

Memorandum 86-41

Subject: Study L-1030 - Estate and Trust Code (Distribution Without Administration - California Transfer on Death Form; Community Property Held in Joint Tenancy)

Assembly Member Harris has sent to the Commission a letter from Owen S. Olds making two suggestions that Mr. Olds believes will facilitate the transfer of real property at death. Assembly Member Harris asks that the Commission study these suggestions and Assembly Member Harris may consider introducing legislation on either of both of the suggestions. The two suggestions are discussed below.

California Statutory Transfer-on-Death (T.O.D.) Form

Mr. Olds makes the following suggestion:

1. There are innumerable single persons (widowed or otherwise) who wish to have their real property transferred at their death to a specified beneficiary(s) free of probate, and without resorting to the use of joint tenancy. I believe that the State Government would be serving these people well, and responsibly, if it made available to them a simple means to accomplish this end. My suggestion in this regard is that the State make available a California Statutory Transfer-on-Death (T.O.D.) form that can be notarized and recorded along with the Deed to the property. At death, the property would pass directly to the named beneficiary(s). The T.O.D. directive would be revocable.

California law already provides similar methods for the transfer of personal property upon death. Perhaps the most common method is the joint tenancy deposit account. The depositor may name a joint tenant on the account, but treat the account as though it were her own. The cotenant may not even know that he has been designated. But there is a risk using a joint tenancy account; if a dispute arises, the court may find that a gift was made of one half of the account to the cotenant. A more recent development and a safer method for transfer of personal property upon death is the pay-on-death provision

(P.O.D.) used for deposit accounts. The person owning the deposit account can designate a beneficiary to receive the funds on deposit in a saving or checking account when the owner dies, and the beneficiary becomes entitled to the funds on death of the depositor. The designation of the P.O.D. beneficiary can be changed. IRA accounts and Keogh plans similarly permit designation of a beneficiary who receives the account upon the death of the owner. Under Probate Code Section 160, a person who lends money to another can designate in the note a beneficiary to whom amounts payable shall be paid if the lender dies. And, of course, the owner of an insurance policy can designate a beneficiary to receive payment under the policy upon the death of the insured.

Employment contracts and employee benefit plans ordinarily permit designation of a beneficiary to receive employee benefits and amounts payable to the employee upon death of the employee. For example, a state employee may designate a person to receive any pay or other moneys due the employee upon the death of the employee, and that amount is paid directly to the person designated without the need for probate; the state employee may designate a beneficiary to receive benefits from the state retirement system (subject to statutory limitations on designation of beneficiaries) and the beneficiary is paid those benefits without the need for probate; the state employee who elects to take part in a deferred compensation plan may designate a beneficiary to receive amounts held under the plan upon the death of the employee, and those benefits are paid to the beneficiary without the need for probate.

There is, however, no comparable method for designation of a beneficiary to receive real property upon the death of the owner. It is likely that many persons use a revocable living trust as a means to accomplish a transfer upon their death to the person or persons they want to take the property upon death. In view of the many available self-help publications, the staff suspects many of these revocable living trusts are prepared without the benefit of legal advice.

Although the revocable living trust is one means to accomplish a transfer upon death, the staff believes that the suggestion of Mr.

Olds is worthy of serious study. We agree with Mr. Olds that there are many persons who wish to have their real property transferred at their death to a specified beneficiary(s) free of probate and do not want to resort to the use of joint tenancy. We believe that the suggested TOD form would provide a simple means to accomplish that objective.

Accordingly, the staff recommends that the Commission direct the staff to make a study of this suggestion. We believe that such a study is required because any legislative proposal will need to deal with the rights of creditors. The staff does not believe that the study would be a particularly difficult one, but we recommend that we defer staff work on the study until such time as the study can be made without delaying work on the new Estate and Trust Code.

Community Property Held in Joint Tenancy

The second suggestion of Mr. Olds is as follows:

2. There are innumerable married couples who wish to hold title to their California community property in joint tenancy in such a manner that they will not only avoid probate (either full probate or the community property petition procedure) but will also realize the step-up basis afforded community property at the death of one of them. My suggestion in this regard, as pertinent to real property, is that the State of California make it a law that if the Deed to the property reads "_____ and _____, husband and wife, as community property held in joint tenancy," then (1) immediately upon the death of one spouse, the surviving spouse will become the sole owner of the entire property by right of survivorship, independent of the will of the decedent, and (2) the entire property will be treated as community property for purposes of both California taxes and Federal taxes.

The Commission itself has made a recommendation along these lines, but the recommendation was withdrawn for further study because it would have affected transfers to married persons that took place before the enactment of the recommendation. The proposal of Mr. Olds could be limited to transfers that take place after the enactment of his suggestion and this would avoid the problem that the prior Commission recommendation created. An important benefit of adopting his proposal is that there would be a clear body of law applicable when a deed is executed using the statutory language. The new form of deed would make available a useful tool to the legal practitioner. In view of the prior Commission study of this area of the law, the staff

believes that it would not require a significant amount of Commission or staff time to prepare a tentative recommendation to effectuate this suggestion. We recommend that the Commission direct the staff to prepare such a tentative recommendation for consideration at a future meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary