

Second Supplement to Memorandum 2017-6

Revocable Transfer on Death Deed: Follow-Up Study

The Commission¹ has received a letter from Mark S. Poochigian, writing on behalf of the Executive Committee of the Trusts and Estates Section of the State Bar (hereafter "TEXCOM"). That letter, which is attached as an Exhibit, comments on the issue raised in Memorandum 2017-6.

Memorandum 2017-6 discusses a potentially problematic ambiguity in the revocable transfer on death deed ("RTODD") statute. While the law expressly requires that an RTODD be recorded, it is not entirely clear whether that requirement applies to the "common questions" (hereafter "FAQ") part of the RTODD form.

TEXCOM believes that the law should require recordation of the FAQ and that the form should be revised to make that requirement clear:

FAQs are an important element of protection of vulnerable persons from predators who might attempt to use a RTODD, and ... recording of the FAQs (or, better yet, specific acknowledgment by the maker of the RTODD of the FAQs) will lead to less fraud and undue influence in this context.²

If the law is revised to expressly require recordation of the FAQ, TEXCOM also recommends that an express savings provision be added, to preserve the validity of RTODDs that have already been recorded without the FAQ.

The staff appreciates TEXCOM's input on this issue.

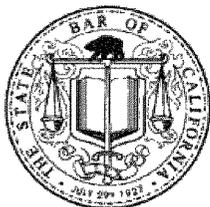
Respectfully submitted,

Brian Hebert
Executive Director

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.

2. See Exhibit p. 2.



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

January 25, 2017

VIA E-MAIL AND U.S. MAIL

California Law Revision Commission

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Re: Memorandum 2017-6
Study L-3032.1 (Revocable Transfer on Death Deed: Follow-Up Study)

Dear Commissioners:

This letter contains comments regarding recordation of a revocable transfer on death deed (“RTODD”) on behalf of the Executive Committee of the Trusts and Estates Section of the State Bar of California (“TEXCOM”). Attorneys appointed to TEXCOM have technical expertise in the area of trusts and estates law, including planning, administration and litigation regarding nonprobate transfers such as those made by RTODDs.

As you know, TEXCOM has continuing concerns regarding the wisdom of the law providing for statutory RTODDs. I anticipate that TEXCOM’s preliminary comments regarding the RTODD law, as enacted in AB 139 of 2015 (Stats. 2015, ch. 293), will be provided to the Commission in the first half of 2017. The comments included in this letter are limited to those relating to the specific issue discussed in Memorandum 2017-6—which we understand will be considered at the Commission’s February 2, 2017, meeting—relating to recordation of RTODDs without the “Common Questions about the Use of this Form” (the “FAQs”) required by Probate Code section 5642, subdivision (b).

The problem of RTODDs being recorded without the FAQs illustrates a fundamental flaw with the RTODD law: by encouraging persons without any experience in preparing or recording deeds to prepare and record deeds without the advice of competent professional advisors, significant resulting mistakes are inevitable. Unfortunately, the failure to record the FAQ page is only one type of error that makers of RTODDs will make; others are bound to be encountered, resulting in the need to review the common mistakes and their consequences, and determine whether the mistakes should be left alone to be resolved by litigation or “rescued” retroactively by statute.

EX 1

Under the circumstances, TEXCOM agrees with Commission staff that any proposed clarification of the statute should attempt to save RTODDs that have already been recorded without the FAQs from potential invalidation.¹ However—particularly in light of the heightened susceptibility of vulnerable persons to fraud, abuse and undue influence in the context of RTODDs—TEXCOM believes that the FAQs are an important element of protection of vulnerable persons from predators who might attempt to use a RTODD, and that recording of the FAQs (or, better yet, specific acknowledgment by the maker of the RTODD of the FAQs) will lead to less fraud and undue influence in this context.

In TEXCOM’s view, one practical way to deal with the problem identified would be to:

1. Enact some savings provision to allow for already-recorded RTODDs to be effective even without the recordation of the FAQs, but
2. Continue to require that the FAQs be recorded for RTODDs recorded after the effective date of the savings provision, while modifying the form of the RTODD to call for the FAQs to appear more prominently, and before the conveyance language and the transferor’s signature.

If handled this way, potential transferors would be more likely to see and read the FAQs, and the requirement that the FAQs be recorded would be more intuitive for makers of RTODDs, because the FAQs would be more integrated into the statutory form. In that case, the requirement that the FAQs be recorded would not be likely to result in the type of invalidating errors that the Commission is attempting to avoid. We believe the Commission could also consider recommending further modification of the statutory form of RTODD to require a separate signature by the transferor acknowledging that the transferor has read the FAQs and acknowledges the significant legal consequences of the RTODD.

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¹ But, consider that, to the extent certain of the RTODDs already recorded without the FAQs were procured by fraud or undue influence of vulnerable persons who might have been persuaded not to sign the RTODD had the FAQs been read, such RTODDs would regrettably enjoy the law’s imprimatur.

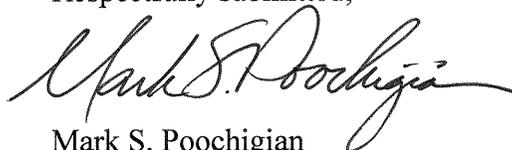
Thank you for your consideration of TEXCOM's comments in this regard. If you have any questions, or if I may provide any additional information regarding TEXCOM's perspective on these matters, I invite you to contact me anytime.

DISCLAIMER:

This position is only that of the TRUSTS AND ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

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Respectfully submitted,



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Trusts and Estates Section Executive Committee
State Bar of California

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