

Memorandum 2015-9

2015 Legislative Program (Status Report)

The attached table summarizes the status of the Commission's¹ 2015 legislative program. The staff will supplement that information orally, if necessary, at the upcoming meeting.

Issues relating to AB 139 (Gatto) are discussed below.

AB 139 (Gatto). Revocable Transfer on Death Deed

Assembly Bill 139 (Gatto) would implement the Commission's recommendation on *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006). The bill would authorize the use of a revocable deed to transfer title to real property on death, outside of probate. The deed would not create any interest in property during the transferor's lifetime and would remain freely revocable until the transferor's death. The deed would need to be recorded to be effective.

This is not the first bill that has been introduced to implement the Commission's recommendation on this topic. The prior bills were: AB 250 (DeVore) (2007), AB 724 (DeVore) (2009), and AB 699 (2011).

The first in the series of bills, AB 250, was amended to address concerns that arose in the Legislature. Those amendments created the following differences between the legislation and the Commission's recommendation:

- *Commission Study.* The legislation added a provision requiring that the Commission conduct a follow-up study, four years after the legislation takes effect. The study would consider any problems that arise and make recommendations on whether the law should continue and, if so, how it might be improved.

¹. 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.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

- *Sunset Provision.* The legislation would be repealed by operation of law, five years after it takes effect, unless the sunset provision is repealed or extended. Repeal of the statute would have no effect on any revocable transfer on death deeds that were executed while the statute was in effect.
- *Execution.* The Commission's recommendation includes express language that would authorize signature by an agent, in the presence of the transferor and with the transferor's acknowledgement. The legislation does not.
- *Recordation.* The Commission's recommendation provides that a revocable transfer on death deed must be recorded before the transferor's death in order to be effective. The legislation would instead require recordation within 60 days of the date of execution of the deed.
- *Statutory form deed.* Under the Commission's recommendation, use of the statutory form deed would be permissive. Under the legislation, it would be mandatory.
- *Joint Tenancy and Community Property with Right of Survivorship.* Under the Commission's recommendation, the operation of the revocable transfer on death deed would sever a right of survivorship (if the property is held at death as joint tenancy or community property with the right of survivorship). Under the legislation, a right of survivorship would trump the revocable transfer on death deed, rendering it void.
- *Reimbursement of Personal Representative for Recovery of Property to Satisfy Creditor Claims.* Both the recommendation and legislation would authorize a transferor's personal representative to bring an action to enforce transferor creditor claims against the beneficiary of a revocable transfer on death deed. The legislation was amended to make clear that such action would be optional and that the personal representative could recover the cost of the action.
- *Medi-Cal Estate Recovery.* The legislation was amended to make clear that the general time limitation for bringing an action to enforce a creditor claim against a beneficiary of a revocable transfer on death deed would have no effect on the time when an action for Medi-Cal estate recovery may be brought.
- *Time to Record Lis Pendens.* Both the recommendation and legislation would authorize recordation of a lis pendens when an action contesting a revocable transfer on death deed has been commenced. The recommendation would allow recordation within 90 days. The legislation would instead provide 120 days.

All of the changes described above were considered by the Commission when the first bill — AB 250 — was pending. There is one further substantive change that was made in AB 139:

- *Life Estate*. The recommendation would have allowed the use of a revocable transfer on death deed to transfer a life estate to a named beneficiary, with a remainder to other named beneficiaries. It included an optional statutory form for that purpose. AB 139 does not include the life estate option.

The Commission needs to decide whether to accept those changes as compatible with the main purpose of its recommendation.

In addition, the Commission should revise its official Comments to reflect the differences described above. Failure to revise the Commission's Comments could create confusion in the record, to the extent that a Comment is inconsistent with the effect of AB 139. The staff has attached a draft report setting out revised Comment language (with strikeout and underscore to show changes from the original).

If approved, the report (with strikeout and underscore removed) will be provided to any further policy committees that consider AB 139 and, if the bill is approved by the Legislature, the Governor. If the bill is eventually enacted into law, the revised Comments will be published as an appendix to the next Annual Report and provided to legal publishers to supplement the Commission's recommendation.

Respectfully submitted,

Brian Hebert
Executive Director

Status of 2015 Commission Legislative Program

As of March 26, 2015

		AB 139	AB 1527									
		Introduced	1/9/15	3/18/15								
		Last Amended	3/5/15									
First House	Policy Committee	3/17/15										
	Second Committee	3/25/15										
	Passed House											
Second House	Policy Committee											
	Second Committee											
	Passed House											
Concurrence												
Governor	Received											
	Approved											
Secretary of State	Date											
	Chapter #											

Bill List: AB 139 (Gatto): Revocable Transfer on Death Deed
 AB 1527 (Committee on Water, Parks, and Wildlife): Fish and Wildlife

KEY

Italics: Future or speculative

"—": Not applicable

*: Double referral, not fiscal

[date]: Deadline

DRAFT REPORT OF THE
CALIFORNIA LAW REVISION COMMISSION
ON ASSEMBLY BILL 139

Revocable Transfer on Death (TOD) deed

Assembly Bill 139 was introduced by Assembly Member Mike Gatto, on recommendation of the California Law Revision Commission. The measure would implement the Commission's recommendations on *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006). The revised Comments set out below supersede the comparable Comments in the recommendation.

Prob. Code § 5602. Effect on other forms of transfer

Comment. ~~Subdivision (a) of~~ Section 5602 recognizes the possibility of other devices that may achieve an effect similar to the revocable TOD deed, such as a revocable deed under *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914), or another instrument under Section 5000 (nonprobate transfer).

~~Although a revocable TOD deed is ineffective unless recorded before the owner's death (see Section 5626), subdivision (b) makes clear that the pre-death recordation requirement does not apply to other types of deed. As between a revocable TOD deed recorded before the transferor's death and another instrument recorded after the transferor's death, the revocable TOD deed prevails. See Section 5660 (conflicting dispositive instruments).~~

Prob. Code § 5622. Beneficiary

Comment. Subdivision (a) of Section 5622 makes explicit the requirement that a beneficiary be identified by name in the instrument. A class gift is not permissible.

~~Subdivision (b) makes explicit the right of a transferor to name an alternate beneficiary. The transferor may name more than one alternate beneficiary. Subdivision (c); see also Section 10 (singular includes plural). multiple beneficiaries.~~

~~Subdivision (c) makes explicit the right of a transferor to name multiple beneficiaries.~~ A beneficiary must survive the transferor in order to take an interest under this section. Section 21109. For the consequence of a named beneficiary's failure to survive the decedent, see Section 21110 (antilapse).

Subdivision (c) makes clear that the beneficiary under a revocable TOD deed may be a trustee and need not be the trust beneficiary. If a trust named as beneficiary is revoked before the transferor's death, general rules of construction applicable to such a gift would govern. See Section 21111 (failure of transfer).

~~A transferor may condition the beneficiary's right to the property on an intervening life estate. See Section 5652 (effect at death).~~

Prob. Code § 5624. Execution

Comment. Section 5624 prescribes execution requirements. A revocable TOD deed is not invalid because it does not comply with the requirements for execution of a will. See Section 5000(a) (provision for nonprobate transfer on death in written instrument).

A properly executed revocable TOD deed is ineffective unless recorded ~~before the transferor's death~~ within 60 days after it is executed. See Section 5626 (recordation, delivery, and acceptance).

Prob. Code § 5626. Recordation, delivery, and acceptance

Comment. Subdivision (a) of Section 5626 requires recordation of the revocable TOD deed ~~before the transferor's death~~, but does not require recordation by the transferor — an agent or other person authorized by the transferor may record the instrument. The deed is considered recorded for purposes of this section when it is deposited for record with the county recorder. See Section 5612 ("record" defined).

Subdivision (b) makes clear that delivery of a revocable TOD deed is not necessary, notwithstanding a Law Revision Commission Comment to Section 5000 to the effect that Section 5000 does not relieve against the delivery requirement of the law of deeds. The recordation requirement for a revocable TOD deed makes delivery unnecessary. Consideration is not required for a revocable TOD deed. See Civ. Code § 1040.

Subdivision (c) states the rule that, unlike an inter vivos deed, a revocable TOD deed does not require acceptance. Acceptance of a donative transfer is presumed. Disclaimer procedures are available to a beneficiary. See Sections 267, 279 (disclaimer).

A revocable TOD deed has no effect, and confers no rights on the beneficiary, until the transferor's death. See Section 5650 (effect during transferor's life).

Prob. Code § 5640. Statutory forms ~~permissive~~ mandatory

Comment. Section 5640 makes clear that use of the statutory ~~forms~~ form provided in this article is ~~permissive and is not~~ mandatory. ~~The statutory forms are sufficient to create or revoke a revocable TOD deed.~~

Prob. Code § 5642. Simple revocable TOD deed form

Comment. Section 5642 provides a form for creation of a revocable TOD deed. ~~Use of the form is not mandatory. See Section 5640 (statutory forms permissive).~~

~~The form provided in this section enables the transferor to condition passage of the property to the beneficiary on a life estate~~

~~in the transferor's surviving spouse. Comparable principles apply to a surviving registered domestic partner under Family Code Section 297.5. The option provided in this form should not be read to preclude a transferor from making a revocable TOD deed subject to a life estate in a person other than the surviving spouse, or from imposing conditions on the life estate. See Sections 5640 (statutory forms permissive), 5652 (effect at death).~~

§ 5652. Effect at death

Comment. Under subdivision (a) of Section 5652, whatever interest the transferor owned at death in the property passes to the beneficiary. It should be noted, however, that this provision is not limited to the fee interest. If the transferor's ownership interest is a less than fee interest, the transferor's entire less than fee ownership interest passes to the beneficiary on the transferor's death.

Under subdivision (c), a beneficiary takes only what the transferor has at death. This is a specific application of the general rule that recordation of a revocable TOD deed does not affect the transferor's ownership rights or ability to deal with the property until death. See Section 5650 (effect during transferor's life). Likewise, if an obligation of the beneficiary attaches to the property as a result of the doctrine of after-acquired title, that obligation is subordinate to any limitations on the transferor's interest in the property, and a transfer by the beneficiary financed by a purchase money mortgage is subject to the priority of a recorded encumbrance on the transferor's interest notwithstanding Civil Code Section 2898 (priority of purchase money encumbrance).

Subdivision (d) emphasizes the point that a revocable TOD deed is basically a quitclaim, passing whatever interest the transferor had at death to the beneficiary. ~~A covenant or warranty of title included by the transferor in the deed has no effect.~~

Prob. Code § 5664. Joint tenancy or community property with right of survivorship

Comment. Section 5664 addresses the ~~conflict between a~~ effect of a revocable TOD deed that purports to transfer property held, at the time of the transferor's death, in joint tenancy or community property with a right of survivorship. ~~and an earlier joint tenancy in the property. In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660 (conflicting dispositive instruments).~~

~~Because a revocable TOD deed is revocable until the transferor's death, execution and recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when the transferor dies with the revocable TOD deed still in effect. If another joint tenant who has not made a revocable TOD deed predeceases the transferor, the transferor takes the other joint tenant's interest by right of survivorship, and the combined interest passes pursuant to~~

~~the transferor's revocable TOD deed. See Section 5652(a) (transferor's entire interest in property passes at death).~~

~~In the case of simultaneous death, Section 223 (joint tenants) controls. The proportionate interest of each joint tenant passes under the revocable TOD deed or other dispositive instrument of that joint tenant.~~

Prob. Code § 5666. Community property

Comment. Subdivision (a) of Section 5666 incorporates the general statutes governing the rights of spouses in a nonprobate transfer of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer apply to a revocable TOD deed. Section 5604(a)(2) (effect of other law).

~~Under the rules governing a nonprobate transfer of community property, a person has the power of disposition at death of the person's interest in community property without the joinder of the person's spouse. A revocable transfer on death deed of community property joined in by both spouses is effective as to the interests of both spouses. The revocable TOD deed may be subject to subsequent modification or revocation as to the interest of each spouse. Comparable principles apply to the property of registered domestic partners under Family Code Section 297.5.~~

Subdivision (b) makes clear that the general statute governing the rights of spouses in a nonprobate transfer of community property is qualified by the recording requirement in the case of a revocable TOD deed of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer are subject to a contrary rule in the revocable TOD deed law. See Section 5604(b); see also Section 5011(b) (rights of parties subject to "contrary state statute specifically applicable to instrument under which nonprobate transfer is made").

A third party that acts in reliance on apparent spousal rights under a revocable TOD deed is protected in that reliance. Section 5682 (bona fide purchaser protection).

Prob. Code § 5668. Community property with right of survivorship

Comment. Section 5668 addresses the effect of a revocable TOD deed on community property with right of survivorship. See Civ. Code § 682.1 (community property with right of survivorship).

~~A revocable TOD deed of the property is subject to the rules governing a nonprobate transfer of community property. Subdivision (a).~~

~~Subdivision (b) is consistent with Civil Code Section 682.1(a) (termination of survivorship right pursuant to same procedures by which joint tenancy may be terminated). In the case of simultaneous death, Section 223 (joint tenants) controls; the one-~~

~~half interest of each spouse passes under the revocable TOD deed or other dispositive instrument of that spouse.~~

~~Subdivision (b) provides a default rule; the spouses may provide a different result in the deed. For example, the deed may provide that on the death of the spouse, the property passes to the surviving spouse and, on the death of the surviving spouse, to the TOD beneficiary. In that circumstance, the TOD deed would remain revocable by the surviving spouse. See Sections 5630 (revocability), 5632 (revocation of deed).~~

~~Comparable principles apply to the property of registered domestic partners under Family Code Section 297.5.~~

§ 5690. Contest of transfer

Comment. Section 5690 incorporates the procedure of Sections 850-859, relating to a conveyance or transfer of property claimed to belong to a decedent or other person. A person adversely affected by a revocable TOD deed has standing to contest the transfer. *Cf.* Section 48 (“interested person” defined).

Grounds for contest may include but are not limited to lack of capacity of the transferor (Section 5620), improper execution or recordation (Sections 5624-5626), invalidating cause for consent to a transfer of community property (Section 5015), and transfer to a disqualified person (Section ~~21350~~ 21380). See also Section 5696 (fraud, undue influence, duress, mistake, or other invalidating cause).

The proper county for proceedings for administration of a decedent’s estate is the county of the decedent’s domicile or, in the case of a nondomiciliary, the county of the decedent’s death or, if the decedent died outside the state, where property of the decedent is located. Prob. Code §§ 7051, 7052.

Recordation of a lis pendens within ~~90~~ 120 days after the transferor’s death preserves remedies for the contestant. See Section 5694 (remedies).

§ 5694. Remedies

Comment. The ~~90~~ 120 day period under Section 5694 represents a balance between the 40 day period applicable to disposition of an estate without administration under Sections 13100 (affidavit procedure for collection or transfer of personal property) and 13151 (court order determining succession to property), and the six month period applicable to the affidavit procedure for real property of small value under Section 13200.