Study L-3032 February 27, 2007

First Supplement to Memorandum 2007-6

Beneficiary Deeds

The staff received an email from Professor Ira L. Shafiroff, of Southwestern Law School, commenting on the Commission's recommendation on the *Revocable Transfer on Death (TOD) Deed* (October 2006). See Exhibit p. 1.

The staff has also received a copy of a pending article by Jeffrey A. Dennis-Strathmeyer, criticizing the Commission's recommendation. See Exhibit p. 2.

The staff has not yet had a chance to analyze these materials, but will do so before the March meeting and will report orally at that time.

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

EMAIL FROM PROFESSOR IRA L. SHAFIROFF (2/26/07)

Subject: TOD Deed

Dear Mr. Herbert:

I teach wills and trusts, and I have a few observations about the proposed revocable TOD deeds.

First, in the instructions, it states that if a beneficiary fails to survive the owner, the gift will go to the beneficiary's descendants if the beneficiary is a "relative" of the owner. I think it is important to spell out for the lay person that relative does not include spouse (or domestic partner) under our anti-lapse statute (Prob. Code section 21110)—assuming that it is the intent of the legislature to give "relative" the same definition as per section 21110 (the term there is "kindred.") Moreover, to be consistent with section 21110 of the probate code, should the anti-lapse provisions also apply to the "kindred of a surviving, deceased, or former spouse of the transferor"?

Further, I think it is important to make clear what a life estate is—and that it is not the same as some type of co-tenancy.

Finally, do we really want to create legal life estates--with the accompanying headaches of actions for waste, liability for taxes, liability for cost for repairs, etc.?

Thank you for taking the time to read this.

Sincerely,

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The Proposed Revocable Transfer on Death (TOD) Deed Legislation

Jeffrey A. Dennis-Strathmeyer

Background of Assembly Bill 250

The Reporter rarely provides detailed coverage of proposed legislation. History proves that most of it is either never enacted or enacted with substantial revisions. Indeed, in the context of federal tax legislation, most bills amount to nothing more than posturing for voters back home. That said, it now appears that the chances of enactment of "Revocable Transfer on Death Deed" (or "revocable TOD deed") legislation, sometimes known as "beneficiary deed" legislation, are quite high.

The objective of such legislation is to permit the transfer of real estate at death in a manner somewhat similar to a transfer of a "Pay On Death" account under the California Multiple-Party Accounts Law (Prob C §§5100–5407), a "Transfer On Death (TOD)" securities account under the Uniform TOD Security Registration Act (Prob C §§5500–5512), or a Totten Trust account, except that, of course, there is no third party holder of the property. We can also think of the objective as permitting a nonprobate transfer of real property that is similar to a transfer by joint tenancy (or termination of a reserved life estate), except that the initial "conveyance" is revocable and (as elaborated later) the "transferee" or "beneficiary" acquires no ownership rights, not even future interest rights, in the property before the transferor's death.

Serious discussion of revocable TOD deed legislation was caused by the introduction of AB 12 by Assembly Member Chuck DeVore on December 6, 2004, in the early days of the 2005–2006 legislative session. According to legislative history, the bill, which proposed statutory authorization for a revocable TOD deed, was opposed at an early stage by the Trusts and Estates Section of the State Bar of California, the California Judges Association, and the California Land Title Association. (Assembly Committee on Judiciary Analysis dated May 2, 2005.) Eventually, the proposal was converted to a bill requiring a study of the proposal by the California Law Revision Commission (CLRC) and chaptered as Stats 2005, ch 422. The CLRC "Recommendation" was issued in late October 2006. *Revocable Transfer on Death (TOD) Deeds*, 36 Cal L Revision Comm'n Reports 103 (2006). The statutes proposed in the Recommendation are now proposed by AB 250—DeVore.

Whether AB 250 will be enacted in some form remains a matter of speculation, given the vagaries of the political process, but there are three good reasons not to bet against it:

- *First*, the idea of a simple, quick, and cheap transfer device has a definite populist appeal—particularly among seniors and organizations that support seniors' concerns.
- *Second*, whatever the pitfalls of self-help estate plans that transfer property in piece-by-piece fashion, it is preferable that the instruments of such transfers be revocable and not create immediate interests in transferees and, potentially, in the devisees and creditors of those transferees. In this respect, a revocable TOD deed is a better device than such alternatives as joint tenancies, transfers with retained life estates, and irrevocable deeds with unrecorded (and often unwritten) retained life estates.
- *Third*, revocable TOD deeds are already authorized in nine states: Arizona, Arkansas, Colorado, Kansas, Missouri, New Mexico, Nevada, Ohio, and Wisconsin. That is some evidence of voter popularity. (The CLRC report somewhat suggests that the enactments in other states also provide evidence of a lack of problems with such deeds. However, Missouri, which enacted its statute in 1989, and Kansas, which enacted its statute in 1997, are the only states that have had such statutes long enough to have much experience with people actually dying with such deeds in force and then having cases concerning those deeds reach their appellate courts. It is important to note that neither of those states is a community property state.)

Whatever the pitfalls of self-help estate plans that transfer property in piece-by-piece fashion, it is preferable that the instruments of such transfers be revocable.

This article presents an overview of the proposed legislation, accompanied by criticisms of selected provisions—particularly those pertaining to (1) the proposed effect of revocable TOD deeds on preexisting survivorship rights and (2) the "statutory form."

What is a Revocable TOD Deed?

One of the more confusing features of AB 250 is the definition of "revocable transfer on death deed." Proposed Prob C §5614(a) states:

> "Revocable transfer on death deed" means an instrument that make a donative transfer of real property under this part [proposed Division 5, Part 4 of the Probate Code].

That definition does not seem particularly helpful. (We also note that proposed Prob C §5606 makes the definition applicable only to "this part," with the apparently unintended consequence that one is left to guess whether the same definition applies to other parts of the Probate Code that would include the phrase as a result of proposed "Conforming Provisions.") Anyway, if we wade through the statute quite a bit further, we can suggest that there

is something of an implication that a deed is a revocable TOD deed under the statute if:

1. The deed indicates in some manner that the transfer is not effective until the death of the transferor;
2. The deed is revocable by its terms;
3. The deed satisfies formality requirements of proposed Division 5, Part 4 (Prob C §§5600–5696), including the requirement that the deed be recorded before death (see below); and
4. The deed does not violate any of the statute's poison pill provisions—such as the seemingly punitive proposed Prob C §5652(a) provision that provides that a conveyance of less than all of the transferor's interests in the property is "void."

It is important to know whether a deed is a revocable TOD deed for several reasons:

- *First*, by virtue of a proposed amendment to Prob C §5000(a), we are provided assurance that a revocable TOD deed is "not invalid because the instrument does not comply with the requirements for execution of a will."
- *Second*, the statute provides the assurance of express statutory authority regarding the rights of parties to such a deed—including the important provisions of proposed Prob C §5650 that make clear that the transferor retains all ownership rights in the property until death.
- *Third*, there are a variety of special rules in the proposed legislation that would apply to revocable TOD deeds but not to other deeds. These rules include a proposed Prob C §5694 90-day postdeath waiting period, during which (apparently) the transferee may not be able to transfer clear title, and a proposed Prob C §5692 1-year (from the date of filing an affidavit of death) limitations period for filing a contest of the deed.

Proposed Prob C §5630(b) makes no sense whatever.

As an aside, we note that a clearer definition of a revocable TOD deed might have enabled the legislation drafter to realize that proposed Prob C §5630(b) makes no sense whatever. That proposed statute states:

> Revocation of a revocable transfer on death deed is effective notwithstanding a provision in the deed that purports to make the deed irrevocable.

It would seem that by its terms this proposed statute can never operate. It only applies if the deed is revocable, and a deed that purports to be irrevocable presumably cannot be such a deed.

The language of the proposed statute is not accidental, but it nevertheless suggests confusion. The narrative explanation portion of the CLRC Recommendation, consistent with the proposed statute, states, "The TOD deed should be revocable notwithstanding language within the deed itself purporting to make it irrevocable." 36 Cal L Revision Comm'n Reports 160. A footnote to that sentences cites *Bolz v Hatfield* (Mo App 2001) 41 SW3d 566, which involved a TOD deed that stated it was irrevocable unless the grantee did not pay the taxes on the property or the grantor had a financial emergency that made it necessary to sell the property. The grantee didn't pay the taxes and the grantor sold the property to a third party. The Missouri courts, confirming the title of the new purchaser, essentially concluded that the deed irrevocably conveyed a conditional remainder interest that was forfeited as a result of the failure to pay the taxes. *Bolz* involved an irrevocable conveyance, and there does not appear to be any reason why it should be addressed in a statute concerning revocable conveyances. Of course, it is possible that the drafter of proposed Prob C §5630(b) thought it would be a good idea to convert irrevocable TOD deeds into revocable TOD deeds, but absent compelling public policy concerns not apparent here, it is not appropriate to treat contracting persons as doing just the opposite of what they both did and intended.

It is possible to question the wisdom of burying such a poison pill provision deep in a statute that will never be read by most of the self-help users of such deeds.

Requirements and Limitations for Revocable TOD Deeds

In this section, we will assume, based on the above discussion, that a revocable TOD deed is subject to Division 5, Part 4 because it purports to be effective only at death; it is revocable; it satisfies recording and other formality requirements of Division 5, Part 4; and it does not attempt to do something not authorized by Division 5, Part 4.

A revocable TOD deed must be signed by the transferor, dated, and notarized. Prop Prob C §5624. The deed can be signed by an attorney-in-fact, but a proposed amendment to Prob C §4264 (that needs redrafting because it confuses a transfer at death with an inter vivos gift) would add the creation of such deeds to the list of powers that are not conferred by a power of attorney in the absence of an express statement.

In sharp contrast to traditional conveyancing rules, the deed needs to be recorded during the lifetime of the transferor, but it does not need to be delivered to the transferee and the transferee does not need to accept it before the transferor's death. Prop Prob C §5626.

The deed must convey the transferor's entire interest in the property. If it doesn't, the deed is void. Prop Prob C §5652(a). (It is possible to question the wisdom of burying such a poison pill provision deep in a statute that will never be read by most of the self-help users of such deeds. The complete voiding of a transfer is a rather

drastic remedy for not taking an action of a type that is not generally required.)

It appears that the beneficiaries must be identified "by name." Prop Prob C §5622(a). The CLRC comment to this section indicates that "class gifts" are not permitted. (The prohibition on class gifts raises a concern similar to that just mentioned with respect to the "entire interest" requirement. The CLRC Recommendation reflects concern about the difficulties of identifying the members of the class. 36 Cal L Revision Comm'n Reports 176. Assuredly, a class disposition might require a judicial proceeding of some kind to determine the takers, but the purposes of the statute would be better accomplished by rescuing a class gift with a judicial proceeding than by voiding the transfer.) Proposed Prob C §5622 permits dispositions to trusts, authorizes naming alternate beneficiaries, authorizes naming multiple beneficiaries, and provides that multiple beneficiaries take as tenants in common unless otherwise specified.

Purposes of the statute would be better accomplished by rescuing a class gift with a judicial proceeding than by voiding the transfer.

In cases of TOD deeds pertaining to community property, the proposed statute, consistent with the notions that the transfer occurs at death and each spouse has testamentary power over one-half of the community property, does not require the consent of both spouses to a transfer of real property under Fam C §1102. However, proposed Prob C §5666 adopts the existing rules of Prob C §§5010–5032 concerning the consequences of obtaining or failing to obtain the consent of a spouse in connection with a nonprobate transfer. Under those statutes, a spouse who does not consent to a nonprobate transfer can recover one-half of the transferred property. Prob C §5021; *Estate of Miramontes-Najera* (2004) 118 CA4th 750, 13 CR3d 240, reported in 25 CEB Est Plan R 168 (June 2004).

Revocation and Amendment

A transferor who has recorded a revocable TOD deed can revoke it at any time. Prop Prob C §5630. Proposed Prob C §5644 provides an optional statutory form for revocation. The revocation is not effective unless recorded during the lifetime of the transferor. Prop Prob C §5632. Revocation also can be accomplished by simply recording a new revocable TOD deed (or an irrevocable deed) before the death of the transferor. Under proposed Prob C §§5628, 5660, if multiple deeds are recorded before death, the deed with the latest execution date is effective. Proposed Prob C §5828 also clarifies that revocation of a later deed will not revive an earlier deed. The statute does not authorize amending a deed, but amendment can be accomplished by recording a new deed.

Drafters of revocable trusts should take note that the provision that requires recording a revoking document before death may make it necessary to act more quickly to record deeds to revocable trusts—particularly in counties where the Recorder's office can leave mailed documents unrecorded for a month or two. In theory, a similar problem has always existed for documents intended to accomplish a *unilateral* severance of a joint tenancy under CC §683.2, but in the overwhelming majority of revocable trust situations, no unilateral severance is involved because there are only two joint tenants and both of them join in and complete the joint tenancy severance the moment they execute the trust.

Effect of the Deed During the Transferor's Lifetime

A number of the sections of the proposed legislation attempt to explain the lifetime consequences of executing and recording a revocable TOD deed. Under proposed Prob §5650(c), these actions do not "transfer or convey any right, title, or interest in the property." Proposed Prob §5650(a)–(b) states that the transferor retains all rights of ownership, including powers to sell and encumber. Further, no legal rights are created in the beneficiary, and the property is not subject to claims of the beneficiary's creditors. Prop Prob §5650(b). Proposed Prob C §5654(a) confirms that there is no transfer for Medi-Cal eligibility purposes. Proposed Prob C §5656(a) confirms that there is no transfer for property tax or documentary tax purposes, and even provides that it is not necessary to file a preliminary change of ownership report (PCOR) when the deed is recorded.

Under proposed Prob C §§5664, 5668, there is no immediate severance of any joint tenancy or any survivorship rights in CC §682.1 community property with right of survivorship. (However, as discussed below, there will be severance at death if the deed is not revoked before then.)

Who Gets Blackacre?: Survivorship Severance and Construction Issues

If the revocable TOD deed has not been revoked before death, title to the property subject to the deed (Blackacre) might pass to the named beneficiary, subject, of course, to mortgages and other interests of record. Prop Prob C §5652(c). Or maybe not.

Existing Prob C §§21101–21140 contain provisions for the construction of wills, trusts, and other documents—expressly including deeds. Prob C §21101. The more relevant provisions include Prob C §21109, which generally provides that a transferee will not take an "at-death" transfer if the transferee fails to survive the transferor, and Prob C §21110, which is the "anti-lapse" statute that in some instances results in an interest passing to the issue of an intended transferee who has failed to survive. The provisions of Prob C §§21131–21139 concerning exoneration and ademption might also be applicable.

The more troublesome issues concerning ownership of Blackacre concern CLRC decisions about survivorship rights of joint tenants (including, for purposes of this discussion, the survivorship rights of holders of community property with right of survivorship under CC §682.1) that are contrary to the statutes enacted in other states that provide, consistent with the general rule that a will does not sever a joint tenancy, that a TOD deed is only effective with respect to the interest of the surviving joint tenant. Under proposed Prob C §§5664, 5668, a revocable TOD deed does not immediately cause a severance of a joint tenancy, but if the TOD deed is not revoked before death, severance occurs at the grantor's death and the grantor's interest in the property passes under the TOD deed. Thus, the legislation presumes that the revocable TOD deed is intended to override the survivorship right.

A significant problem with a "severance at death" rule is that it defeats a major purpose of the CC §682.3 pre-death recordation requirement for a document that is intended to unilaterally sever a joint tenancy. That requirement is intended to prevent a joint tenant from having her cake and eating it too. By recording a document that severs the joint tenancy, she gains the benefit of being able to transfer her property interest to others, but she also surrenders her right to receive the interest of the other joint tenant by survivorship if the other joint tenant dies first. In contrast, under the revocable TOD legislation, the execution and recording of a revocable TOD deed by only one of the joint tenants will not result in loss of rights to take the interest of another joint tenant by survivorship should that other tenant predecease the TOD deed transferor, because no severance has yet occurred.

A significant problem with a "severance at death" rule is that it defeats a major purpose of the CC §682.3 pre-death recordation requirement for a document that is intended to unilaterally sever a joint tenancy.

Even if the "have your cake and eat it too" problem could be resolved, there would be reasons to be concerned about a statute that assumes that one or more of the persons who once agreed that Blackacre would pass to the survivor have now had a change of mind and knowingly decided to make the survivor subject to the risks and limitations of holding property as a tenant in common. As a practical matter, a tenant in common has very limited options for selling or encumbering his or her interests, but a surviving joint tenant may need to sell or encumber in order to move to a retirement community or obtain a reverse mortgage. Further, it may be difficult to force a new tenant in common to pay half of the mortgage. (See the discussion below of the "statutory form" revocable TOD deed regarding the concerns that arise when mortgaged property is transferred to someone other than an original co-owner.) Each tenant in common has a right of occupancy, and each tenant in common is exposed to the risk of a sale of the property in a partition by sale. Concerns about such problems can become acute if the interest of another tenant in common unexpectedly passes into the hands of the other tenant's successors in interest—particularly if those successors are creditors or a bankruptcy trustee. Under the circumstances, it appears preferable to follow the policy of other states and presume that there is no intention to revoke a joint tenancy using a TOD deed—particularly if statutory forms for TOD deeds provide and explain an optional provision for accomplishing an immediate (because of the "have your cake" problem) severance of the joint tenancy.

There are other "Who gets Blackacre?" issues. We have already alluded to the rules applicable if there is a deed pertaining to community property and the spouse does not consent. It should also be noted that the proposed legislation does not contain any provisions that would allow claims by omitted spouses or children. Similarly, there are no provisions allowing an award of a probate homestead. The CLRC report indicates these omissions are intentional.

Proposed "conforming provisions" appropriately do such things as expressly provide that a person who feloniously and intentionally kills the transferor does not take under the deed. Prob C §250.

Title Issues; 90-Day Delay

The proposed legislation generally contemplates that the transferee will clear title by recording an affidavit of death or similar proof of death in the same manner routinely used by surviving joint tenants. It appears, however, that a purchaser who acquires the property from the transferee within 90 days after death may be subject to a risk of a contest of the deed. Prop Prob C §5694. This result is not entirely clear because proposed Prob C §5682 may (intentionally or otherwise) provide protection for a bona fide purchaser even during the 90-day period. Clarification would be helpful. It is not clear why a 90-day waiting period is needed here. There is no similar requirement applicable to joint tenancies, life estate terminations, deeds from trusts, and unrecorded irrevocable deeds.

Proposed Prob C §5692 provides that contests of the deed must be commenced within 1 year after the filing of the affidavit of death or 3 years after the transferor's death, whichever comes first. The wisdom of the 1-year statute is open to debate in cases where interested persons may have no idea that the decedent owned or conveyed a particular property. Recording an affidavit of death does not provide *actual* notice to interested persons. And, again, it is not clear why there is a need for a limitations period that is different than the period that would apply in the case of a irrevocable deed or a joint tenancy transfer. The more general statute of limitations for fraud is 3 years from discovery. CCP §338(d).

Liability for Transferor's Debts and Other Consequences

A beneficiary who acquires a decedent's property under a revocable TOD deed generally becomes liable for the decedent's debts, to the extent of the net value of the transfer, unless the transfer is disclaimed. Prop Prob C §§5672–5676. These rules are not unlike those that apply when a small estate is collected without administration. The transferee also may be liable for Medi-Cal recoveries, and must give the Prob C §215 notice to the Department of Health Services. Prop Prob C §5654(b), 5680(c). The transfer at death will trigger a reassessment for property tax purposes unless a parent-child or other statutory exemption applies. Prop Prob C §5656(b).

The Statutory Form

Proposed Prob C §5642 provides a "statutory form" for a revocable TOD deed. Use of the statutory form is permissive. Prop Prob C §5640. A copy of the statutory form follows this article. Despite confusing warnings, the statutory form effectively invites estate planning disaster for married couples by suggesting that married couples create legal life estates for each other. The potential problems would apply to other co-owners as well. The well-intended motivation for this choice can be found in 36 Cal L Revision Comm'n Reports 163–164, which states in part:

> Revocable TOD deed legislation should be clear that all coowners may join in a revocable TOD deed of their property. However, a joint revocable TOD deed raises issues with respect to revocability and other exercise of ownership rights during the lives of the coowners as well as during the period between the deaths of the coowners.
>
> Suppose both spouses join in a revocable TOD deed of their community property or joint tenancy property, naming their child as beneficiary. Suppose further that after the first spouse dies the survivor remarries and wishes to revoke the revocable TOD deed and make a disposition of the property to the new spouse. Is that permissible? Or should the survivor be allowed to revoke only as to the survivor's interest? Or should a jointly executed TOD deed become irrevocable?
>
> ….
>
> The law should pass an interest to the revocable TOD beneficiary immediately on death of a coowner, and allow revocation of the revocable TOD deed as to the surviving coowner's interest. The transfer may be made subject to a life estate in the surviving coowner, if desired.

The quoted language reveals a policy decision in favor of assuring that ultimate disposition of the property is not unilaterally determined by the last co-owner to die. As we see, the one and only statutory form reflects that decision.

The problem here, for better or worse (pardon the phrase), is that it is necessary to consider the question of whether to preserve the testamentary wishes of a first spouse to die. This question must be considered, both by individuals and by the law, in the context of the price to be paid for that preservation. The choices are particularly difficult in the case of those couples who are the most likely candidates for using self-help estate planning devices—couples who may not have sufficient wealth to be reasonably sure that the surviving spouse can survive financially on nothing more than the survivor's share of the community property.

When there is doubt about the sufficiency of the survivor's own wealth, a myriad of problems can be addressed by a carefully drafted trust that, among other things, can address the following issues:

- Can the residence be sold or encumbered without the consent and joinder of remainder beneficiaries if the spouse needs to move to a retirement home or closer to family members?
- Are the beneficiaries of the first spouse to die determined on the first death or 20 years later when the survivor dies?
- How do we determine the value of the property that is fairly (and legally) distributed in accordance with the wishes of the first spouse to die if the residence is worth $1 million on the date of the first death, but is subject to a mortgage of $800,000?
- What happens if, during the life of the surviving spouse, the beneficiary of the first spouse to die develops creditor problems (perhaps because of catastrophic medical bills), goes bankrupt, loses capacity, or goes to jail?

In the context of very modest wealth, even the most skillful trust drafters would find it difficult to address these questions with custom-drafted trusts. It is simply not possible to address the same questions adequately or even reasonably by, essentially, checking the "legal life estates" box on a statutory form revocable TOD deed.

Consider the case of a couple of very modest wealth—age 60, both of whom currently want a residence to go to Husband's "Daughter" when the survivor dies. Assume they sign the statutory revocable TOD deed and choose the life estate option. Husband dies. Residence is worth $700,000 and has a mortgage of $350,000, so that, Husband's one-half community property equity has a present value of $175,000. The value of a remainder interest in that $175,000 of equity following the life of a 60-year-old woman is peanuts financially—no matter how important it may be psychologically. The price(s) paid to preserve that remainder interest immediately include the following:

- Daughter can effectively create a lawsuit out of any attempt to sell or encumber the residence—even if, for example, the survivor needs a reverse mortgage or money to repair the roof.

- There are a lot of issues concerning liability for the mortgage, with Daughter taking the position that she should contribute nothing towards the increased value of her remainder interest that would result if the survivor paid all the mortgage payments.
- Daughter is a wonderful stepchild and there are no problems for 10 years, but her one-half remainder interest is then acquired by creditors (perhaps, again, the health care providers for a catastrophic illness), or by her heirs or whoever—persons or entities who might be able to force partition by sale of the residence, thereby evicting Wife while she is still living.

One could gild this lily of an argument, but the point is that it is difficult to imagine that a respectable estate planner would allow the creation of such a mess without suggestions of better alternatives and signatures in blood of Husband and Wife attesting that they were fully informed of the potential disadvantages of exposing the survivor to such risks.

Under the circumstances, it seems difficult to justify a proposed legislative choice to create a single statutory form that encourages this result. Ironically and inconsistently, the CLRC identifies and criticizes the disadvantages of legal life estates—barely coming to the conclusion that they should be allowed at all—but certainly not concluding that they should recommended. 36 Cal L Revision Comm'n Reports 177–179.

Ironically and inconsistently, the CLRC identifies and criticizes the disadvantages of legal life estates.

Making matters worse, the proposed legislation provides no assistance for couples who might choose to leave property outright to the survivor and to make a provision for an alternative transfer that would avoid conferring immediate rights on that alternate transferee by giving the surviving spouse the ability to unilaterally revoke that transferee's interest during the period of survivorship. Trying to word a joint revocable deed in a way that would accomplish that result would be a challenge even for a very skilled real estate attorney. (Try it!) Matters are not helped by the fact that the proposed legislation, as noted above, provides that a revised TOD deed severs any joint tenancy or community property right on the death of a transferor. The deed can override that rule, but the drafter not only would need drafting skill, but would also need to understand a long and complicated statute that most self-helpers will not read and could not reasonably be expected to understand even if they did.

We hope these issues can be addressed during the legislative process. A good first step would be to eliminate the statutory form that allows for multiple transferors and substitute a statutory form for a single transferor. If each spouse filled out a separate form stating what he or she wanted to have happen on death, there would be at least a sporting chance that the transferor would perceive the need to designate the spouse as the primary transferee before naming an alternate.

Text of Proposed Statutory Form

Proposed Prob C §5642 would create the following statutory form.

Recording Requested By:

When Recorded Mail This Deed To

Name:

Address:

Assessor's Parcel Number: Space Above For Recorder's Use

This deed is exempt from documentary transfer tax under Rev. & Tax. Code § 11930.

This deed is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3.

Notice to Owner. This deed may have significant and unintended consequences for your estate plan; you should consult a professional before using it.

- This deed MUST be recorded before you die in order to be effective.
- You may revoke this deed by recording another instrument before you die.
- The property conveyed by this deed may be liable for reimbursement of the state for Medi-Cal expenditures.
- If you hold this property in joint tenancy or as community property with right of survivorship, this deed will pass your interest in the property to the beneficiary and not to a surviving co-owner. You may choose to make the beneficiary's right subject to a life estate in your surviving spouse.
- If you do not want these results, you should not use this form.

Notice to Beneficiary. This deed does not transfer ownership of the property to you until the owner dies, and you acquire no rights in the property until then. The owner may revoke this deed at any time.

- When the owner dies you should record evidence of death under Probate Code Section 210 and you must (1) file the change in ownership notice required by Revenue and Taxation Code Section 480 and (2) notify the Department of Health Services if required by Probate Code Section 215.
- You should file a claim for reassessment exclusion under Revenue and Taxation Code Section 63.1, if applicable.
- If you do not wish to receive the property, you may disclaim it under Probate Code Section 275.

IDENTIFYING INFORMATION

Owner(s) of Property Who Join in this Deed: _____

_____

Address or Other Description of Property: _____

Name(s) of Beneficiary(ies): _____

_____

TRANSFER ON DEATH

I transfer all my interest in the described property to the named beneficiary on my death. If I name more than one beneficiary, the beneficiaries shall take equal shares as tenants in common. If a named beneficiary dies before me, the share that would otherwise go to that beneficiary shall pass in accordance with applicable provisions of the California Probate Code.

If I sign here, I choose to make the beneficiary's right to the described property subject to a life estate in my surviving spouse. Signature(s) of owner(s) who make this choice:

_____

_____

This revocable TOD deed revokes any previous revocable TOD deed I have made for the described property. This deed is revocable at any time before my death.

SIGNATURE AND DATE

Signature(s) of Owner(s) Who Join in this Deed:

_____

_____

Date: _____

ACKNOWLEDGMENT

State of California)

County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that by his/her/their signature(s) on the instrument the person(s) executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

Refundable AMT Credit and 100-Percent Excise Tax on UBTI of Charitable Remainder Trusts Highlight Tax Relief and Health Care Act of 2006

Robert Denham

Introduction

On December 20, 2006, President George W. Bush signed into law the Tax Relief and Health Care Act of 2006 (Pub L 109–432, 120 Stat 2922). In a landmark success for Silicon Valley lobbying efforts, the Act provides a one-time, 5-year refundable credit for taxpayers with long-term unused minimum tax credits from incentive stock options. The Act also modifies the tax treatment of unrelated business taxable income (UBTI) so that charitable remainder trusts with UBTI are no longer taxed as complex trusts.

The Act temporarily extends a number of popular tax relief provisions that were set to expire and includes a number of provisions designed to increase the use of Health Savings Accounts (HSAs), including a provision for a once-in-a-lifetime rollover from an IRA. (As discussed below under Health Savings Accounts, these provisions are of limited interest in California because state law does not permit the tax-free use of these accounts.) The Act also amends the Medicaid annuity provisions of the Deficit Reduction Act.

Finally, the Act increases the civil penalty for filing frivolous returns and imposes the same penalty on specified "frivolous submissions" to the IRS.

Refundable Long-Term Unused AMT Credits

Under IRC §421(a), no income results on the exercise of incentive stock options. Instead, the excess of the amount realized on later sale of the stock over the exercise price is generally treated as a capital gain. However, §421 does not apply for purposes of the alternative minimum tax (AMT). IRC §56(b)(3). Thus, an amount equal to the excess of the fair market value of the stock over the exercise price on the exercise date is included in the taxpayer's alternative minimum taxable income under IRC §55(b)(2). The amount included is the taxable amount on the exercise of nonqualified stock options under IRC §83. In *Tuff v U.S.* (9th Cir 2006) 469 F3d 1249, for example, the court held that a taxpayer who exercised nonqualified stock options in 1999 to purchase RealNetworks stock with a fair market value of $460,093 and an exercise price of $6137 had a tax liability of $208,513 on income equal to the difference of $453,956.

The AMT applies to the extent that the taxpayer's tentative minimum tax exceeds the taxpayer's regular tax for the taxable year. The tentative minimum tax is equal to 26–28 percent of alternative minimum taxable income in excess of the exemption amount ($62,550 for a joint return, $42,500 for single taxpayers, in 2006). In 2007, the exemption amounts revert to $45,000 and $33,750, respectively, unless the increased amounts are again extended. The exemption amounts are phased out for married couples with adjusted gross income (AGI) over $150,000 and single taxpayers with AGI over $112,500.

Taxpayers receive a minimum tax credit for AMT paid that may be applied in future years to the extent that the regular tax liability of the taxpayer (reduced by other allowable credits) exceeds the tentative minimum tax for the taxable year. IRC §53(c). The credit is not allowed for AMT resulting from exclusion preferences under IRC §57, but the credit is allowed for adjustments made in