

Memorandum 2007-60

2007 Legislative Program: Revocable Transfer on Death Deed

AB 250 would create the revocable transfer on death ("TOD") deed for real property. See *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006). The bill was set for a July 10, 2007, hearing before the Senate Committee on the Judiciary.

At the hearing, committee members expressed general concerns about the risk of fraud or user error that might attach to the proposed TOD deed. It appeared plain that the committee members were not ready to approve the bill.

Assembly Member DeVore voluntarily withdrew the bill from the committee's calendar, without a vote. He indicated that he would work with the committee staff to address concerns about the bill and bring it back for a hearing in 2008.

On December 4, 2007, staff from the Law Revision Commission, Assembly Member DeVore's office, and the Senate Committee on the Judiciary met informally to discuss AB 250. No commitments were made, but a number of possible changes to the bill were discussed.

The possible changes are discussed below.

Simplified Revocation Form

Under the proposed law, a recorded revocable TOD deed could be revoked by executing and recording a statutory revocation form. The form would require that the affected property be identified and that the deed being revoked be identified (by the date it was recorded and the specific book and page number at which it appears in the county records).

Concern has been expressed that the complexity of the form could impede revocation, leaving a deed in effect that the transferor would like to revoke. That is possible. The requirements for identification of the deed being revoked could be confusing, or lead to error. Suppose the wrong book and page number are given? Suppose that the transferor had previously recorded two deeds, with the

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

second automatically revoking the first by operation of the proposed law. Then the transferor records a revocation identifying the *first* deed (which was already revoked by recordation of the second deed). In all likelihood, that would be a mistake that would defeat the transferor's intentions (to revoke the *second* deed).

The staff believes that there is no need to identify the specific deed being revoked. By operation of the proposed law, the recordation of any revocable TOD deed revokes all prior recorded revocable TOD deeds. As a result, there can only ever be one operative deed in the records. It should therefore be sufficient to provide a revocation form that would be used by a person to *revoke all prior revocable TOD deeds that were recorded for the identified property*. The requirement that a specific deed be identified could be eliminated.

That should not produce any substantive change in outcome, but would make the form simpler to use and would avoid the possibility of errors relating to the identification of the deed.

This seems like a positive change that would help to reduce the risk of user error.

Special Form for Life Estate Creation

Under the proposed law, the statutory revocable TOD deed form could be used either to transfer property directly to named beneficiaries on death, or to first transfer it to a life tenant, and then to named remainder beneficiaries on the death of the life tenant.

The fact that *one* form allows for *both* alternatives adds to the complexity of the form and the user instructions on the back of the form.

The presence of a technically complicated "option" in the middle of the form could lead to misunderstanding and error. As presently drafted, the form would include the following content:

OPTIONAL LIFE ESTATE

DO NOT COMPLETE THIS PART OF THE FORM UNLESS YOU WANT TO CREATE A LIFE ESTATE. See the other side of this form for a description of the life estate option.

By naming a person below, I create a life estate in that person. After that person dies, ownership of the property will transfer to my named beneficiary or beneficiaries.

Print name of person to receive life estate (IF ANY):

If a user is not sure what is meant by a “life estate” or cannot follow the “do not ... unless” construction of the explanation, the user could misunderstand and accidentally create a life estate.

In principle, the potential for misunderstanding and error could be reduced if there were two revocable TOD deed forms. The first would not have any provision for creation of a life estate. The second would be specifically designed for the creation of a life estate. Neither form would have an optional section. The explanatory text could be tailored to the limited purpose of the form.

Most users will probably not want to create a life estate. For those users, the simple form would be almost fool-proof.

There would be some risk that a person would use the wrong form. However, that risk would probably be smaller than the risk that a person would make a mistake using a unified form with a life estate option built into the form.

The staff has attached model forms as an Exhibit, to illustrate the principle discussed above. Final details would need to be worked out with Mr. DeVore, if he decides to follow that approach.

In preparing the draft form for creation of a life estate, the staff attempted to minimize use of the term “life estate,” which many users will not understand. Instead the form speaks in terms of a “two-step” transfer: the property would first be transferred to the “first-step beneficiary” for that person’s life, and then to the “second-step beneficiary.”

In order to avoid any legal ambiguity that would result from that unconventional language, the text introducing the transferor’s signature uses the terms “life estate” and “remainder.” In addition, language could be added to the proposed law to expressly provide that the effect of the form is to create a life estate in the “first-step beneficiary” with a remainder to the “second-step beneficiary.”

The staff believes that the “two-step” terminology would be easier for a layperson to understand and would reduce the risk of error.

Extended Contest Period

Under the proposed law, if a person successfully contests the validity of a revocable TOD deed, the relief that can be granted depends on whether the contest was initiated and a *lis pendens* recorded within 90 days of the transferor’s death. If so, then the deed can be voided and the transfer undone. If not, the court may grant “appropriate relief” except that the rights of a bona fide

purchaser in good faith are not disturbed (if the person purchased the property before the commencement of the contest and the recording of the lis pendens.)

In other words, there is a 90-day period during which there is no BFP protection. A person who purchases the property from the nominal beneficiary during that period is at risk of having the transfer voided.

Concern was expressed that the 90-day period might be too short. The disruption and grief associated with the death of a loved one may make it difficult to learn of a revocable TOD deed, figure out whether there is grounds for a contest, and file a contest within such a short time after the transferor's death. The California Judges Association has previously recommended that the period be doubled, to 180 days.

That would extend the period in which it would be difficult for a beneficiary to sell the property, but not by much. However, the extra 90 days could possibly be crucial to grieving heirs who need time to evaluate a transferor's estate plan and figure out whether a problem exists with the revocable TOD deed.

On balance, the increased delay on the sale of the property that would result from an extension of the time period would be relatively modest, while the increased opportunity to stop a fraudulent transfer could be quite significant.

Deadline for Recordation of Deed

Another proposed change would be to require that a revocable TOD deed be recorded within a fixed period of time (e.g., 30 days) in order to be effective. Under the proposed law, a deed could be recorded at any time prior to the transferor's death.

The purpose of the proposed change would be to reduce the risk that a transferor would procrastinate and ultimately forget to record. If one can act any time before death, there is no incentive to act right away. By contrast, if it is clear that the deed must be recorded before a specified date to have any effect, it is much less likely that a deed will go unrecorded as a result of forgetfulness.

There are other problems that could arise under the proposed law. Suppose that a person executes a revocable TOD deed and gives it to the beneficiary to record. The beneficiary holds the deed and does not record it right away. Then the beneficiary and the transferor have a falling out. The transferor would like to revoke the deed, *but cannot do so until after the deed is recorded*. The transferor executes a new deed naming another person as beneficiary and gives the deed to that person to record. Under the proposed law, when more than one deed is

recorded, the last recorded deed prevails, regardless of the dates of execution. This could lead to a game of “chicken,” with contending beneficiaries delaying recordation in order to record last.

Those sorts of problems could be avoided if the law were to require recordation within 30 days after execution. Any deed could be revoked within 30 days after its execution, either by recordation of a revocation form, or by recordation of a new deed for the same property.

Limited Scope “Pilot Project”

Another possible revision that was suggested at the staff meeting would be to limit the operation of the proposed law, either geographically or by limiting the persons who could use the revocable TOD deed (e.g., only for gifts to a spouse, domestic partner, or child of the transferor). The efficacy of the revocable TOD deed could then be evaluated in a limited arena, where any problems would also be limited. The Commission could reevaluate after several years and recommend whether the limits should be removed or the concept scrapped entirely.

Conclusion

In its present form, it is doubtful that AB 250 will be approved by the Senate Committee on the Judiciary. However, if significant good faith efforts are made to address the committee’s concerns, the staff believes that there is a good chance of approval (though no certainty).

The Commission should consider whether any of the changes described above are so incompatible with the Commission’s recommendation that they would require the Commission to withdraw from participation in the enactment of the bill. If so, the staff will communicate that fact to Mr. DeVore.

Respectfully submitted,

Brian Hebert
Executive Secretary

ONE-STEP REVOCABLE TRANSFER ON DEATH (TOD) DEED
(California Probate Code Section 5600)

Recording Requested By:
When Recorded Mail This Deed To
Name:

Address:

Assessor's Parcel Number

Space Above For Recorder's Use

This document is exempt from documentary transfer tax under Rev. & Tax. Code § 11930. This document is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3.

IMPORTANT NOTICE: THIS DEED MUST BE RECORDED BEFORE YOU DIE

Use this deed to transfer the property described below directly to your named beneficiaries when you die.

YOU SHOULD CAREFULLY READ ALL OF THE INFORMATION ON THE OTHER SIDE OF THIS FORM. You may wish to consult an attorney before using this deed. It may have results that you don't want. Provide only the information asked for in the form. DO NOT INSERT ANY OTHER INFORMATION OR INSTRUCTIONS. This form MUST be RECORDED before your death or it will not be effective.

PROPERTY DESCRIPTION

Print the address or other legal description of the property affected by this deed:

BENEFICIARY(IES)

Print the NAME(S) of the person(s) who will receive the property on your death (DO NOT use general terms like "my children"):

TRANSFER ON DEATH

I transfer all of my interest in the described property to the named beneficiary(ies) on my death. I may revoke this deed. When recorded, this deed revokes any TOD deed that I made before signing this deed.

Sign and print your name below:

_____ Date _____

NOTE: This deed only transfers MY ownership share of the property. The deed does NOT transfer the share of any co-owner of the property. Any co-owner who wants to name a TOD beneficiary must complete and RECORD a SEPARATE deed.

ACKNOWLEDGMENT OF NOTARY

State of California)
County of _____)

On (date), before me, (name of notary), a notary public in and for said County and State, personally appeared (name of signer), personally known to me, or proved to me on the basis of satisfactory evidence, to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument. WITNESS my hand and official seal.

Signature of Notary _____

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

WHAT DOES THE TOD DEED DO? When you die, the identified property will transfer to your named beneficiary, without probate. The TOD deed has no effect until you die. You can revoke it at any time.

HOW DO I USE THE TOD DEED? Complete this form. Have it notarized. RECORD the form in the county where the property is located. The form MUST be recorded before your death or it has no effect.

HOW DO I "RECORD" THE FORM? Take the completed and notarized form to the County Recorder for the county in which the property is located. Follow the instructions given by the County Recorder to make the form part of the official property records.

WHAT IF I SHARE OWNERSHIP OF THE PROPERTY? This form only transfers YOUR share of the property. If a co-owner also wants to name a TOD beneficiary, that co-owner must complete and RECORD a separate form.

CAN I REVOKE THE TOD DEED IF I CHANGE MY MIND? Yes. You may revoke the TOD deed at any time. No one, including your beneficiary, can prevent you from revoking the deed.

HOW DO I REVOKE THE TOD DEED? There are three ways to revoke a recorded TOD deed: (1) Complete, notarize, and RECORD a revocation form. (2) Create and RECORD a new TOD deed, trust, or other estate planning document that disposes of the same property. (3) Sell or give away the property before your death and RECORD the deed. A TOD deed can only affect property that you own when you die.

IF I CREATE A NEW TOD DEED, TRUST, OR OTHER ESTATE PLANNING DOCUMENT THAT DISPOSES OF THE SAME PROPERTY, DOES THAT AUTOMATICALLY REVOKE A RECORDED TOD DEED? No. If you want the new document to revoke a recorded TOD deed, the new document MUST be signed and dated after the deed you wish to revoke and it must be RECORDED. To avoid any doubt about whether the deed is revoked, you can also complete and RECORD a revocation form.

I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO? Do NOT complete this form unless you freely choose to do so. If you are being pressured to dispose of your property in a way that you do not want, you may want to alert a family member, friend, the district attorney, or a senior service agency.

DO I NEED TO TELL MY BENEFICIARY ABOUT THE TOD DEED? No. But, secrecy can cause later complications and might make it easier for others to commit fraud.

WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your beneficiary must RECORD evidence of your death (Prob. Code § 210), and file a change in ownership notice (Rev. & Tax. Code § 480). If you received Medi-Cal benefits, your beneficiary may also be required to notify the State Department of Health Care Services (Prob. Code § 215).

WHAT IF I NAME MORE THAN ONE BENEFICIARY? Your beneficiaries will become co-owners in equal shares. If you want a different result, you should not use this form. You MUST name your beneficiaries individually. You MAY NOT use general terms to describe beneficiaries, such as "my children."

WHAT IF A BENEFICIARY DIES BEFORE I DO? You should probably create and RECORD a new deed. Otherwise, the property will transfer according to the general rules on failed gifts, which may not meet your needs. See Prob. Code §§ 21110-21111.

WHAT IS THE EFFECT OF A TOD DEED ON PROPERTY THAT I OWN AS JOINT TENANCY OR COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP? If you are the first joint tenant or spouse to die, the deed is VOID and has no effect. The property transfers to your joint tenant or surviving spouse and not according to this deed. If you are the last joint tenant or spouse to die, the deed takes effect and controls the ownership of your property when you die. If you do not want these results, do not use this form. The deed does NOT transfer the share of a co-owner of the property. Any co-owner who wants to name a TOD beneficiary must complete and RECORD a SEPARATE deed.

CAN I ADD OTHER CONDITIONS ON THE FORM? No. If you do, your beneficiary may need to go to court to clear title.

IS PROPERTY TRANSFERRED BY THE TOD DEED SUBJECT TO MY DEBTS? Yes.

DOES THE TOD DEED HELP ME TO AVOID GIFT AND ESTATE TAXES? No.

HOW DOES THE TOD DEED AFFECT PROPERTY TAXES? The TOD deed has no effect on your property taxes until your death. At that time, property tax law applies as it would to any other change of ownership.

DOES THE TOD DEED AFFECT MY ELIGIBILITY FOR MEDI-CAL? No.

AFTER MY DEATH, WILL MY HOME BE LIABLE FOR REIMBURSEMENT OF THE STATE FOR MEDI-CAL EXPENDITURES? If your estate is subject to reimbursement, any property transferred by a TOD deed will also be subject to reimbursement.

TWO-STEP REVOCABLE TRANSFER ON DEATH (TOD) DEED
(California Probate Code Section 5600)

Recording Requested By:
When Recorded Mail This Deed To
Name:
Address:
Assessor's Parcel Number

Space Above For Recorder's Use

This document is exempt from documentary transfer tax under Rev. & Tax. Code § 11930. This document is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3.

IMPORTANT NOTICE: THIS DEED MUST BE RECORDED BEFORE YOU DIE

Use this deed to transfer the property described below in two steps: first to the person named as "first-step beneficiary" for the duration of that person's life, and then to the person or persons named as "second-step beneficiaries" after the death of the first-step beneficiary. This is a complex arrangement that may cause disputes between the first and second-step beneficiaries. You should consult an attorney before choosing to use this form. **If you do not want a two-step transfer, use the One-Step Revocable Transfer on Death (TOD) Deed Form instead.**

YOU SHOULD CAREFULLY READ ALL OF THE INFORMATION ON THE OTHER SIDE OF THIS FORM. Provide only the information asked for in the form. DO NOT INSERT ANY OTHER INFORMATION OR INSTRUCTIONS. This form MUST BE RECORDED before your death or it will not be effective.

PROPERTY DESCRIPTION

Print the address or other legal description of the property affected by this deed:

FIRST-STEP BENEFICIARY

Print the NAME of the person who will receive the property on your death. This person will own the property until the person's death, at which time it will transfer to the second-step beneficiaries named below. You must NAME the person. Do not use descriptive terms like "my children."

SECOND-STEP BENEFICIARY

Print the NAME(S) of the person(s) who will receive the property on the death of the first-step beneficiary named above. You must NAME the person(s). Do not use descriptive terms like "my children."

TRANSFER ON DEATH

I transfer all of my interest in the described property on my death, as follows: a life estate to the person named as "first-step beneficiary" with a remainder to the person(s) named as "second-step beneficiaries." I may revoke this deed. When recorded, this deed revokes any TOD deed that I made before signing this deed.

Sign and print your name below:

_____ Date _____

NOTE: This deed only transfers MY ownership share of the property. The deed does NOT transfer the share of any co-owner of the property. Any co-owner who wants to name a TOD beneficiary must complete and RECORD a SEPARATE deed.

ACKNOWLEDGMENT OF NOTARY

State of California)
County of _____)

On (date), before me, (name of notary), a notary public in and for said County and State, personally appeared (name of signer), personally known to me, or proved to me on the basis of satisfactory evidence, to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument. WITNESS my hand and official seal.

Signature of Notary _____

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

WHAT DOES THE TOD DEED DO? When you die, the identified property will transfer to the “first-step beneficiary” for the duration of that person’s life. After that person’s death, the property will transfer to your “second-step beneficiary.” If you do not want this two-step arrangement, you should use the One-Step Revocable Transfer on Death (TOD) Deed Form instead. Probate is not required for a transfer under this deed. The deed has no effect until you die. You can revoke it at any time.

HOW DO I USE THE TOD DEED? Complete this form. Have it notarized. RECORD the form in the county where the property is located. The form MUST be recorded before your death or it has no effect.

HOW DO I "RECORD" THE FORM? Take the completed and notarized form to the County Recorder for the county in which the property is located. Follow the instructions given by the County Recorder to make the form part of the official property records.

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WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your beneficiary must RECORD evidence of your death (Prob. Code § 210), and file a change in ownership notice (Rev. & Tax. Code § 480). If you received Medi-Cal benefits, your beneficiary may also be required to notify the State Department of Health Care Services (Prob. Code § 215).

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CAN I ADD OTHER CONDITIONS ON THE FORM? No. If you do, your beneficiary may need to go to court to clear title.

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DOES THE TOD DEED HELP ME TO AVOID GIFT AND ESTATE TAXES? No.

HOW DOES THE TOD DEED AFFECT PROPERTY TAXES? The TOD deed has no effect on your property taxes until your death. At that time, property tax law applies as it would to any other change of ownership.

DOES THE TOD DEED AFFECT MY ELIGIBILITY FOR MEDI-CAL? No.

AFTER MY DEATH, WILL MY HOME BE LIABLE FOR REIMBURSEMENT OF THE STATE FOR MEDI-CAL EXPENDITURES? If your estate is subject to reimbursement, any property transferred by a TOD deed will also be subject to reimbursement.