

## Memorandum 2016-36

**Revocable Transfer on Death Deed —  
Follow-Up Study: Other States**

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In 2006, the Commission<sup>1</sup> recommended that California authorize the use of a revocable transfer on death deed (“RTODD”) to transfer real property on death, outside of probate.<sup>2</sup>

In 2015, legislation was enacted to implement most of the Commission’s recommendation (with some significant changes as to the scope and effect of the proposed RTODD).<sup>3</sup>

One difference between the Commission’s recommendation and the enacted statute is that the statute contains a “sunset” provision — it will be repealed by operation of law on January 1, 2021 (unless the sunset date is extended or repealed before that date).<sup>4</sup> The sunset provision expressly states that the repeal of the statute will not affect the validity of an RTODD executed before the statute is repealed.<sup>5</sup>

The new law also requires the Commission to conduct a follow-up study of the efficacy of the RTODD:

(a) The California Law Revision Commission shall study the effect of California’s revocable transfer on death deed set forth in Part 4 (commencing with Section 5600) of Division 5 of the Probate Code and make recommendations in this regard. The commission shall report all of its findings to the Legislature on or before January 1, 2020.

(b) In the study required by subdivision (a), the commission shall address all of the following:

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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](http://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.

2. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103 (2006).

3. AB 139 (Gatto); 2015 Cal. Stat. ch. 293.

4. Prob. Code § 5600(c).

5. *Id.*

(1) Whether the revocable transfer on death deed is working effectively.

(2) Whether the revocable transfer on death deed should be continued.

(3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.

(4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.

(5) Whether the revocable transfer on death deed has been used to [perpetrate] financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.

(c)(1) The report required by subdivision (a) shall comply with Section 9795 of the Government Code.

(2) Pursuant to Section 10231.5 of the Government Code, this section is repealed on January 1, 2024.<sup>6</sup>

The staff has begun work on that study, by reviewing the case law in other states that authorize the use of an RTODD.<sup>7</sup> The results of that review are reported below.

## CONTENT AND ORGANIZATION OF MEMORANDUM

### Scope of Research

In preparing this memorandum, the staff searched for cases that involve an RTODD, in the 9 states that have authorized use of the RTODD for at least 10 years. Those states are listed below (with the date of authorization noted in parentheses):

Missouri (1989)<sup>8</sup>  
Kansas (1997)<sup>9</sup>  
Ohio (2000)<sup>10</sup>  
Arizona (2001)<sup>11</sup>  
New Mexico (2001)<sup>12</sup>  
Nevada (2003)<sup>13</sup>  
Colorado (2004)<sup>14</sup>

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6. 2015 Cal. Stat. ch. 293, § 21.

7. For convenience, this memorandum uses the acronym “RTODD” to refer to transfer on death deeds authorized in any state, regardless of how the deed is denominated in that state.

8. Mo. Rev. Stat. § 461.025.

9. Kan. Stat. Ann. § 59-3501.

10. Ohio Rev. Code Ann. § 5302.22.

11. Ariz. Rev. Stat. § 33-405.

12. N.M. Stat. Ann. § 45-6-401.

13. Nev. Rev. Stat. § 111.109.

14. Colo. Rev. Stat. § 15-15-401.

Arkansas (2005)<sup>15</sup>  
Wisconsin (2005)<sup>16</sup>

With respect to those jurisdictions, the staff searched for cases that include the terms “transfer on death deed” or “beneficiary deed,” or that include an express reference to the state statute that authorizes use of the RTODD. The research encompassed both state and federal courts. The staff found no reported RTODD cases for three of the 9 states listed above (Arkansas, Nevada, and New Mexico).

The staff read well over 100 cases, including trial court and appellate court opinions, published and unpublished. While unpublished opinions may have limited precedential value, they are a good source of information about practical problems with the operation of the law.

In dozens of the cases that the staff reviewed, an RTODD was mentioned as part of the factual background but did not appear to have caused any problem. Such cases are not discussed further in this memorandum.

### **Case Summaries**

Summaries of the relevant cases are set out in the attached Exhibit. The summaries are organized first by state. Then, within the discussion of each state’s cases, the summaries are divided into broad categories, by issue:

- *Fraud, Undue Influence, and Incapacity.* This heading is used to collect cases that involve an attack on the validity of the RTODD, based on allegations of fraud, undue influence, or the incapacity of the transferor.
- *Mistake.* In these cases it appears (or is alleged) that an RTODD did not operate as expected, due to an error.
- *Creditor Claims.* These cases address claims of the deceased transferor’s creditors against the property transferred by RTODD. This includes state Medicaid estate recovery claims.<sup>17</sup>
- *Uncertainty.* The cases collected under this heading involve some uncertainty about the effect of an RTODD, for reasons other than a transferor error. Such reasons include an issue left unaddressed by the state’s RTODD statute or an unanticipated interaction between the RTODD statute and other law.

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15. Ark. Code Ann. § 18-12-608.

16. Wisc. Stat. § 705.15.

17. With some exceptions, federal law, as supplemented by state law, allows a state to recover the cost of Medicaid benefits provided to a person. A claim is made after the person’s death, against that person’s estate. See, e.g., 42 U.S.C. § 1396p; Welf. & Inst. Code § 14009.5.

The cases summarized in the Exhibit are analyzed below. That analysis is organized according to the four categories described above.

## ANALYSIS

### **Fraud, Undue Influence, and Incapacity**

The Exhibit summarizes 17 cases in which an RTODD was contested on grounds of fraud, undue influence, or transferor incapacity.

The allegations were proven in 6 of the cases. This confirms, unsurprisingly, that it is *possible* to perpetrate financial abuse using an RTODD.

Unfortunately, that number, by itself, does not give any indication of whether the use of an RTODD to perpetrate financial abuse is *more or less prevalent* than the use of other types of estate planning instruments (e.g., a will, trust, pay-on-death beneficiary designation, joint tenancy, etc.). To answer that question, the staff would need to know how many of each type of instrument operated during a given period of time, and how many of those instruments were subsequently invalidated on grounds of fraud, undue influence, or incapacity. That would allow direct comparison of the rate of abuse for each type of instrument. The staff could not find such data.

However, it is possible to draw two qualitative lessons from the RTODD cases in which the allegations of fraud, undue influence, or incapacity were borne out:

#### *Caregiver Abuse*

Non-family caregivers were the perpetrators in half of the abuse cases. This supports the notion that elderly people are particularly vulnerable to financial abuse by their caregivers.

For that reason, California law establishes a rebuttable presumption that a gift to a caregiver was the product of fraud or undue influence.<sup>18</sup> The California RTODD statute states expressly that an RTODD is subject to that presumption.<sup>19</sup> *That should offer significant protection against caregiver financial abuse.*

#### *No Special Vulnerability to Abuse*

The staff did not find anything in the reported cases that exposed a problem with the RTODD that increased its vulnerability to abuse. None of the cases

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18. Prob. Code § 21380(a)(3).

19. Prob. Code § 5690(a)(1).

identify or allege an abusive practice that would be easier to perpetrate using an RTODD.

Moreover, most of the cases involved a mix of different types of instruments, in addition to an RTODD (e.g., will, trust, joint bank account, annuity). In fact, the staff found only one case of confirmed abuse that involved an RTODD by itself.<sup>20</sup> This suggests that the abuse cited in the cases was not prompted by or contingent on the availability of the RTODD as a device.

*In short, while there has been abuse of the RTODD, the staff's research did not find anything to suggest that an RTODD poses any heightened risk of abuse as compared to other types of estate planning instruments.*

### **Mistake**

The Exhibit summarizes 20 cases in which some type of transferor error was alleged to have occurred. The alleged errors run the gamut from minor technical defects that had no effect on the operation of an RTODD, to major errors that either invalidated an RTODD or produced something other than the intended result.

The types of errors at issue in the cases are discussed below.

#### *Formal Execution Errors*

There were several cases that involved an alleged failure to comply with execution formalities. For example, the RTODD was not recorded before the transferor's death (as required by law)<sup>21</sup> or was not properly acknowledged by a notary.<sup>22</sup> Such errors can invalidate an RTODD.

The staff does not see anything that can be done to entirely prevent these types of errors. They may be particularly likely when an RTODD is executed without the assistance of counsel.

*That said, California's use of a mandatory form RTODD provides some protection against such errors. The statutory form includes prominent and repeated instructions and warnings that the RTODD must be signed, notarized, and recorded within 60 days, or the RTODD will not take effect.*<sup>23</sup>

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20. *Severing v. Severing*, 2015-Ohio-5236.

21. *Mattia v. Hall*, 2008-Ohio-180; *In re Scott*, 2005-Ohio-5917; *Estate of Dugger v. Dugger*, 110 S.W.3d 423 (Missouri 2003).

22. *Fragola v. Graham*, 2015 Ohio Misc. LEXIS 22054; *Estate of Frie*, 2014 Kan. App. Unpub. LEXIS 6.

23. See Prob. Code § 5642.

### *Unauthorized Contingency*

In some of the cases, the transferor attempted to condition the RTODD on a contingency that the authorizing statute does not permit. For example, the operation of the RTODD might be contingent on the death of a person other than the property owner<sup>24</sup> or on the payment of property taxes by the beneficiary during the owner's lifetime.<sup>25</sup> Such errors might invalidate the RTODD or cause the instrument to be construed as something other than an RTODD (e.g., the immediate creation of a life estate subject to a contingent remainder<sup>26</sup>).

*Errors of this type are not possible in California.* Unlike the states examined in this memorandum, California does not permit user-drafted instruments. California requires the use of a mandatory form, which only allows for the simplest of transfers — an unqualified transfer of the owner's entire interest to the named beneficiaries in equal shares. Although this significantly limits the flexibility and utility of the RTODD, it also prevents laypeople and others from generating problems by attempting to draft customized contingencies.

### *Attempt to Transfer Property Not Owned by the Transferor at Death*

A number of the cases involved the use of an RTODD to transfer property that the transferor did not own at the time of the transferor's death.

This can occur if an RTODD purports to transfer property that has already been conveyed to a trust.<sup>27</sup> It can also happen if the property owner sells or gifts property *after* execution of an RTODD that purports to transfer the same property.<sup>28</sup>

This type of error generally causes the RTODD to fail (except where the court exercises its equitable powers to effectuate the transferor's plain intent, often through imposition of a constructive trust).

The situation is slightly more complicated in California. Under the California RTODD statute, a properly executed and recorded RTODD controls over any *unrecorded* conveyance of property.<sup>29</sup> If an RTODD and a *revocable* instrument that purports to dispose of the same property are both recorded, the later

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24. *Delcour v. Rakestraw*, 340 S.W.3d 320 (Missouri 2011); *Pippin v. Pippin*, 154 S.W.3d 376 (Missouri 2004).

25. *Bolz v. Hatfield*, 42 S.W.3d 566 (Missouri 2001).

26. *Id.*

27. *Sorrell v. Gaarde-Morton*, 238 Ariz. 144 (2015); *Estate of Ferguson*, 130 S.W.3d (Missouri 2004); *Fischbach v. Holzberlein*, 215 P.3d 1379 (9th Cir. 1990).

28. *Sheils v. Wright*, 357 P.3d 294 (2015).

29. Prob. Code § 5660(a).

executed of the two instruments controls.<sup>30</sup> If an RTODD and an *irrevocable* instrument that purports to dispose of the same property are both recorded, the irrevocable instruments controls.<sup>31</sup> This approach ensures that the operative instrument can always be determined by reference to title records.

*The California approach doesn't make errors any more or less likely to occur, but it does provide a clear statutory rule for resolving such errors when they do occur.* This is critical to the effectiveness of the RTODD statute. In order for title to transfer outside of court, it is essential that the effect of an RTODD be entirely determinable from the recorded title records.

#### *Failed Revocation*

In one case, a transferor apparently had intended to revoke an RTODD but forgot to do so.<sup>32</sup> The staff sees nothing that could be done to prevent this kind of mistake.

In another case, a transferor attempted to revoke but executed a document that was insufficient to do so under the governing statute.<sup>33</sup>

California provides a statutory form for express revocation of an RTODD, which must be recorded before death to be effective.<sup>34</sup> Use of the statutory form is not mandatory. An RTODD can also be revoked by executing and recording a new RTODD. *These straightforward alternatives should reduce the risk of ineffective revocation. Instructions on how to revoke an RTODD are given on the mandatory RTODD form.*

#### *Property Description / Beneficiary Designation Error*

In one case, a transferor executed two RTODDs, for two different properties, each naming a different beneficiary.<sup>35</sup> The transferor mistakenly switched the property descriptions used in the RTODDs, resulting in each beneficiary being designated for the property intended for the other. *The situation that gave rise to this mistake should be rare.*

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30. Prob. Code § 5660(b).

31. Prob. Code § 5660(c).

32. *Blausey v. Vanness*, 2015 Ohio Misc. 4365.

33. See also *Sheils v. Wright*, 357 P.3d 294 (2015). See also *Brown v. Brown*, 152 S.W.3d 911 (Missouri 2005).

34. Prob. Code § 5644.

35. *Groh v. Ballard*, 965 S.W.2d 872 (Missouri 1998).

### *Fundamental Misunderstanding*

In a small number of cases, the transferors seemed to fundamentally misunderstand the effect of their actions (e.g., executing a quitclaim deed when intending to execute an RTODD).<sup>36</sup> The potential for such errors cannot be entirely eliminated. However, the California mandatory RTODD form includes an extensive “Common Questions” section on the reverse of the form.<sup>37</sup> It was drafted to answer a wide range of questions that transferors might have about the effect of the RTODD and its execution requirements. *This should help to prevent some fundamental misunderstandings that might otherwise arise from a less informative bare-bones form (or no form at all).*

### **Creditor Claims**

There were a small number of cases that addressed claims by a decedent’s creditors against property transferred by RTODD.

#### *Liability of Transferred Property*

One case addressed the extent to which property transferred by RTODD is liable for the payment of the transferor’s unsecured debts.<sup>38</sup> That issue is clearly addressed in the California RTODD statute (the beneficiary of an RTODD is liable for the transferor’s unsecured debts, pro rata).<sup>39</sup>

Two other cases addressed liability for a transferor debt that had been secured against the transferred property.<sup>40</sup> That issue is also directly addressed by the California statute (the beneficiary take property transferred by RTODD subject to any liens or encumbrances against that property).<sup>41</sup>

*The staff did not see anything in these cases that suggest any problem with the California statute’s treatment of creditor claims.*

#### *Medicaid Estate Recovery*

Some of the cases involved a specific type of creditor claim: Medicate estate recovery. This is an action brought by the state for reimbursement of the cost of Medicaid services provided to a person before that person’s death. The claim is brought after the person’s death, against the person’s estate. A combination of

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36. Fees v. Fees, 2016 Ariz. App. Unpub. LEXIS 1254. See also Helbling v. Thomas, 2013 Bankr. LEXIS 5644.

37. Prob. Code § 5642(b).

38. See Citizen’s Farmers Bank of Cole Camp v. Merriott, 439 S.W.3d 259 (Missouri 2014).

39. Prob. Code § 5672.

40. Fannie Mae v. Walton, 2015-Ohio-2855; Lee v. Peters, 250 S.W.3d 783 (Missouri 2008).

41. Prob. Code § 5652(b).

federal and state law determines which estate assets are liable for Medicaid estate recovery claims. Two reported cases addressed whether property transferred by RTODD is subject to such claims.<sup>42</sup>

The Commission recommended that the RTODD statute include a provision expressly stating that property transferred by RTODD is subject to Medicaid estate recovery. This was intended as a declaration of existing law, rather than a new rule.<sup>43</sup> When the Legislature enacted the RTODD statute, it softened that provision. The revised language provides that property transferred by RTODD “is subject to claims of the State Department of Health Care Services to the extent authorized by law,” but it does not state when such claims are authorized.”<sup>44</sup> That change was made to avoid a conflict with pending Legislation that, if enacted, would have made property transferred by RTODD immune from Medicaid estate recovery.<sup>45</sup> Ultimately, that legislation was not enacted. *The Commission may wish to recommend restoring the stronger language that it originally recommended.*

### **Uncertainty**

A number of cases involve unanticipated circumstances that created uncertainty about the effect of an RTODD. These cases highlight questions that should perhaps be addressed proactively, in order to avoid the need for litigation if such issues arise in California.

#### *Effect of RTODD on Beneficiary Bankruptcy*

Several of the cases involved an RTODD beneficiary who had initiated bankruptcy proceedings before the RTODD operated. During the pendency of the proceeding, the transferor died and title was transferred to the beneficiary. In that situation, it was not clear whether the property acquired by RTODD should be included within the bankruptcy estate and used to pay the beneficiary’s creditors.

The cases approached that question in two different ways.

First, a court could conclude that a beneficiary’s interest in an RTODD is a present contingent property interest, which the beneficiary held when the

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42. See, e.g., *Maynard v. Ohio Dep’t of Job & Family Servs.*, 2011 Ohio Misc. 16785; *State Dep’t of Soc. Servs., MO HealthNet Div. v. Knight*, 280 S.W.3d 647 (Missouri 2009).

43. See *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103, 234-35 (2006).

44. Prob. Code § 5654(b).

45. See Memorandum 2015-27, p. 4.

bankruptcy *commenced*. This would make the interest in the RTODD part of the bankruptcy estate under the federal statute providing that the bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.”<sup>46</sup> That was the approach taken in an unpublished bankruptcy case, *Jones v. Mullen*,<sup>47</sup> in which the court relied on an opinion of the Ninth Circuit Court of Appeal reaching the same conclusion with respect to a debtor’s interest as a beneficiary of a revocable trust that vested after commencement of bankruptcy proceedings.<sup>48</sup>

It is not clear that this reasoning would hold up in California. The California RTODD statute expressly states that (1) the beneficiary of an RTODD holds no property interest prior to operation of the RTODD and (2) the property to be transferred is not subject to process by the beneficiary’s creditors:

During the transferor’s life, execution and recordation of a revocable transfer on death deed:

...  
(b) Does not create any legal or equitable right in the beneficiary, and the property is not subject to process of the beneficiary’s creditors.

(c) Does not transfer or convey any right, title, or interest in the property.<sup>49</sup>

The other approach taken in the cases is to concede that the beneficiary held no property interest in the RTODD when the bankruptcy proceeding was commenced, and instead analyze whether the later-acquired property received by RTODD should be *added* to the bankruptcy estate.<sup>50</sup> The governing federal statute provides that the bankruptcy estate includes:

Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date —

- (A) by bequest, devise, or inheritance;
- (B) as a result of a property settlement agreement with the debtor’s spouse, or of an interlocutory or final divorce decree; or
- (C) as a beneficiary of a life insurance policy or of a death benefit plan.<sup>51</sup>

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46. 11 U.S.C. Sec. 541(a)(1).

47. 2014 Bankr. LEXIS 488.

48. *Neuton v. B. Danning*, 922 F.2d 1379 (9th Cir. 1990).

49. Prob. Code § 5650.

50. See, e.g., *Williamson v. Hall*, 394 B.R. 582 (2008).

51. 11 U.S.C. § 541(a)(5).

Applying that rule, the courts considered whether receipt of property by operation of an RTODD was receipt by “bequest, devise, or inheritance.” That question was answered by applying the definition of those terms used in state estate planning law.

It is not entirely clear whether receipt of property by RTODD would be considered a bequest, devise, or inheritance under California law. A “devise” is defined by statute to mean a disposition of property by *will*.<sup>52</sup> The term “bequest” is not defined, but is generally understood to mean a disposition of personal property by *will*.<sup>53</sup> The term “inheritance” is not defined, but “heir” means a person entitled to take property by *intestate succession*.<sup>54</sup> None of those terms seem directly applicable to a beneficiary designation in an RTODD (or in any number of other types of nonprobate transfers).

On the other hand, an RTODD is intended to operate as a will substitute, and the federal statute does expressly include “death benefits.” It is conceivable that a court might conclude that an RTODD is a close enough analog to a will to be covered by the federal statute that governs a “devise.” Or it might be viewed as a “death benefit.” There seems to be a plausible *policy* argument for treating nonprobate transfers similarly to wills, intestacy, insurance policies, and death benefits. Whether the language of the federal statute is elastic enough to support that policy argument is another matter.

*The Commission may wish to consider clarifying whether property transferred by RTODD is part of a beneficiary’s bankruptcy estate.*

#### *Governing Law*

In one case, the authorizing RTODD statute was significantly amended after an RTODD had been executed, but before it operated.<sup>55</sup> The RTODD was contested on the grounds that it did not comply with the requirements of the amended statute. This raised the question of which version of the statute applied to the RTODD, the version in effect when it was executed or the version in effect when it operated?

This kind of problem can arise whenever substantive amendments are made to a statute. The solution to this kind of problem is to provide clear guidance

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52. Prob. Code § 32.

53. See Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed <<http://thelawdictionary.org/bequest/>>.

54. Prob. Code § 44.

55. Amerifirst Home Improvement Fin. Co. v. Heirs, 2014 Ohio Misc. LEXIS 16354.

regarding the effect of a change in the law. This can be done on a case-by-case basis, by providing guidance in the bill that amends a statute.

In California, the Probate Code contains a default rule, applicable to the entire code, which provides guidance on the effect of a new (or amended) law.<sup>56</sup> That should help to resolve any uncertainty that might arise if an amended law is silent on whether it affects previously executed instruments.

In another case, an RTODD was executed before the statute authorizing the use of an RTODD took effect.<sup>57</sup> That unusual problem is unlikely to arise in California. If it does, there is little that could be done about it.

*The staff does not believe that the Commission needs to study these issues further.*

#### *Transfer of Fixtures*

Some of the cases consider whether a transfer of real property by RTODD also transfers personal property associated with that property. For example: *In re Estate of Roloff* considered whether the transfer of farmland included growing crops.<sup>58</sup> *O'Dell v. Mefford* involved title to a mobilehome on land transferred by RTODD.<sup>59</sup>

Such questions are not unique to the use of an RTODD. They could arise with respect to any conveyance of land, however effected. The answers to these kinds of questions will likely be found in the state's general law on fixtures to real property. For example, in California, "[o]n transfer of the land, growing crops are considered real property and are conveyed to the grantee unless expressly reserved to the grantor."<sup>60</sup>

The situation with mobilehomes may be more complicated in California, because title to mobilehomes is established through state registration.<sup>61</sup> *The staff believes that the intersection of mobilehome title registration and general real estate fixture conveyance law is worth a closer look. If the Commission agrees, the staff will revisit the issue later in this study.*

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56. Prob. Code § 3.

57. *Rickels v. Goyings*, 2008-Ohio-2119.

58. 36 Kan. App. 2d 684 (2006).

59. 211 S.W.3d 136 (Missouri 2007).

60. Miller & Starr, *California Real Estate, Transferable Property Interests; Fixtures* § 9:38, at 154 (4th ed. 2015).

61. Health & Safety Code § 18075 *et seq.*

### *Beneficiary Standing*

In *Splechter v. Splechter*,<sup>62</sup> an unpublished decision, the court held that an RTODD beneficiary did not have standing to contest an instrument that revoked the RTODD. Because the RTODD only created an *expectancy*, the beneficiary lacked a vested property interest sufficient to establish standing.

Similarly, in *Estate of Givens v. Givens*,<sup>63</sup> the court held that the beneficiary of an RTODD was not an “interested person” entitled to notice of the opening of probate for the transferor’s estate. This was true, even though the sole purpose of probate was to recover the property transferred by the RTODD, for the satisfaction of creditor claims.

For the most part, the California RTODD statute does not address the standing of an RTODD beneficiary to contest an instrument that revokes or otherwise defeats the operation of an RTODD.<sup>64</sup> It might be helpful to provide an express rule on this point.

Nor is it clear whether an RTODD beneficiary would be considered an “interested person” for the purposes of the Probate Code. The statutory definition of “interested person” is limited to a person who has an interest in a decedent’s trust or estate.<sup>65</sup> It is not clear that this would include a beneficiary of an RTODD.

*The Commission may wish to consider these issues further, later in the study.*

### *Joint Ownership of Property*

In one case, the question before the court arose because the RTODD was executed by two spouses, to transfer their jointly-owned property. More specifically, the case turned on the fact that the property had been owned as a “tenancy by the entireties.”<sup>66</sup>

The problem in that case could not arise in California. The California RTODD cannot be used by more than one person to transfer jointly-owned property.<sup>67</sup> *The staff does not believe that this issue requires further analysis.*

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62. 313 P.3d 106 (Kansas 2013). But see *Crocker v. Crocker*, 261 S.W.3d 724 (Missouri 2008) (RTODD beneficiary had contingent interest sufficient for standing to contest instrument that revoked RTODD).

63. 234 S.W.3d 519 (Missouri 2007).

64. There is an exception if an RTODD is used to revoke a prior RTODD. The statute does specify who can contest an RTODD. See Prob. Code § 5690.

65. Prob. Code § 48.

66. See *Jennings v. Atkinson*, 456 S.W.3d 461 (Missouri 2014).

67. See Prob. Code § 5642.

## CONCLUSION

Overall, the staff's research did not reveal any significant RTODD shortcomings. There were disputes in some situations involving RTODDs, just as there are disputes in some situations involving wills or other estate planning instruments. However, nothing in the case law suggests that RTODDs are *more* problematic than any other type of estate planning instrument. Nor did the cases reveal any particular defect in the RTODD concept.

More specific conclusions are discussed below.

### **Fraud, Undue Influence, and Incapacity**

The staff's research did not show any special vulnerability to fraud, undue influence, or execution by a person lacking capacity. For the most part, when those problems arose in the cases, the bad actor used an array of instruments to effect the abuse. Thus, it appears that the abuse would have occurred whether or not an RTODD was an authorized estate planning instrument. If it had not been, the abuser would probably have used a will, trust, or grant deed instead.

### **Mistake**

The staff's research did not show that an RTODD is more prone to mistake than any other kind of instrument.

Importantly, California's use of a mandatory form with robust instructions and warnings will prevent many of the kinds of mistakes that were discovered in the research. The simple fact that property owners are not permitted to draft their own instruments will substantially reduce the scope for drafting errors.

### **Creditor Claims**

The California statute's treatment of Medicaid estate recovery is legally sound, but could provide clearer guidance (as the Commission had originally recommended). **The Commission may wish to recommend restoring its original language on this point.**

The staff saw no other significant issues regarding creditor claims.

### **Uncertainty**

A few cases involved questions about the operation of the RTODD that might be helpful to address in California. They were:

- The extent to which property transferred by RTODD is part of a beneficiary's bankruptcy estate.
- The extent to which an RTODD transfers title to a mobilehome located on the transferred property.
- The extent to which an RTODD beneficiary has standing to contest an instrument that revokes or otherwise defeats the RTODD.
- Whether the beneficiary of an RTODD is an "interested person" for the purposes of the Probate Code generally.

**It might be helpful to research those issues and determine whether the existing statute requires any adjustment to avoid potential problems.**

Respectfully submitted,

Brian Hebert  
Executive Director

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## ARIZONA

**Fraud, Undue Influence, and Incapacity**

The staff found three unpublished Arizona cases addressing fraud, undue influence, or incapacity. They are summarized below.

In *Shepherd v. Burns*,<sup>1</sup> an elderly woman with diminished capacity took a number of steps that benefited her caregiver. She named him as her attorney in fact, executed a will leaving all of her property to him, and executed an RTODD that named the caregiver as sole beneficiary. She also added the caregiver's name to all of her financial accounts, from which he withdrew substantial sums. When these transactions were discovered, the court appointed an emergency conservator. The conservator took steps to recover funds that had been removed from the woman's bank accounts and petitioned the court to nullify all of the instruments naming the caregiver as beneficiary. That relief was granted and affirmed on appeal.

*Entrust Fiduciary Servs. v. Snyder*<sup>2</sup> was another case involving alleged financial abuse by a caregiver. An elderly man added his caregiver as a beneficiary to existing pay-on-death bank accounts, added her as a beneficiary for an existing annuity, executed a power of attorney naming her as attorney-in-fact, and executed an RTODD to transfer real property to her on his death. The decedent's estate brought an action against the caregiver for a range of torts, including elder financial abuse. The case was settled.

In *Lalonde v. Lynch*,<sup>3</sup> a sister petitioned to be appointed as her brother's conservator, to be named as trustee of his revocable living trust, and to invalidate a beneficiary deed. The action to invalidate the RTODD was based on alleged transferor incapacity. The petition was denied and the sister's attorney was sanctioned by the court.

**Mistake**

The staff found two Arizona cases involving a mistake. They are summarized below.

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1. 2015 Ariz. App. Unpub. LEXIS 262.  
2. 2015 Ariz. App. Unpub. LEXIS 688.  
3. 2012 Ariz. App. Unpub. LEXIS 199.

In *Sorrell v. Gaarde-Morton*,<sup>4</sup> a woman had established a revocable living trust to dispose of her property on death. The trust held title to her house. Three years later, she executed an RTODD transferring the house to her attorney. Eight years after that, she had an apparent change of heart. She revised her trust to make a gift of \$10,000 to her attorney but transfer the house to someone else. After her death, the attorney petitioned to be appointed as the decedent's personal representative and requested that the court transfer the house to him pursuant to the unrevoked RTODD.

The court held that the RTODD was invalid, because the house was owned by the trust when the RTODD was executed. Arizona law does not permit a trustee to execute an RTODD to transfer trust property on the trustee's death. Only a natural person can execute an RTODD in Arizona, and only for property owned by that person.

In *Fees v. Fees*,<sup>5</sup> an unpublished decision, a mother executed a quitclaim deed transferring title to certain real property to her son. She later claimed that this had been a mistake. She had intended to execute a beneficiary deed. She filed an action for reformation of the deed based on her unilateral mistake. The trial court granted summary judgment in her favor. The court of appeal reversed, finding that there was an issue of material fact, and remanded.

### **Uncertainty**

*Jones v. Mullen*,<sup>6</sup> an unpublished opinion, considered whether property governed by an RTODD was properly brought within the beneficiary's bankruptcy estate. The RTODD had been executed before the beneficiary's bankruptcy proceeding commenced, but it vested on the transferor's death while the bankruptcy proceeding was pending.

The bankruptcy appellate panel cited a Ninth Circuit case holding that a debtor's interest in income from a revocable trust, which vested during the pendency of a bankruptcy proceeding, was properly brought into the bankruptcy estate as a "contingent" property interest.<sup>7</sup> Drawing an analogy between the trust in that case and an RTODD, the bankruptcy appellate panel held that the

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4. 238 Ariz. 144 (2015).

5. 2015 Ariz. App. Unpub. LEXIS 1254.

6. 2014 Bankr. LEXIS 488.

7. See *Neuton v. B. Danning*, 922 F.2d 1379 (9th Cir. 1990).

debtor's interest as beneficiary of an RTODD was a contingent interest that was properly part of the bankruptcy estate.

#### COLORADO

##### **Mistake**

In *Fischbach v. Holzberlein*,<sup>8</sup> a woman established a revocable intervivos trust, naming herself as sole trustee and beneficiary. The trust property included two pieces of real estate. She later purported to execute two RTODDs, each naming a different child as beneficiary. After her death, her two *other* children (who were not named as beneficiaries) contested the validity of the RTODDs. They argued that the mother had signed in her capacity as trustee and that Colorado law only permits a natural person to execute an RTODD (because the Colorado statute provides for transfer of property on the owner's "death," and only natural persons can die). The trial court granted summary judgment in favor of the contestants, invalidating the RTODDs, and the court of appeal affirmed.

#### KANSAS

##### **Fraud, Undue Influence, and Incapacity**

In *Fail v. Fail*,<sup>9</sup> an unpublished opinion, a man executed an RTODD that named three of his four children as beneficiaries. After his death, the disinherited son contested the RTODD, alleging fraud, breach of trust, and interference with inheritance. His contest was not successful.

##### **Mistake**

The staff found two Kansas cases involving a mistake. They are summarized below.

In *Sheils v. Wright*,<sup>10</sup> a transferor purported to revoke an RTODD, by including express revocation language in a subsequently-executed grant deed affecting the same property. That attempted revocation was ineffective, because the grant deed was not recorded before the transferor's death (as the Kansas statute requires).

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8. 215 P.3d 407 (Kansas 2009).

9. 2010 Kan. App. Unpub. LEXIS 571.

10. 357 P.3d 294 (Kansas 2015).

Even though the grant deed did not *revoke* the RTODD, it ultimately defeated the RTODD. Recordation was not a requirement for the grant deed to operate. Consequently, the deed transferred fee title to the grantee immediately on execution and delivery. Thus, when the transferor died, he no longer owned the property that was described in the RTODD and the RTODD had no effect.

*In re Estate of Frie*,<sup>11</sup> an unpublished decision, involved a challenge to the validity of an RTODD. The challenge was based on a claim that the transferor's signature was not properly acknowledged, as required. The trial court denied the challenge and the court of appeal affirmed.

### **Uncertainty**

The staff found three Kansas cases involving uncertainty as to the effect of an RTODD. They are summarized below.

In *Splechter v. Splechter*,<sup>12</sup> an unpublished decision, the court found that the beneficiary of an RTODD did not have standing to contest the capacity of the transferor to execute a *later* instrument that had the effect of defeating the RTODD. A beneficiary of a Kansas RTODD has only an expectancy, with no vested property interest until the transferor's death. Consequently, the beneficiary did not have a vested interest in the transferor's estate and did not have standing to contest the transferor's capacity to execute the later instrument.

*Williamson v. Hall*<sup>13</sup> addressed whether property transferred by RTODD was part of the beneficiary's bankruptcy estate. One of the key questions was whether property transferred by an RTODD was transferred by "bequest, devise or inheritance" for the purposes of federal bankruptcy law. If so, then the property would be brought into the bankruptcy estate.<sup>14</sup> The court looked to Kansas state law for definitions of the terms "bequest, devise or inheritance" and concluded that those terms were limited to transfers by will or intestacy. Consequently, the property transferred by RTODD was not part of the bankruptcy estate.

*In re Estate of Roloff*<sup>15</sup> considered whether the transfer of farmland by RTODD also transferred the crops growing on that land at the time of the transferor's

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11. 2014 Kan. App. Unpub. LEXIS 6.

12. 313 P.3d 106 (Kansas 2013).

13. 394 B.R. 582 (2008).

14. See 11 U.S.C. § 541(a)(5)(A).

15. 36 Kan. App. 2d 684 (2006).

death. The court looked to state common law for the general rule that “a conveyance of land by voluntary deed or judicial sale, without reservations, carries all growing crops with the title to the land.”<sup>16</sup>

## MISSOURI

### **Fraud, Undue Influence, and Incapacity**

The staff found five Missouri cases addressing fraud, undue influence, or incapacity. They are summarized below.

In *Watermann v. Eleanor E. Fitzpatrick Revocable Living Trust*,<sup>17</sup> a daughter alleged undue influence with regard to certain estate planning changes that her mother had made before her death. The mother removed the daughter as beneficiary to certain accounts. She also revoked an RTODD that had named the daughter as beneficiary, and executed a new RTODD that omitted the daughter. All of the contested changes were made with the assistance of counsel. Although undue influence was alleged, the daughter did not prevail with that claim.

In *Hahn v. Tanksley*,<sup>18</sup> an elderly man establish joint ownership accounts with his two daughters and executed an RTODD naming them as beneficiaries. Later, the man married and brought an action to set aside those transactions. He died before it was completed. His widow then brought an action contesting the transactions on the ground that the decedent had lacked the necessary capacity. The trial court found against her. That decision was affirmed on appeal.

In *Alle v. Sigeas Estate*,<sup>19</sup> decedent’s two daughters contested her estate plan on the grounds of undue influence and lack of capacity. The estate plan, which had been prepared with the assistance of counsel, included a will, a durable power of attorney, a warranty deed, and an RTODD. The trial court decided against the contestants on both grounds. The court of appeal affirmed.

In *Jolly v. Clarkson*,<sup>20</sup> an RTODD benefiting one of the transferor’s children was contested by another of his children on the ground that the transferor lacked the requisite capacity. The matter went to trial and the contestant did not prevail.

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16. *Id.* at 687 (citations omitted).

17. 369 S.W.3d 69 (Missouri 2012).

18. 317 S.W.3d 145 (Missouri 2010).

19. 182 S.W.3d 772 (Missouri 2006).

20. 157 S.W.3d 290 (Missouri 2005).

On appeal, the court held that the trial court had applied the wrong standard for capacity. It should have applied the testamentary capacity standard, but instead had applied the standard for execution of a deed. Because the court had applied a *higher* standard, this was a harmless error. The RTODD was valid.

In *Bentch v. Collins*,<sup>21</sup> two daughters brought an action to contest the following instruments executed by their mother before her death: an RTODD, a power of attorney, and a life insurance policy beneficiary change. The contest was based on allegations of fraud, undue influence, and incapacity. The trial court dismissed for failure to state a cause of action upon which relief could be granted. With some complicated intervening procedural steps, the court of appeal eventually affirmed.

### **Mistake**

The staff found seven Missouri cases involving a mistake. They are summarized below.

*Brown v. Brown*<sup>22</sup> involved a complicated sequence of errors. As a result of those errors, a woman wound up as sole owner of a piece of property despite her intention to create a joint tenancy between herself and two of her four children. Years later, the woman executed a beneficiary deed naming all four of her children as beneficiaries, in equal shares. The court imposed a constructive trust on the property, for the benefit of the two children who were originally supposed to have been joint tenants. This had the effect of nullifying the subsequent RTODD.

*In the Estate of Ferguson*<sup>23</sup> involved an attempt to execute an RTODD for property that had already been conveyed to a revocable intervivos trust. The attempt was ineffective.

In *Pippin v. Pippin*,<sup>24</sup> an RTODD was invalid because it did not “expressly state[] that the deed is not to take effect until the death of the owner,” as required by the Missouri statute. Instead, the RTODD said that it would not take effect until the death of the owner *and his non-owner spouse*. The court held that this was a substantively different contingency than the Missouri statute mandates. The

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21. 28 S.W.3d 453 (Missouri 2000).

22. 152 S.W.3d 911 (Missouri 2005).

23. 130 S.W.3d (Missouri 2004).

24. 154 S.W.3d 376 (Missouri 2004).

RTODD was invalid. *Delcour v. Rakestraw*<sup>25</sup> presented facts very similar to those in *Pippin* — the operative date of an RTODD had been expressly conditioned on the death of both the owner *and his non-owner spouse*. Again, the RTODD was invalid.

In *Estate of Dugger v. Dugger*,<sup>26</sup> an RTODD did not operate because it was not recorded before the transferor's death. The failure to record was due to miscommunication between the transferor and the drafting attorney.

In *Bolz v. Hatfield*,<sup>27</sup> the property owner purported to execute an RTODD, with an unusual contingency. The RTODD was made expressly irrevocable, unless the beneficiary failed to pay all taxes on the property on time. The court seems to have concluded that this was not a valid RTODD. Instead, it was construed as immediately creating a life estate in the transferor with a contingent remainder in the beneficiary. Later, when the beneficiary failed to pay the property taxes on time, the contingency failed and the remainder reverted to the transferor. This restored fee simple ownership to the transferor, who then conveyed the property to a third party.

In *Groh v. Ballard*,<sup>28</sup> the transferor executed two RTODDs, each affecting a different piece of property. Allegedly, the transferor made a serious mistake in executing the deeds, accidentally swapping the property descriptions used in the deeds, thereby causing the beneficiaries to receive the wrong properties.

### **Creditor Claims**

The staff found three Missouri cases involving creditor claims. They are summarized below.

*Citizen's Farmers Bank of Cole Camp v. Merriott*,<sup>29</sup> involved a creditor claim against a decedent's estate. The estate had insufficient funds to pay the claim, so the creditor initiated proceedings to recover from the recipients of decedent's property that had passed outside of probate (including property transferred by RTODD). Missouri law provides that the recipients of a nonprobate transfer are liable for a pro rata share of the value of the received property, to the extent

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25. 340 S.W.3d 320 (Missouri 2011).

26. 110 S.W.3d 423 (Missouri 2003).

27. 41 S.W.3d 566 (Missouri 2001).

28. 965 S.W.2d 872 (Missouri 1998).

29. 439 S.W.3d 259 (Missouri 2014).

necessary to satisfy claims against the decedent's estate.<sup>30</sup> The issue before the court was whether the court below had made an error in implementing that rule.

In *State Dep't of Soc. Servs., MO HealthNet Div. v. Knight*,<sup>31</sup> the beneficiaries of an RTODD challenged the application of the state's Medicaid estate recovery program to the property transferred to them by the RTODD. The court rejected all of their arguments, finding that the property was subject to the estate recovery program.

In *Lee v. Peters*,<sup>32</sup> a beneficiary received property pursuant to an RTODD, which was subject to an existing loan secured against the property. On learning of the loan, the beneficiary attempted to pay the full amount owing. The creditor repeatedly refused to accept payment, on the grounds that the beneficiary's name was not on the loan documents. The beneficiary successfully sued to compel acceptance of payment.

### **Uncertainty**

The staff found seven Missouri cases involving uncertainty as to the effect of an RTODD. They are summarized below.

In *Jennings v. Atkinson*,<sup>33</sup> a married couple held title to real property jointly, as a "tenancy by the entirety." The couple jointly executed an RTODD. A short time later, the two deeded the property to the wife, as sole owner. The court held that this revoked the RTODD deed.

Missouri law provides that an RTODD is revoked if the property to be transferred by the RTODD is conveyed to another during the owner's lifetime.<sup>34</sup> Conveyance of title from the joint marital estate to one of the spouses as an individual was sufficient for the purposes of that rule.

In *Bohr v. Nodaway Valley Bank*,<sup>35</sup> the court construed the term "owner" as it is used in the Missouri RTODD statute. **The case does not appear to be relevant to the operation or meaning of the California statute.**

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30. Mo. Rev. Stat. § 461.300.

31. 280 S.W.3d 647 (Missouri 2009).

32. 250 S.W.3d 783 (Missouri 2008).

33. 456 S.W.3d 461 (Missouri 2014).

34. Mo. Rev. Stat. § 461.033.

35. 411 S.W.3d 352 (Missouri 2013).

In *Hammack v. Coffelt Land Title, Inc.*,<sup>36</sup> the property designated in an RTODD was later sold by the transferor. It is clear under Missouri law that a completed transfer of property revokes an earlier RTODD for that property.<sup>37</sup> However, *Hammack* involved a peculiar timing issue. When selling the property, the owner prepared a deed, which was placed into escrow. Before the end of the escrow period and final delivery of the deed to the purchaser, the seller died.

The question before the court was whether the transfer of the property was completed at the moment that the deed was placed into escrow (i.e., before the seller's death). If so, then the RTODD was revoked. If not, then the RTODD would not be revoked.

The court found that the "relation back" doctrine applied, because the deed was placed into escrow with an express condition that it would be delivered to the buyer at the end of the escrow period on payment of the full sale price. Because that condition was satisfied, the relation back doctrine applied and the transfer was deemed to have been completed when the deed was placed into escrow. Because that preceded the seller's death, the RTODD was revoked.

In *Crocker v. Crocker*,<sup>38</sup> a mother executed an RTODD naming her three sons as equal beneficiaries. Years later, she executed a new RTODD that expressly revoked the first and named only two of her sons as equal beneficiaries. The excluded son contested the second RTODD as having been the product of undue influence. The trial court dismissed on the ground that the plaintiff lacked standing to challenge the second RTODD. The court of appeal reversed and remanded, concluding that a successful contest of the subsequent instrument would nullify it, leaving the first RTODD unrevoked. The plaintiff therefore had a sufficient interest to have standing to contest the second instrument.

In *O'dell v. Mefford*,<sup>39</sup> a man executed an RTODD for a piece of land with a mobile home on it. He named his sister as beneficiary. However, he had also assigned title to the mobile home to another person. Because the mobile home had been placed on a permanent foundation, with additions that could not be easily severed from the original structure, the trial court held that the mobile home had been annexed to the real property as a fixture (rather than moveable

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36. 348 S.W.3d 75 (Missouri 2011).

37. Mo. Rev. Stat. § 461.033.

38. 261 S.W.3d 724 (Missouri 2008).

39. 211 S.W.3d 136 (Missouri 2007).

personal property). Thus, the RTODD operated to transfer title to both the mobile home and the underlying land. The court of appeal affirmed.

In *Estate of Givens v. Givens*,<sup>40</sup> a Medicaid estate recovery claim was made against decedent. Probate was commenced, despite the fact that the decedent's only significant asset had been transferred outside of probate, by RTODD. The decedent's personal representative contested the validity of the RTODD, on the alternative grounds of undue influence and fraud. The beneficiary objected that the statutory period for commencement of probate had expired. She also objected that, as an interested person, she was entitled to notice of the commencement of probate and had not received it. The court held that the beneficiary of an RTODD is not an interested person entitled to notice on commencement of probate.

In *Dawes v. Dawes*,<sup>41</sup> the transferor left all of his property to one of his sons, using various nonprobate transfer devices, including an RTODD. Extrinsic evidence showed that he expected his son to divide the property equally with his other siblings after the transferor's death. The beneficiary declined to do so. The other siblings successfully brought an action seeking a constructive trust in their favor.

## OHIO

### **Fraud, Undue Influence, and Incapacity**

The staff found seven Ohio cases addressing fraud, undue influence, or incapacity. They are summarized below.

*Severing v. Severing*,<sup>42</sup> involved an RTODD that was held to be invalid because the transferor lacked the required capacity to execute it. The facts surrounding that issue are not well explained in the appellate opinion.

In *Ryerson v. White*,<sup>43</sup> a woman made one of her two daughters co-owner with a right of survivorship for certain financial accounts and named her as beneficiary in an RTODD. The other daughter contested those instruments, alleging they were the product of undue influence. The trial court found no evidence of undue influence. The court of appeal affirmed that decision.

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40. 234 S.W.3d 519 (Missouri 2007).

41. 891 S.W.2d 510 (Missouri 1994).

42. 2015-Ohio-5236.

43. 2014-Ohio-3233.

In *Miller v. Shreve*,<sup>44</sup> a woman executed a power of attorney naming her daughter as attorney-in-fact. Exercising that authority, the daughter then executed an RTODD for the mother's residence, naming herself as beneficiary. The woman's son contested the RTODD on grounds of undue influence. The trial court granted summary judgment in favor of the son. The court of appeal reversed and remanded, finding that the trial court had improperly excluded evidence that raised a triable issue of fact.

*My Father's House #1, Inc. v. McCardle*<sup>45</sup> involved an action to contest the validity of a will and an RTODD. The appellate opinion focused solely on the standing of the contestants and did not discuss the underlying basis for the contest.

*Rinhart v. Stebelton*<sup>46</sup> was one part of a complex set of actions surrounding a deceased woman's estate plan. The core of the dispute was a will contest, based on claims of undue influence. That matter was settled. As part of the settlement, an RTODD was set aside. The opinion provides no details about the nature of the RTODD or why it was negated in the settlement.

In *Treadway v. Free Pentecostal Pater Av. Church of God, Inc.*,<sup>47</sup> a care custodian for an elderly and infirm woman took her to an estate planning attorney where she executed a new will, a power of attorney, and an RTODD. All named the caregiver as beneficiary. The woman's son contested the validity of those instruments, alleging undue influence. That case was settled. Later, the woman's grandchildren sued for interference with expectation of inheritance, but that claim was dismissed for lack of standing (the grandchildren's only interest in the estate was contingent on their father predeceasing them, which he did not).

In *Hamblin v. Daugherty*,<sup>48</sup> a man executed a will dividing his estate equally between his three daughters. Later, he executed instruments that provided for nonprobate transfer of most of his assets on his death. These included certificates of deposit, an annuity, and an RTODD. One of his daughters was named as sole beneficiary for all of those instruments. The other two daughters successfully contested the instruments, based on undue influence.

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44. 2014-Ohio-4612.

45. 2013-Ohio-420.

46. 2010 Ohio Misc. LEXIS 5030.

47. 2008-Ohio-1663.

48. 2008-Ohio-5306. See also 2007-Ohio-5893.

## Mistake

The staff found seven Ohio cases that involve a mistake. They are summarized below.

In *Blausey v. Vanness*,<sup>49</sup> a woman executed a number of estate planning instruments — including an RTODD — to leave all of her property to Mr. and Mrs. Vanness. The next year, she had a change of heart and decided to leave her estate to Mr. and Mrs. Blausey. With the assistance of counsel, she revoked and replaced all but one of her estate planning instruments. The RTODD was left unchanged. After her death, the Blauseys claimed that the failure to revoke and replace the RTODD was a mistake. They argued, unsuccessfully, that the property should be subject to a constructive trust in their favor.

In *Fragola v. Graham*,<sup>50</sup> a woman executed an RTODD naming her son as beneficiary. Four years later, she executed a new RTODD, naming her daughter as beneficiary. If valid, the later RTODD would revoke the former. After the woman's death, her son contested the later RTODD on the ground that it had not been properly acknowledged before a notary, as Missouri law requires. The notary had failed to write the transferor's name on the notarization form, or date it. Citing state law that allows a court to overlook technical execution errors where the transferor's intention is clear, the court upheld the later RTODD.

In *Helbling v. Thomas*,<sup>51</sup> a property owner executed what he thought was an RTODD, in order to transfer his property to his two children on his death. The attorney-drafted deed was worded incorrectly. Rather than creating an at-death transfer, it immediately conveyed fee simple ownership to his children. The error was discovered the next year and the transferor's attorney drafted new documents to correct it. Unbeknownst to the transferor, those documents were also defective and ineffectual. This second error was not discovered until years later, when the transferor's son commenced a bankruptcy proceeding, and the son's half-interest in the house was brought into the bankruptcy estate. Recognizing that the transferor had relied in good faith on professionals to carry out his intended result, the court found that a constructive trust had been created by operation of law, for the benefit of the transferor. Consequently, the house was not part of the son's bankruptcy estate.

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49. 2015 Ohio Misc. 4365. See also 2015 Ohio Misc. LEXIS 4458; 2013-Ohio-5624.

50. 2015 Ohio Misc. LEXIS 22054.

51. 2013 Bankr. LEXIS 5644.

The facts in *Brannan v. Easter*<sup>52</sup> are not well-explained. It appears that a purported RTODD was incorrectly drafted and failed to operate. The staff is unsure of the underlying details.

In *Mattia v. Hall*,<sup>53</sup> an RTODD was held invalid because it was not recorded before the transferor's death, as required by the authorizing statute.

In *Rickels v. Goyings*,<sup>54</sup> the transferor executed an RTODD shortly before the RTODD statute took effect. Consequently, the RTODD was invalid and had no effect when the transferor died.

*In re Scott*<sup>55</sup> also involved an RTODD that was not recorded before the transferor's death. The trial court held that failure to record did not invalidate the RTODD. The court of appeal reversed, based on analysis of the statute and secondary sources construing the statute.

### **Creditor Claims**

The staff found two Ohio cases involving creditor claims. They are summarized below.

*Fannie Mae v. Walton*<sup>56</sup> involved an action to foreclose on a mortgage on property that had been transferred by RTODD. The beneficiary argued that the decedent's estate should have been joined in the action, presumably to assist in paying off the mortgage. The court held that the estate need not be joined, because it had no obligation to pay a debt that was secured by real estate that had passed outside of probate.

*Maynard v. Ohio Dep't of Job & Family Servs.*<sup>57</sup> considered whether property transferred by RTODD was subject to Medicaid estate recovery. The case turned on close analysis of the particular facts and the details of governing state law.

### **Uncertainty**

In *Amerifirst Home Improvement Fin. Co. v. Heirs*,<sup>58</sup> a creditor of the deceased transferor was trying to invalidate an RTODD, on the grounds that it had been

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52. 2012-Ohio-2045.

53. 2008-Ohio-180.

54. 2008-Ohio-2119.

55. 2005-Ohio-5917.

56. 2015-Ohio-2855.

57. 2011 Ohio Misc. 16785.

executed in improper form. The argument was based on a 2009 amendment to the RTODD statute, which changed the formal requirements for execution of an RTODD. The beneficiary counter-argued that the RTODD had been executed before the 2009 amendment and was governed by the former law.

Ultimately, the court did not resolve that issue, deciding the matter before it on other grounds.

#### WISCONSIN

#### **Fraud, Undue Influence, and Incapacity**

In *Sarow v. Vike*,<sup>59</sup> an unpublished opinion, a surviving spouse contested her deceased husband's RTODD, which named their daughter and her husband as beneficiaries. She claimed that the daughter had exerted undue influence on the decedent when he executed the RTODD. The trial court found that the RTODD was not the product of undue influence. The court of appeal affirmed.

#### **Mistake**

*Sarow v. Vike*,<sup>60</sup> noted above, also involved an execution mistake. The transferor named both himself and his wife as owners on the RTODD, despite the fact that he was sole owner. This error did not invalidate the RTODD.

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58. 2014 Ohio Misc. LEXIS 16354. See also *Amerifirst Home Improvement Fin. Co. v. Heirs*, 2014 Ohio Misc. LEXIS 16380; *Amerifirst Home Improvement Fin. Co. v. Heirs*, 2014 Ohio Misc. LEXIS 16392.

59. 2015 Wisc. App. LEXIS 427.

60. *Id.*