because there are other suggested forms in the Colorado statutes, see for example §38-30-113. The subcommittee also added the caution regarding the necessity of recording prior to death as a means of protecting the perhaps uninformed practitioner and the invariable lay scrivener using a Bradford form. The

legislature liked the caution so much they added a couple of more admonitions for good measure.

It should also be noted that this form allows for “successor” grantee beneficiaries to be named as set forth in the definitions. The anti-lapse statute is made inapplicable to beneficiary deeds pursuant to §15-15-407(5) so it is important to consider successor grantee beneficiaries when drafting. If there are multiple grantee beneficiaries and one dies, unless otherwise designated the surviving grantee beneficiaries take a proportionate share before the “successor” grantee beneficiaries. §15-15-407(5).

**15-15-405. Revocation--change--revocation by will prohibited.**

**(1) An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. The joinder, signature, consent, agreement of, or notice to, the grantee-beneficiary is not required for the revocation to be effective. A revocation may be in substantially the following form:**

**REVOCATION OF BENEFICIARY DEED**

**(§§ 15-15-401, et seq., Colorado Revised Statutes)**

**CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.**

\_\_\_\_\_, as grantor, hereby

(Name of grantor)

**REVOKES all beneficiary deeds concerning the following described real property located in the County of \_\_\_\_\_, State of Colorado:**

(insert legal description here)

Known and numbered as \_\_\_\_\_

Executed this \_\_\_\_\_.

(Date)

\_\_\_\_\_

(Grantor)

**(2) A subsequent beneficiary deed revokes all prior grantee-beneficiary designations by the owner for the described real property in their entirety even if the subsequent beneficiary deed fails to convey all of the owner's interest in the described real property. The joinder, signature, consent, or agreement of, or notice to, either the original or new grantee-beneficiary is not required for the change to be effective.**

**(3) The most recently executed beneficiary deed or revocation of all beneficiary deeds or revocations that have been recorded prior to the owner's death shall control regardless of the order of recording.**

**(4) A beneficiary deed that complies with the requirements of this part 4 may not be revoked, altered, or amended by the provisions of the will of the owner.**

Comments:

This section recites the mechanism for revocation of a prior beneficiary deed and also provides that a subsequent beneficiary deed revokes a prior beneficiary deed concerning the same property. The order of execution of conflicting beneficiary deeds and/or revocations controls – not the order of recording, so long as recorded prior to the grantor-owner's death. The owner's Will cannot alter, amend or revoke the beneficiary deed.

#### ***15-15-406. Acknowledgment.***

**A beneficiary deed or revocation of a beneficiary deed shall be subject to the requirements of section 38-35-109(2), C.R.S., and may be acknowledged in accordance with section 38-35-101, C.R.S.**

Comments:

This section contains language similar to that found in the statute dealing with deeds generally [see 38-30-113(b)] permitting but not requiring the beneficiary deed to be acknowledged.

#### ***15-15-407. Vesting of ownership in grantee-beneficiary.***

**(1) Title to the interest in real property transferred by a beneficiary deed shall vest in the designated grantee-beneficiary only on the death of the owner.**

**(2) A grantee-beneficiary of a beneficiary deed takes title to the owner's interest in the real property conveyed by the beneficiary deed at the death of the owner subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests, affecting title to the property, whether created before or after the recording of the beneficiary deed, or to which the owner was subject during the owner's lifetime including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust, or other lien. The grantee-beneficiary also takes title subject to any interest in the property of which the grantee-beneficiary has either actual or constructive notice.**

**(3)(a) A person having an interest described in subsection (2) of this section whose interest is not recorded in the records of the office of the clerk and**

recorder of the county in which the property is located at the time of the death of the owner, shall record evidence or a notice of the interest in the property not later than four months after the death of the owner. The notice shall name the person asserting the interest, describe the real property, and describe the nature of the interest asserted.

(b) Failure to record evidence or notice of interest in the property described in subsection (2) of this section within four months after the death of the owner shall forever bar the person from asserting an interest in the property as against all persons who do not have notice of the interest. A person who, without notice, obtains an interest in the property acquired by the grantee-beneficiary shall take the interest free from all persons who have not recorded their notice of interest in the property or evidence of their interest prior to the expiration of the four-month period.

(4) The interest of the grantee-beneficiary shall be subject to any claim of the department of health care policy and financing for recovery of medical assistance payments pursuant to section 26-4-403 or 26-4-403.3, C.R.S., which shall be enforced in accordance with section 15-15-409.

(5) The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries.

Comments:

This section dictates that the title vests in the grantee-beneficiary only upon the death of the owner, and the grantee-beneficiary takes title subject to any grants, encumbrances, etc., the owner may have put on the property during his lifetime.

If the interest of a person claiming an interest in the property (such as a holder of an option to purchase) is not of record and the grantee-beneficiary does not have actual knowledge of that interest, that claimant has 4 months after death within which to place notice of the interest of record or be forever barred.

If the grantee-beneficiary does not survive the owner, and there is no designated alternate or "successor" grantee-beneficiary as defined in §401, the transfer lapses.

### ***15-15-408. Joint tenancy.***

(1) A joint tenant of an interest in real property may use the procedures described in this part 4 to transfer his or her interest effective upon the death of such joint tenant. However, title to the interest shall vest in the designated grantee-beneficiary only if the joint tenant-grantor is the last to die of all of the joint tenants of such interest. If a joint tenant-grantor is not the last joint

tenant to die, the beneficiary deed shall not be effective, and the beneficiary deed shall not make the grantee-beneficiary an owner in joint tenancy with the surviving joint tenant or tenants. A beneficiary deed shall not sever a joint tenancy.

(2) As used in this section, "joint tenant" means a person who owns an interest in real property as a joint tenant with right of survivorship.

Comments:

This section provides that if the owner-grantor is one of a number of joint tenants, the interest given to the grantee-beneficiary will only vest if the grantor is the last surviving joint tenant. A beneficiary deed by a joint tenant will not sever a joint tenancy.

### ***15-15-409. Rights of creditors and others.***

(1) If other assets of the estate of the deceased owner are insufficient to pay all claims against the deceased owner's estate and statutory allowances to the deceased owner's surviving spouse and children, a transfer resulting from a beneficiary designation under this part 4 is not effective against the estate of a deceased owner to the extent needed to pay all claims against the deceased owner's estate and statutory allowances to the deceased owner's surviving spouse and children.

(2) (a) A grantee-beneficiary who receives property through a beneficiary deed upon death of the owner is liable to account to the personal representative of the deceased owner's estate for a proportionate share of the fair market value of the equity in the interest received to the extent necessary to discharge the claims and allowances described in subsection (1) of this section remaining unpaid after application of the deceased owner's estate. For the purposes of this paragraph (a), the fair market value shall be determined as of the date of death of the owner. For the purposes of this paragraph (a), the grantee-beneficiary's "proportionate share" shall mean the proportionate share of all nonprobate transfers recovered by the personal representative for the payment of the claims and allowances under all the provisions of this article.

(b) A proceeding to assert the liability may not be commenced unless the surviving spouse, a creditor, or a child or a person acting for a child of the deceased owner has sent a written demand to the personal representative at the last known address of the personal representative or has filed it with the clerk of the court in which the probate is pending. A creditor or claimant against the deceased owner's estate may file a petition to open an estate for the deceased owner and may be appointed as personal representative of the estate of the deceased owner pursuant to section 15-12-203 for the purpose of providing the written demand required by this subsection (2). The proceeding shall be commenced within one year after the death of the deceased owner.

(3) A grantee-beneficiary against whom a proceeding to account is brought may join as a party to the proceeding a surviving party or beneficiary of any other

**beneficiary designation or other account of the owner pursuant to other provisions of this article.**

**(4) Assets recovered by the personal representative shall be administered as part of the decedent's estate. This section does not affect the protection provided by section 15-15-410 to a purchaser from, or lender to, a grantee-beneficiary against claims of the personal representative or estate of a deceased owner.**

**(5) Nothing in this part 4 shall be construed to limit the rights of creditors under other laws of this state.**

Comments:

This section gives creditors of the deceased owner-grantor certain rights similar to those granted creditors, under the provisions relating to joint tenancy and POD bank accounts [see §15-15-215]. In general a spouse, child or creditor can assert a claim against a grantee beneficiary for a proportionate share of the fair market value of the equity if needed to satisfy probate claims. Note that under §15-15-407 the title becomes marketable four months after death if no interests created in the real property by the owner are of record or recorded, however a grantee-beneficiary is still liable for the proceeds for up to three years after the date of death and potentially longer if fraud is involved.

***15-15-410. Purchaser from grantee-beneficiary protected.***

**(1) Subject to the rights of claimants under section 15-15-407(2), if the property acquired by a grantee-beneficiary or a security interest therein is acquired for value and without notice by a purchaser from, or lender to, a grantee-beneficiary, the purchaser or lender shall take title free of rights of an interested person in the deceased owner's estate and shall not incur personal liability to the estate or to any interested person.**

**(2) For purposes of this section, any recorded instrument evidencing a transfer to a purchaser from, or lender to, a grantee-beneficiary on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that the transfer was made for value. Any such sale or loan by the grantee-beneficiary shall not relieve the grantee-beneficiary of the obligation to the personal representative of the deceased owner's estate under section 15-15-409.**

Comments:

This section protects bona fide purchases from or lenders to the grantee-beneficiary after the four month period provided in §15-15-407 [similar to 15-12-910 protecting purchasers from or lenders to a distributee in an estate proceeding]. However, a sale by

the grantee-beneficiary does not relieve him of any personal liability he may have to pay creditors under 15-15-409.

**15-15-411. Limitations on actions and proceedings against grantee-beneficiaries.**

**(1) Unless previously adjudicated or otherwise barred, the claim of a claimant to recover from a grantee-beneficiary who is liable to pay the claim, and the right of an heir or devisee or of a personal representative acting on behalf of an heir or devisee, to recover property from a grantee-beneficiary or the value thereof from a grantee-beneficiary is forever barred as follows:**

**(a) A claim by a creditor of the owner is forever barred at one year after the owner's death.**

**(b) Any other claimant or an heir or devisee is forever barred at the earlier of the following:**

**(I) Three years after the owner's death; or**

**(II) One year after the time of recording the proof of death of the owner in the office of the clerk and recorder in the county in which the legal property is located.**

**(2) Nothing in this section shall be construed to bar an action to recover property or value received as the result of fraud.**

Comments:

This section provides certain time limitations on the rights of certain parties to bring actions against the grantee-beneficiary or otherwise assert any rights against the property itself [similar to 15-12-1006 relating to actions against a distributee in an estate proceeding]. Note that any general creditor of the owner will be barred after one year and this should dispose of most potential problems. Although there are extraordinary claims which may be brought under the longer three year statute this does not place the grantee beneficiary in any more of a disadvantage than if taking pursuant to will or intestate succession.

**15-15-412. Nontestamentary disposition.**

**A beneficiary deed shall not be construed to be a testamentary disposition and shall not be invalidated due to nonconformity with the provisions of the "Colorado Probate Code" governing wills.**

Comments:

This section clarifies that such a deed is not considered testamentary in nature and is not controlled by the Colorado Probate Code sections regarding Wills.

**15-15-413. Proof of death.**

**Proof of the death of the owner or a grantee-beneficiary shall be established in the same manner as for proving the death of a joint tenant.**

Comments:

Recording of a Certificate of Death and/or affidavit as provided under 38-31-102 and 38-31-103 for proof of death of a joint tenant is sufficient to prove death and trigger the transfer under the deed.

**15-15-414. Disclaimer.**

**A grantee-beneficiary may refuse to accept all or any part of the real property interest described in a beneficiary deed. A grantee-beneficiary may disclaim all or any part of the real property interest described in a beneficiary deed by any method provided by law. If a grantee-beneficiary refuses to accept or disclaims any real property interest, the grantee-beneficiary shall have no liability by reason of being designated as a grantee-beneficiary under this part 4.**

Comments:

This section makes it clear that the grantee-beneficiary has the right to refuse [or disclaim] the property which is the subject of the beneficiary deed. Certain members of the subcommittee indicated that there is a procedure of refusal rather than disclaimer by recipients of some real estate as a means of avoiding any liability which might be associated with the property. Questions have been raised since the enactment whether the use of this terminology may adversely impact Colorado's disclaimer statute. Due to a recent Supreme Court ruling in the area of disclaimers and potential amendments to Colorado's disclaimer now being considered corrective amendments in this area may be appropriate.

**15-15-415. Applicability**

**The provisions of this part 4 shall apply to beneficiary deeds executed by owners who die on or after the effective date of House Bill 04-1048, as enacted at the second regular session of the sixty-fourth general assembly.**

Comments:

This section makes the statute apply to those beneficiary deeds in those cases where the grantor-owner dies after the effective date of this legislation.

**SECTION 2. *The introductory portion to 15-11-706(1)*, Colorado Revised Statutes, is amended to read:**

**15-11-706. Nonprobate transfers; deceased beneficiary.**

**(1) Definitions. This section shall not apply to wills; beneficiary deeds; insurance or annuity policies; or pension, profit sharing, retirement, or similar benefit plans. As used in this section, unless the context otherwise requires: SECTION 3. 15-15-101, Colorado Revised Statutes, is amended BY THE ADDITION OF A SUBSECTION to read:**

Comments:

The addition to **15-11-706** (the antilapse statute) is to be consistent with the new 15-15-407(5) [see above] in that the gift lapses if there is no *named* grantee-beneficiary or successor grantee-beneficiary who survives the owner.

**SECTION 3. *15-15-101, Colorado Revised Statutes*, is amended BY THE ADDITION OF A SUBSECTION to read:**

**15-15-101. Nonprobate transfers on death.**

**(1.5) A conveyance or deed of gift described in subsection (1) of this section that relates to an interest in real property may be created pursuant to part 4 of this article and, if so created, shall be subject to the rights of third parties described in part 4 of this article.**

Comments:

The additional section 15-15-101(1.5) is to direct the reader anticipating the preparation of a “transfer on death” deed to the correct part of Article 15 of Title 15.

**SECTION 4. *Part 1 of article 30 of title 38, Colorado Revised Statutes*, is amended BY THE ADDITION OF A NEW SECTION to read:**

**38-30-113.5. Beneficiary deeds.**

**Deeds intended to take effect at the death of the grantor may be executed and recorded pursuant to the provisions of part 4 of article 15 of title 15, C.R.S.**

Comments:

Section 4 of HB04-1048: The new section 38-30-113.5 was added as a cross reference to the place in C.R.S. establishing the use of beneficiary deeds.